WTO LAW, LITIGATION & POLICY
Sourcebook of Internet Material

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PREFACE

Mike Moore, Director-General of the WTO (1999 – 2002).

The World Trade Organization (WTO) recently celebrated its tenth anniversary. The publication of Dr. Stuart Malawer's unique sourcebook of public documents relating to the WTO and its dispute resolution system is most timely and welcomed. This institutional and comparative compilation is truly an exciting and excellent contribution. It recognizes the central role that both the WTO and its settlement procedures now play in global commerce and global governance. Those procedures are both innovative an historical.

The WTO system is the embodiment of a revolutionary idea: That freedom – free democracies, free markets, the free co-existence of nations and peoples – is the surest guarantee of peace. And that a free world could, in turn, only be built on the foundations of the international rule of law.

The WTO is not imposed on countries. Countries choose to belong to the WTO. No one is told to join. No one is forced to sign its agreements. Each and every one of the WTO's rules is negotiated by Member governments; it is agreed by consensus, and ratified by parliaments. Countries choose to participate in an open, rules-based multilateral trading system for the simple reason that it is overwhelmingly in their interest to do so. The alternative is a less open, less prosperous, more uncertain world economy – an option few countries would willingly choose.

No other international body oversees rules that extend so widely around the world, or so deeply into the fabric of economies. Yet, at the same time, no other body is as directly run by Member governments, or is as firmly rooted in consensus decision making and collective rule. The multilateral trading system works precisely because it is based on persuasion, not coercion; rules, not force.

The WTO has expanded the rules of international trade manifold compared with the General Agreement on Tariffs and Trade (GATT), and it has created a new dispute settlement system – a 'world trade court' – with the possibility of appeal. This new system is central to international trade relations today. It is of huge historical significance. It provides an international mechanism to interpret and apply the negotiated rules of trade. WTO members bring their trade disputes to a neutral panel and Appellate Body. Decisions of the system are enforceable by sanctions authorized by the Dispute Settlement Body.

The fact remains that the multilateral trading system – for all its imperfections – gives even the smallest and poorest countries far greater leverage and security than they would ever have outside the system. Multilateral negotiations allow weaker countries to pool their collective influence and interests – as opposed to bilateral or even regional negotiations in which they have virtually no negotiating clout. In the same way, a system which replaces the role of "power" in international trade relations with the rule of "law" is invariably to the advantage to the smallest and weakest countries. The alternative is no rules and no impartial dispute settlement, a world where commercial relations are based on economic and political power alone, where small countries are at the mercy of the larger ones.

A measure of civilized society is how it manages its differences. Is it by the rule of law or by force? By that measure the members of the WTO have a lot to be proud of. With all its imperfections, the world

would be a more dangerous, less democratic place without the WTO. It is worth defending despite its imperfections.

This outstanding sourcebook of Internet documents on WTO law and the dispute resolution system is a tremendous undertaking. It is long-overdue and will be invaluable to governments and professionals worldwide. Its comparative and institutional focus as well as its inclusion of interdisciplinary information on issues of law, trade and politics from a range of member states is a significant undertaking. Its reliance on material available on the Internet provides evidence of the growth of the historical revolution in information and communications technology that coincides with the birth and growth of the WTO itself.

The interpretation and application of WTO trade law, litigation and policy is as complex as it is vital to all participants in the global trading system. To the extent that this work significantly assists in this global process, we all owe a great debt of gratitude to Dr. Stuart Malawer of George Mason University.*

*** For a more detailed discussion of the first ten years of the WTO, *see* Moore, "*The WTO's First Decade*," 4 WORLD TRADE REVIEW 359 (November 2005).**

FOREWORD.

Peter S. Watson, formerly served as Chairman, United States International Trade Commission and as President, Overseas Private Investment Corporation.

As a former Chairman of the United States International Trade Commission it is great news that Professor Stuart S. Malawer of George Mason University has produced this outstanding sourcebook of hard to find laws and related policy documents concerning the WTO'S litigation process, focusing on the United States and other major trading countries. Locating these documents on the World Wide Web is a daunting task. It takes the skill of a highly trained and experienced international lawyer and international relationist as well as a technology savy professional..

WTO trade law is part of the law of the United States. To fully understand WTO law, it is necessary to know the applicable domestic law of the United States. To fully comprehend global trade issues it is essential to know the laws and policies of our trading partners. To this end Dr. Malawer's inclusion of both institutional data from the WTO and comparative data from major trading countries is truly a unique and innovative undertaking.

While serving on the ITC and then later as the President of the Overseas Private Investment Corporation (OPIC), I can personally testify how critical this type of information is for fully assessing the true nature of WTO obligations and in operating in today's global economy. At that time I was preparing a study of the WTO it became clear that there was an imperative to make the relevant international and comparative data pertaining to WTO litigation more easily available.

In a historical context the development of a multilateral and global dispute resolution system is truly breathtaking. It provides for compulsory jurisdiction, binding decisions, surveillance of implementation efforts, and trade sanctions to enforce the decisions. Not even within the broadest visions of President Roosevelt's Secretary of State Cordell Hull, the leading statesman who pursued bilateral trade liberalization during the darkest days of the depression and World War II, was the system even a glimmer of an idea. The system that emerged at the conclusion of the Uruguay Round of trade negotiations and then evolved over the last ten years is a momentous international development – in terms of law, politics and trade.

The development of this new multilateral dispute resolution system is intended to reduce unilateral measures, depoliticize trade disputes, clarify rules of trade, increase market access, and further trade liberalization. An underlying premise of the WTO system is that a rule-based trading system will inevitably lead to free markets and free societies. At the core, rule-based trade is viewed as having transformational power, leading to greater economic and political development of civic societies.

This undertaking by Dr. Malawer is truly innovative and Herculean. It will undoubtedly be a starting point in the efforts of many to grapple with the intricacies of the rule-based trading system and to participate effectively in this new dynamic legal order. Certainly, this field of WTO-centered trade relations and its dispute resolution process will only grow in importance as economic integration continues globally.

INTRODUCTION.

Stuart S. Malawer, *J.D., Ph.D., George Mason University.*

The dispute resolution system of the World Trade Organization (WTO) is of central importance to the global trading system. Within the last ten years it has become critical to global trade relations. The largest and the smallest of nations participate in litigation before the WTO. Cases involve an extraordinarily wide range of economic and trade issues with significant domestic and international political implications. These issues often reflect deeply held cultural beliefs as well as involve the newest issues of technology and science. All sectors of the economy have a stake in the outcome of such litigation.

But as important as the dispute resolution has become, litigation before the WTO has not become any easier. Litigation is vastly complex and technical. As the use of the system has exploded access to the documents of the WTO, information concerning laws and policies of the major players, still remain exceedingly difficult to find.

Growth in WTO litigation is expected to grow exponentially as new players join the WTO and as trade issues evolve to encompass more and more areas of economic and business activity traditionally regulated by national governments. Many such areas are regarded as core areas of domestic national concern and increasingly raise question not normally thought of as trade related. The importance of the litigation process in the global trading system may grow even more as the negotiation function of the WTO is slowed because of growth in WTO membership and increased assertiveness of nations in trade negotiations.

My purpose in undertaking this research project is simply to provide in one location many of the essential pieces of legal and policy information from the WTO, the United States and other key players, such as the EU, China, Japan, Korea and Brazil. I also hope to present the information in such a way as to convey the technical as well as the policy issues involved. It is intended to be a launching pad into this new world.

I decided to focus on the public information made available by the parties on the World Wide Web. Thus, in this age of the Internet, that roughly corresponds to the ten years of the WTO, all the material included in this book is often located in the far reaches of the Web. Each document cited has the Web site or URL.

Governments, corporations, individuals and, indeed, the global system have a stake in accurately assessing and utilizing this system effectively. It is the dispute resolution system that ensures that global commerce is governed by the rule of law rather than unilateral actions and power politics.

International relations today, as well foreign affairs and international business transactions, are more concerned with difficult trade issues than ever before. Global trade issues and global trade litigation are at the core of globalization. Corporate and individual welfare are affected by decisions made by this new international institution. Fully understanding and participating effectively in this system is crucial. Access to the relevant information through the Internet is a starting point. I hope this objective is met at least in some small way by this book.

Stuart S. Malawer with the WTO Director-General Mike Moore.

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[Address before the European Society of International Law.]
WTO News -- Speech by DG Pascal Lamy
May 19, 2006 (Sorbonne, Paris, France)
http://www.wto.org/english/news_e/sppl_e/sppl26_e.htm

I am particularly honoured by your invitation to this Second Biennial Conference of the European Society of International Law. Indeed, I am both honoured and pleased, not only because I am in Paris, but above all because I subscribe to the ESIL project, the objective of which is to develop trade and promote a better understanding among all persons working in the field of international law.

Admittedly, I have only distant memories of the Hague Academy of International Law where I once worked on estoppel, but the general theme of this conference — International Law: Do We Need It? — convinced me that there was room, this evening, for a non-specialist. It is in that capacity that I will be speaking to you, in the hope that I can contribute the views of a practician on the place and role of WTO law within the international legal order. In doing so, I am seeking to establish a constructive dialogue between doctrine and practice in the hope of improving normative and institutional coherence within the international legal order.

Before beginning, I wanted to mention that at the request of the European Society of International Law, my address will be partly in French and partly in English in order to use the ESIL's two official languages.

Trade is at the origin of entire segments of public international law, and accounts for one of its main sources: the treaty. Indeed, one of the first international legal instruments to leave its trace in history was the commercial treaty between Amenophis IV and the king of Alasia (Cyprus) during the XIV century BC. This treaty exempts Cypriot traders from customs duty in exchange for the importation of a certain quantity of copper and wood. Nothing has fundamentally changed since: at the beginning of the XXI century AD we still have bilateral trade agreements. But they now have to be notified to the WTO where they are checked for consistency with international trade rules.

The international legal order, on the other hand, has evolved dramatically. The great empires have disappeared into history. Philippe le Bel and Jean Bodin's jurists progressively conceptualized the notion of sovereignty, the treaties of Westphalia ushered in the pre-eminence of a society of sovereign States, the Congress of Vienna of 1815 laid the foundations of multilateralism, and the XIX century invented the first international organizations. With the creation of the League of Nations followed by the United Nations system, and finally, with the disintegration of the Eastern Bloc, the XX century

saw the evolution of traditional international law between States towards a contemporary and universal international law open to new players such as the international organizations and the non-governmental organizations.

Thus, the international legal order has gone through a number of upheavals. But its evolution has been neither linear nor homogenous - which is why international society still bears the marks of several historical stages of the process.

As a metaphorical illustration, let us take the three physical states of matter: gas, liquid, and finally solid. Today's international legal order is made up simultaneously of these three states: gas is the coexistence of particles devoid of any hierarchical differentiation: the Westphalien order made up of sovereign States organized according to an essentially "horizontal" logic with a decentralized responsibility mechanism. The solid state is reflected in the European Union, the perfect example of an international integration organization which produces rules that it interprets "autonomously" and whose primacy and direct applicability it guarantees through a system of judicial remedy. The judicialization of the responsibility of member States for the violation of Community law is a cornerstone of this integrated legal order. Between the gaseous state and the solid state, there remains the liquid state. It is to this category that the WTO belongs. Neither entirely vertical nor entirely horizontal in essence, resembling an intergovernmental cooperation organization in certain respects while closer to an international integration organization in others, the WTO represents a unique legal order or system of law. At the risk of oversimplification, in fact, I will draw no distinction between a system of law, a legal system and a legal order. The reason why the international legal order exists in several physical states is that it is evolving; and the WTO is both a product and a vehicle of that evolution.

Indeed, the WTO is an international organization that brings together two concepts of international law. Leaving aside one or two specificities, it is a permanent negotiating forum between sovereign states and is therefore a cooperation organization akin to the international conferences under traditional international law. But it also comprises a sophisticated dispute settlement mechanism which makes it an integration organization, rooted in contemporary international law. In simple terms, the WTO's sophisticated dispute settlement mechanism makes it a distinctive organization.

Above all, the WTO comprises a true legal order. If we go by professor Jean Salmon's definition, "a body of rules of law constituting a system and governing a particular society or grouping", we see that there exists, within the international legal order, a specific WTO legal order. The WTO system has two essential attributes: valid rules, and enforcement mechanisms. But the fact that it is specific does not mean that it is insularized or isolated. These are the two points that I will be discussing here today in an effort to explain firstly how this legal system fits into the international legal order, and secondly, how it links in with the other legal systems.

Let us begin with the first point, and see what makes the WTO a unique legal system within the international legal order.

The WTO is an international organization. This may seem obvious, and yet it took over 50 years to achieve that result. This protracted effort to acquire a legal existence has left its marks.

The GATT, which was replaced by the WTO in 1994, was a provisional agreement that entered into force in January 1948 and was to disappear with the treaty creating the International Trade Organization. Since that treaty never entered into force, the GATT remained, for a half a century, an agreement in simplified form which, in principle, did not provide for any institutional continuity.

Thus, the GATT did not have "Members" but "contracting parties", a term which highlighted the purely contractual nature of the arrangement. Without any international organization in the strict sense of the term, and therefore without a separate international legal personality, the GATT could only operate through its CONTRACTING PARTIES and, for its every day work, with the support of the Interim Commission for the International Trade Organization (ICITO), a provisional commission responsible for setting up the ITO.

Thus, it was almost 50 years later, with the Marrakesh Agreement, that a true international organization was finally created, i.e., according to the definition supplied by the International Law Commission in its draft articles on the responsibility of international organizations, "an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality". In order to avoid any ambiguity, the Agreement Establishing the WTO states in Article VIII that the Organization shall have legal personality.

The implications of this status are numerous. The Marrakesh Agreement states that Members shall accord the WTO such privileges and immunities as are necessary for the exercise of its functions. Thus, its legal personality consists of an international facet, which enables it to act at the international level, and an internal personality, which enables it to conclude contracts for the purposes of its day-to-day operations and among other things to employ its six hundred permanent staff members. As with all international organizations, the competencies of the WTO are limited by the principle of speciality. But alongside its subject-matter competence, which is explicitly provided for in its constituent instrument, the WTO also has implicit competencies. Thus, the main consequence of this status of international organization is that it enables the WTO to have its own will which is expressed in a legislative output within the limits fixed by its constituent instrument, and to interact with other international players.

As a true international organization, the WTO now comprises an integrated and distinctive legal order: it produces a body of legal rules (1) making up a system (2) and governing a community (3).

(1) A body of legal rules, first of all. The WTO is a treaty comprising some 500 pages of text accompanied by more than 2,000 pages of schedules of commitments. Moreover, 50 years worth of GATT practice and decisions — what we call the "GATT acquis" — have been incorporated in what constitutes the new WTO treaty. WTO rules are regularly renegotiated. While it is true that the WTO Secretariat and the WTO bodies do not have any general power to adopt formally binding rules, the WTO bodies are able to adopt effective decisions that provide pragmatic responses to specific needs, and in that sense, they do produce a kind of secondary legislation. The system is no longer based solely on the principles of a certain diplomacy which often led, under the GATT, to the adoption of negotiated solutions that reflected the relative power of the States involved. The WTO does not produce equity, in the meaning given to the term by public international law — rather, it produces legality.

(2) Secondly, these legal rules form an integrated system. Indeed, the WTO agreements are integrated in a "single undertaking" which forms an entity that is meant to be coherent. A number of provisions recall this fact, and in particular Article II:2, which states that the multilateral trade agreements "are integral parts" of the Agreement Establishing the WTO and are "binding on all Members". This is why they appear in annex to the Agreement Establishing the WTO. In the Indonesia — Autos dispute, the panel which ruled in the first instance recalled that there was a presumption against conflict between the different provisions of the WTO treaty since they formed part of agreements having different scopes of application or whose application took place in different circumstances. On several occasions, the Dispute Settlement Body (DSB) reaffirmed that Members must comply with all

of the WTO provisions, which must be interpreted harmoniously and applied cumulatively and simultaneously. Thus, the WTO treaty is in fact a "single agreement" which has established an "organized legal order".

(3) Thirdly, WTO law governs a community, namely its Members. In United States — Section 301, the Panel confirmed the existence of a GATT/WTO legal order and even seemed to suggest that this order was characterized by its "[i]ndirect impact on individuals". For, by contrast, "when an actual violation takes place ... in a treaty the benefits of which depend in part on the activity of individual operators the legislation itself may be construed as a breach, since the mere existence of legislation could have an appreciable 'chilling effect' on the economic activities of individuals." The qualification of nations no longer only as objects of WTO law, but also as subjects, is still disputed. Leaving that debate aside, I would say that the WTO rules above all effectively govern the community of its Members, since failure to comply is punishable in the framework of the DSB. In other words, they do form a new legal order as defined above.

However, this integrated legal system is not "clinically isolated": there is a presumption of validity in international law and the rules of its treaties must therefore be read in harmony with the principles of international law. Thus, the WTO legal order respects, inter alia, the sovereign equality of States, good faith, international cooperation, and the obligation to settle disputes peacefully, not to mention the rules of interpretation of conventions which the Appellate Body, for example, applies without hesitation. The WTO respects general international law, while at the same time adapting it to the realities of international trade. In joining the international legal order, the WTO has ended up producing its own unique system of law.

Leaving aside the doctrinal debate on the autonomy of international economic law, it is clear that WTO law is largely a circumstantial application of international law in general.

I shall illustrate this with two examples, two principles of general international law which the WTO has brought to life in its own manner and on which it has left a durable imprint: the sovereign equality of States and the obligation to settle disputes peacefully.

The sovereign equality of States requires formal equality between States of different sizes and power. This principle is fully respected at the WTO.

While most international economic organizations have a restricted body alongside their plenary body, the WTO is unusual in that the totality of its Members participate, as a matter of law, in all of its bodies from the Ministerial Conference, which meets at least once every two years, to the General Council, which functions during the interval, not to mention each of the councils and committees. All of the decisions are taken according to the principle "one government/one vote" and by consensus. While it is true that this rule of consensus is responsible for a certain sluggishness in the negotiations, it does enable all States, whatever their share in international trade, to express their views and to participate on an equal footing.

The principle of equality is also reflected concretely in the substantial rules of the WTO. For example, in the form of the principle of non discrimination it can be found in the most favoured nation clause and the national treatment rule. It also underlies the principle of reciprocity, which is at the heart of the negotiating mechanism. Indeed, as recalled by the UN Secretary-General before the General Assembly in 2004, equality is a fundamental requirement:
"At the international level, all States — strong and weak, big and small — need a framework of fair rules, which each can be confident that others will obey. Fortunately, such a framework exists. From

trade to terrorism, from the law of the sea to weapons of mass destruction, States have created an impressive body of norms and laws."

But as Kofi Annan points out, these rules must also be fair — which is why the WTO goes beyond formal equality and seeks to establish real equality. True equality can only exist between equals. When it comes to trade, some of the less developed countries require certain flexibilities if trade and development are to continue to exist side by side. So the developing countries can enjoy non-reciprocal benefits, in particular special and differential treatment. This deviation from the GATT principles for the developing countries was made official in 1964 with the addition to the GATT text of part IV, "Trade and Development".

Article XXXVI.8 states that "[t]he developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to trade of the less developed contracting parties." And there is also the so-called Enabling Clause, which provides for the establishment of a "generalized system of preferences" that authorizes the developed countries to grant tariff advantages to the developing countries as an exception to the most favoured nation clause. These are positive discrimination mechanisms to ensure effective equality among Members. They are in no way inconsistent with the sovereign equality of States — on the contrary, precisely as in the case of domestic laws, where social legislation is an essential corollary to equal dignity of men and women, this adaptation of applicable rules to the real situation of States is a way of ensuring more genuine equality. You will probably recognize, here, the very pertinent remarks of my old friend Professor Alain Pellet.

The WTO, then, rests largely on the principle of sovereign equality of States. But this does not mean that it is incapable of showing the kind of pragmatism that befits the area of trade in applying the principles of traditional international law.

Let me add, with regard to the sovereignty of States, that in principle, only sovereign States are equal. This is why in principle, the traditional international organizations are made up of States only. It is true that the WTO remains an inter-State framework. However, once again it has been able to adapt to the evolution of the international society and the emergence of new actors.

Members may be "customs territories", so that Chinese Taipei has been able to join the WTO, and Hong Kong has been able to continue participating as an autonomous Member following its return to China. Similarly, the participation of the European Community as a WTO Member is unique. In the 1970s, the Commission participated de facto in GATT meetings, substituting for the European Economic Community Members to express a common position. With the creation of the WTO, this practice was formalized. The Organization's constituent treaty provides that the number of votes of the European Communities and their member States shall in no case exceed the number of their member States. What is new here is above all the participation of the Community alongside its member States.

Also worth mentioning in this respect is the growing participation of NGOs — a term which the WTO interprets in a very broad sense. Article V:2 of the Agreement Establishing the WTO stipulates that "[t]he General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO." There has been no detailed arrangement to date, but in 1996, the General Council adopted guidelines specifying the nature and scope of relations between the WTO Secretariat and the NGOs. These new rules have served as the basis for a policy of greater transparency towards the NGOs. This does not mean, however, that they are allowed into the actual negotiating forum: the WTO remains an inter-State

negotiating framework. Nor are the NGOs given access to the Dispute Settlement Body, although they have been allowed a growing role in the proceedings through amicus curiae briefs since the report of the Appellate Body in United States — Shrimps.

It is in fact necessary to preserve the inter-State framework of the WTO while keeping an ear open to the non-State actors that represent civil society. This balance aims to ensure that the WTO acts in the general interest which, in principle, is embodied in the State, while the NGOs defend — quite legitimately — interests that are often specific. Nevertheless, by recognizing the role of the NGOs the WTO is contributing to their impact within the international legal order. Thus, the WTO has also acted as a vehicle in the evolution of international law towards its contemporary form, and indeed a driving force in the progressive transformation of international society into an international community.

Let us turn to another example of the WTO respecting general international law while adapting it to the constraints of its own legal order: the principle of the obligation to settle disputes by peaceful means.

This obligation is a principle that lies at the heart of general international law and is enshrined in the United Nations Charter. Twenty-five years later, the General Assembly voted the famous Declaration on the seven principles of peaceful coexistence, which recalls that "States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered". Thus, when they created the international organizations, the States ensured that their chief goal was to maintain peace through appeasement and prevention of international tensions, and then introduced the dispute settlement systems. In this context, the creation of a multilateral trading system was a means of ensuring both peace through law and peace through prosperity.

The implementation of the principle of the obligation to settle disputes by peaceful means, with bodies created to that end, is a way of institutionalizing international responsibility, the main characteristic of which, in traditional international law, is decentralization. It has now been established that States are responsible for any negative impact of their wrongful acts; but the determination of their responsibility and above all, its implementation, remain essential to the effectiveness and efficiency of any legal system. One of the WTO's distinctive features is its sophisticated dispute settlement mechanism which, as I mentioned earlier, tends to make it more of an integration organization, "solid" rather than "liquid". Under Article 56 of the text of the International Law Commission on "Responsibility of States for Internationally Wrongful Acts" which appears in annex to General Assembly Resolution 56/83, the WTO dispute settlement mechanism is a special system, or lex specialis. Consequently, the DSB can go beyond general international law on the road to communitizing WTO law — that is, consolidating its legal system in the wake of an institutionalization of international responsibility.

Although still influenced by its origins, when, in the words of Professor Canal-Forgues, it was more of a quasi-judicial conciliation mechanism, the WTO dispute settlement system introduced a new "jurisdiction" which ensures the enforcement of rulings and recommendations. At the same time, the procedure tends to preserve the fundamental requirements of fair trial. It is a compulsory jurisdiction that is broadly accessible to Members; it decides according to law; the procedure for adopting decisions is quasi-automatic; rulings are made by independent persons, and their implementation is subject to continuous multilateral monitoring until full satisfaction of the complainant where a violation has been found. Moreover, the Appellate Body functions more or less like a court of cassation, which hears only matters of law. This confirms the essentially legal nature of the system.

Above all, WTO jurisdiction is compulsory for all WTO Members. No Member may oppose the initiation of a dispute settlement procedure by another Member: in other words, that Member must submit to WTO law. Contrary to what may happen in other international forums, for example the International Court of Justice, all WTO Members have, by definition, accepted the compulsory and exclusive jurisdiction of the Dispute Settlement Body for all matters relating to the WTO agreements.

In order to avoid the fragmentation of the dispute settlement mechanisms that existed under the GATT regime, the Marrakesh agreements also sought to preserve the unity of the system under the DSB. Thus, the settlement of all disputes relating to WTO rules has been placed under the auspices of a single institutional body, the Dispute Settlement Body, and is subject to a single body of rules and procedures contained in the Understanding. In other words, it is an integrated system.

An important, and in many ways innovative feature of this system is the presumption of legal and economic interest in bringing proceedings, which confirms the hypothesis of a "communitization" of WTO law: each Member State can enforce WTO law whether or not it has a direct and personal interest — in the interests, so to speak, of the "community of States parties". This principle, which dates back to the GATT period, was revived by the Appellate Body in EC — Bananas when it confirmed that the United States had sufficient interest to bring proceedings against the European Community, even though, in practical terms, the Americans did not export bananas. In other words, any State may initiate dispute settlement procedures on the basis of a claim that another Member is not complying with its obligations under WTO law.

Everything is done to ensure that the complaint, if it is substantiated, is followed by concrete effects. After the adoption by the panel, and possibly the Appellate Body, of their "recommendations", WTO Members continue to monitor and to follow up the implementation by the losing country of the conclusions of the case. Furthermore, if the conclusions are not fully implemented, the winning party that so requests may impose countermeasures in the form of trade sanctions.

What can we conclude from all of these mechanisms? First of all they are the confirmation of a certain "communitization" that is under way at the WTO, with an institutionalization of international responsibility. The idea is essentially to ensure respect for the rule rather than reparation, a clear sign of the transformation of a society into a community. It is no longer the interest of the adversely affected party that counts, but the common interest. Indeed, violation of the law that applies to the community is in itself an infringement of the rights of all of the States parties, which are all entitled to feel that they have been adversely affected. In other words, responsibility is generated by an objective "fact": it is the result of non-compliance, whatever the consequences may be.

But what is interesting about the institutionalization of international responsibility by the Dispute Settlement Body is that sovereign States ultimately retain a certain control on the result of peaceful settlement of disputes. When it comes to enforcing the consequences of a DSB decision, we revert to law in its most traditional form, since the decision in fact authorizes the State that has won the case to exercise its right to countermeasures. The countermeasures are determined by the State itself, which is free within the limits of the treaty and subject to arbitration, to decide on their scope. These countermeasures (formerly "unarmed reprisals") are the product of international law in its most traditional form: the right of each State to take the law into its own hands. Thus, there is a margin of controlled freedom or sovereignty, a balance between the decentralized responsibility of traditional international law and the complete jurisdictionalization of the peaceful settlement of disputes. The WTO is one of the rare systems to have truly succeeded in regulating the countermeasures applied by

the powerful States by making their application contingent on the prior collective approval of Members.

In the end, I share the view of Professor Ruiz-Fabri: to all intents and purposes the WTO is a true jurisdiction, since the political control that the DSB is able to exercise remains largely theoretical. The "reverse" consensus mechanism practically automatically requires the DSB to reach a decision as long as the complainant remains determined to pursue the case.

Thus, WTO law is a body of legal rules making up a system and governing a community. As such, the WTO incorporates an integrated and distinctive legal order. Bringing together traditional international law, which it respects, and contemporary international law, which it is helping to promote, the WTO has become a part of the international legal order as a sui generis legal system. But how does WTO law link up to the legal systems of other international organizations within the international legal order?

Which leads me to my second point, which will review "The link between the legal system of the WTO and the legal systems of other international organizations."

The effectiveness and legitimacy of the WTO depends on how it relates to norms of other legal systems and on the nature and quality of its relationships with other international organisations. In order to address more specifically the place and the role of the WTO's legal system in the international legal order, I will briefly discuss how the WTO's provisions operate and treat other legal norms, including norms developed by other international organisations. My focus will first address this issue from a normative point of view, and then from an institutional perspective. I will show that the WTO, far from being hegemonic as it is sometimes portrayed to be, recognizes its limited competence and the specialization of other international organizations. In this sense the WTO participates in the construction of international coherence and reinforces the international legal order.

The WTO, its treaty provisions and their interpretation, confirms the absence of any hierarchy between the WTO norms and those norms developed in other fora: WTO norms do not supersede or trump other international norms.

In fact the GATT, and now the WTO, recognizes explicitly that trade is not the only policy consideration that Members can favour. The WTO contains various exception provisions referring to policy objectives other than trade, often under the responsibility of other international organisations. Our Appellate Body has managed to operationalize these exception provisions so as to provide Members with the necessary policy space to ensure if they do wish, that their actions in various fora are coherent.
Let me give you a few examples of how our system deals with non-trade concerns and norms developed in other fora and you will see why I believe that the WTO has been pro-active in stimulating efforts of international coherence.

The WTO is of course a "trade" organisation; it comprises provisions that favour trade opening and discipline trade restrictions. The basic philosophy of the WTO is that trade opening obligations are good, and even necessary, to increase people's standards of living and well-being. But at the same time the GATT, and now the WTO, contains provisions of "exceptions" to these market access obligations. The old — but still in force — Article XX of GATT provides that nothing prevents a Member from setting aside market access obligations when a Member decides, unilaterally, that considerations other than those of trade must prevail. This can happen when, for instance, a Member has made

commitments in other fora, say on an environmental issue, when such an environmental commitment may lead to market access restrictions.

The revolution brought about by WTO jurisprudence was to offer a new teleological interpretation of the WTO that recognizes the place of trade in the overall scheme of States' actions and the necessary balance that ought to be maintained between all such policies.

How is this done within the WTO legal order?

First, and very simply, the WTO treaty was considered and interpreted as a "treaty". In the very first WTO dispute, an environment— related dispute (US — Gasoline) the Appellate Body concluded that the Panel had overlooked a fundamental rule of treaty interpretation, expressed in the Vienna Convention on the Law of Treaties (the "Vienna Convention"). I am sure this sounds very obvious to you international legal experts! The Appellate Body first recalled that these general rule on treaty interpretation had attained the status of a rule of customary or general international law. It was important to do so because, as you may know, neither the USA nor the EC have ratified the Vienna Convention on Treaties. Then the Appellate Body made its first statement, now famous, on the nature of the relationship between the WTO and the international legal order: "the GATT is not to be read in clinical isolation from public international law."

Recalling that pursuant to Article 31 of the Vienna Convention, terms of treaties are to be given "their ordinary meaning, in their context and in the light of the Treaty's object and purpose", the Appellate Body noted that the Panel Report had failed to take adequate account of the different words actually used for each of the Article XX exceptions. This led to a reading that offered much more flexibility in the so-called environment exception and a categorical turn about in 50 years of GATT jurisprudence.

In relying on the steps and principles of the Vienna Convention, panels as well as the Appellate Body have since often referred to the "context" of the WTO treaty and to non-WTO norms when relevant. I've been told that no other international dispute system is so attached to the Vienna Convention! In my view, this insistence on the use of the Vienna Convention on Treaties is a clear confirmation that the WTO wants to see itself being as fully integrated into the international legal order as possible.

The linkage between the WTO and other sets of international norms was also reinforced when the Appellate Body stated that in WTO, exception provisions — referring to such non-trade concerns (environment, morality, religion etc...) — are not to be interpreted narrowly: exceptions should be interpreted according to the ordinary meaning of the terms of such exceptions. In this context, our Appellate Body has insisted that exceptions cannot be interpreted and applied so narrowly that they have no relevant or effective application.

The Appellate Body further expanded the availability of WTO exceptions in the following manner. In WTO exceptions are subject to what we call a "necessity test", a test having features of a "proportionality" requirement. When assessing whether a measure is "necessary" for any non-WTO concern, a new and additional balancing test is to be used.

Such an assessment will have to balance first (1) the "value" protected by such measure — and the more important this "value", the easier it will be to prove the necessity (and the importance of the value will affect the entire balancing process); second (2) the choice of the measure chosen to implement such a non-trade concern — is it a complete or partial ban on trade? is it a labelling

requirement? Is it a discriminatory tax?; and finally a third element (3) the trade impact of the restriction.

Once a measure prioritizing a non-trade value or standard is considered "necessary", there is always an assessment as to whether the measure is indeed applied in a non-protectionist manner, pursuant to the chapeau of Article XX. Here again the Appellate Body has said that when assessing whether a measure complies with Article XX, a "balance" between WTO market access obligations and a government's right to favour policies other than trade must always be kept.

Our jurisprudence has determined that the "control" exercised by the chapeau of Article XX of GATT, against disguised protectionist measures, is in fact an expression of the "good faith" general principle or an expression of the principle against the "abus de droit". I quote

"the task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception ... and the rights of the other Members under varying substantive provisions ... The location of the line of equilibrium, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."

But let's not get dizzy or sea sick! Here again, faced with tensions between Members' market access obligations and the right to favour non-WTO considerations (and norms of other legal systems), the Appellate Body has introduced a form of "balancing test" or "proportionality test" between sets of values, or between sets of rights and obligations.

I hope it is now clear that WTO Members' trade restrictions imposed to implement non-trade considerations, will be able to prevail over WTO market access obligations so long as they are not protectionist. In other words, the WTO provisions themselves recognize the existence of non-WTO norms and other legal orders and attempts to limit the scope of application of its own provisions, thereby nourishing sustainable coherence within the international legal order.

Another fundamental principle of the WTO is that Members can set national standards at the level they wish, so long as such Members are consistent and coherent. For example, in the dispute between Canada and the European Communities over the importation of asbestos-related material, the Appellate Body stated clearly that France was entitled to maintain its ban since it was based on authentic health risks and standards recognized in other fora and no alternative measures could guarantee zero risk as required by the EC regulation.

An additional feature of the WTO that confirms its integration into the international legal order, is the legal value and status it provides to international standards and norms developed in other fora. For instance, the Sanitary and Phytosanitary (SPS) Agreement states that Members' measures based on standards developed in Codex Alimentarius, the International Office of Epizootics and the International Plant Protection Convention are presumed to be compatible with the WTO. So, while Codex, and others do not by any means legislate in the normal or full sense, the norms that they produce have a certain authority in creating a presumption of WTO compatibility when such international standards are respected. The SPS Agreement provisions thus provide important incentives for States to base their national standards on, or conform their national standards to, international standards. Therefore the WTO encourages Members to negotiate norms in other international fora which they will then implement coherently in the context of the WTO.

I could give you further examples but let me simply point to the preamble of the WTO which, contrary to that of the GATT, explicitly refers to sustainable development as an objective of the WTO. While it is not yet clear whether sustainable development has crystallized into a general principle of law, the reference to such an important non-trade principle shows that the signatories of the WTO were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy.

In the famous US — Shrimps dispute this preambular language was considered to indicate that further flexibility should be introduced when interpreting "natural resources" in the environment exception, and that it added, I quote: "colour, texture and shading to the rights and obligations" of WTO provisions. It also made explicit reference to the need to interpret WTO provisions — and specially the old GATT provisions — in an "evolutionary manner" taking into account the ordinary meaning of the terms of the WTO at the time of the dispute, rather at the time of their drafting in 1947. This allowed the Appellate Body to consider contemporary treaties that define "natural resources" and to conclude that these definitions should also be used in the WTO so as to ensure some international coherence with respect to natural resources.

I agree therefore with Professor Abi-Saab, from our Appellate Body, that in using general principles of public international law in its interpretation of the WTO provisions, the Appellate Body confirmed that the WTO is operating within the compound of international legal order.

The WTO does, therefore, take into account other norms of international law. Absent protectionism, a WTO restriction based on non-WTO norms, will trump WTO norms on market access. In so doing, it expands coherence between systems of norms or legal order. Moreover, I believe that in leaving Members with the necessary policy space to favour non-WTO concerns, the WTO also recognizes the specialization, expertise and importance of other international organizations. In sum, the WTO is well aware of the existence of other systems of norms and that it is not acting alone in the international sphere.

Existing relations between the WTO and other international organisations again reflect efforts of coherence within the international legal order. Now that the WTO is an authentic international organisation will full legal personality, it has set up an important network of formal and de facto arrangements with other actors on the international scene. The greater the coherence within the international legal order, the stronger the international "community".

Let's look briefly at the actual interactions between the WTO and other international organisations. There are, for example, explicit WTO provisions on IMF/World Bank/WTO coherence with an explicit mandate to the Director General. There exists a series of inter-agency cooperation on technical assistance and capacity building with several international organisations. Indeed the current Round of negotiation is to some extent premised on coherence, as we are suggesting a new "Aid-for-Trade programme" which brings together several multilateral organisations and regional development banks to assist developing countries in reaping the benefits of trade opening !

We also have formal cooperation agreements with other international organisations. For example, in the area of standards setting, we now have a mechanism — The Standards and Trade Development Facility — involving the WTO, World Bank, Food and Agriculture Organisation (FAO), World Health Organization and the World Organization for Animal Health. Some 75 international organisations have obtained regular or ad hoc observer status in WTO bodies. The WTO also participates as an observer in many international organisations. Although the extent of such cooperation varies, coordination and coherence between the work of the WTO and that of other

international organisations continue to evolve in a pragmatic manner. The WTO Secretariat maintains working relations with almost 200 international organisations in activities ranging from statistics, research, standard-setting, and technical assistance and training.

As I wrote it in 2004 in a book about "international democracy", I am a firm advocate of international coherence. I wouldn't dare to say that "international coherence" is a general principle of international law! But I recall that international cooperation is one of the United Nations objectives as stated in Article 1 of the UN Charter. I believe that efforts of international coherence are the only way to ensure the peaceful evolution of international relations and of our international legal system. But international coherence is also crucial to ensuring the legitimacy of the WTO and the effectiveness of trade rules.

The WTO's mantra in favour of trade openness plays a vital role in Members' growth and development, but it's not a panacea for all the challenges of development, neither is it necessarily easy to accomplish, nor in many circumstances can it be effective unless it is embedded in a supportive economic, social and political context and a coherent multi-faceted policy framework. Trade opening can only be politically and economically sustainable if it is complemented by policies which address, at the same time, capacity problems (whether human, bureaucratic or structural); the challenges of distribution of the benefits created by freer trade; the need for sustainable environment; the respect of public morals, etc. This is also about international legal coherence.

All these policies are intertwined with the other treaty obligations of WTO Members. So further international coherence will only assist in getting the best out of the WTO ! Since WTO norms are not hierarchically superior or inferior to any other norms (except jus cogens) States must find ways to coordinate all these policies in a coherent manner. I believe that the WTO favours and encourages such coherence.

But this is not enough and the description I just gave you is, to some extent, misleading.

Although I personally believe in the need for more global governance, I am a "pragmatic practitioner". This brings me twice back down to earth! As international legal experts, you are well aware that States find themselves often faced with opposite — even contradictory — sets of international obligations. Moreover, as treaties proliferate, so do dispute settlement systems, and the potential for clashes with the WTO's compulsory and binding dispute settlement mechanism.

Let me give you one example and you will quickly see the "cracks" in the coherence of our international legal order. The EC — Swordfish dispute was concerned with the following situation. In 1999, Chile enacted swordfish conservation measures, by regulating gear and limiting the level of fishing through the denial of new permits. Chile effectively prohibited the utilisation of its ports for the landing and service to the EC longliners and factory ships that disregarded minimum conservation standards. The EC challenged those measures as being contrary to its WTO transit. Chile demanded that the EC enact and enforce conservation measures for its fishing operations on the high seas, in accordance with United Nation Convention on the Law of the Sea (UNCLOS). Chile responded to the EC's WTO challenge by initiating the dispute settlement provisions of UNCLOS and invited the EC to the International tribunal on the Law of the Sea (ITLOS). The substantive issues before the WTO included the right of Chile to benefit from the application of Article XX of GATT on the conservation of natural resources, when acting pursuant to UNCLOS. The issue before UNCLOS could have included whether Chile was entitled to regulate and limit access to swordfish as part of a conservation programme.

In such a situation, it is conceivable that both instances would have examined whether UNCLOS effectively requires, authorizes or tolerates Chile's measures, and whether the Chilean measures were compatible with UNCLOS, an element that could influence a WTO panel in its decision as to whether Chile may benefit from the application of the exception provision on environment. It is, therefore, conceivable that the two fora may reach different conclusions on the same facts or on the interpretation of the applicable law.

Fortunately, in that dispute, the parties reached an agreement to suspend both their disputes before ITLOS and before the WTO. But in the absence of a mutual agreement, the WTO panel would have proceeded much faster than that of ITLOS. Short of any agreement between the parties and in the absence of any international rule as to how these two different mechanisms should interact, many scenarios may emerge. In light of the quasi-automaticity of the compulsory and binding WTO dispute mechanism, it is unlikely that a WTO panel would decline jurisdiction because another dispute process — albeit more relevant and better equipped — has been seized for a similar or related dispute. And if both processes were triggered at the same time, it is quite probable that the WTO panel process would proceed much faster than any other process.

This is where part of the imbalance of our international legal order remains. If the WTO, through its dispute settlement system, can show that it does take into account the norms of other legal orders, many still challenge the fact that it will be for the WTO judge to determine the balance, the "line of equilibrium" between trade norms and norms of other legal orders. Indeed, at present, if a measure has an impact on trade, the matter can always be taken to the WTO dispute settlement system fairly simply and quickly. The WTO adjudicating body will then have to determine whether the trade restriction can find justification in the exception provisions of the WTO. In assessing the invocation of such WTO exception justification, the WTO judge may in fact be deciding on the relative hierarchical value between two sets of norms.

Indeed, if a WTO Member invokes the environment exception to justify a trade restriction adopted pursuant to an multilateral environment agreement (MEA), in practice, it is the WTO judge who will determine whether, and the extent to which, compliance with such an MEA can provide a WTO justification for trade restriction. If, in support of its invocation of the WTO exception for public morals, a Member points to an International Labor Organization (ILO) resolution condemning a specific State for violation of core labour standards, it is the WTO judge who will end up deciding on the legal value and impact of such an ILO resolution on international trade and its opposability to trade rules.

But I believe there are no reasons to provide the WTO with the exclusive authority to operate the much needed coherence between norms from different legal orders. The lack of coherence of our international legal system is amplified by the relative power of the WTO and in particular its dispute mechanism. This shows the discrepancy between the WTO's very powerful enforcement mechanism and the traditional decentralized system of counter measures still used in several legal orders. I do not think that the solution lies in weakening our dispute system. Many aspects of the WTO need to be improved but I believe that the WTO dispute settlement system works well. The solution to the potential imbalance I alluded to lies, I believe, in strengthening the enforcement (the effectiveness) of other legal orders so as to rebalance the relative power of the WTO in the international legal order.

Legal orders and legal systems will continue to co-exist and coherence will depend on ad hoc solutions based on the goodwill and interests of the jurisdictions concerned. Several people have suggested unsatisfactory solutions including a referral to the International Court of Justice (ICJ) in situations of concurrent jurisdictions. A call for order has already been made by the ICJ against the dangers of fragmented and contradictory international law. The International Law Commission has undertaken important work in that direction.

Let me now conclude:

Today's international legal order will be able to evolve peacefully only to the extent that the existing legal orders evolve through mutual respect. There is no exception to this rule and the WTO is well aware of its importance.

The WTO has evolved from the GATT's closure. States signatories to the GATT wanted to reinforce the status of the international trading system and provided it with a formal international organization: the WTO. This international organization is now up and running well; it even produces effective norms of derivative law (droit dérivé). The legal value and enforcement of those norms adopted by WTO bodies are matters for debate but the WTO normative capacity, including as a forum of permanent negotiations and its powerful but open dispute settlement mechanism, confirms the sui generis nature of its legal order.

In addition the WTO makes full use of its international legal personality and is now collaborating actively with other international organizations. But there is more. In setting a system whereby good faith norms developed in other fora are presumed to be WTO consistent, the WTO not only gives due deference to other legal systems but it also stimulates negotiations in such other specialized fora and reinforces the coherence of our legal order. In this sense the WTO is an engine, a motor energizing the international legal order. This is, in my view, the place and the role of the WTO and its legal order in the international legal order: a catalyst for international mutual respect towards international coherence and even for more global governance.

November 2006

"The World Trade Organization: Laboratory for Global Governance."

[Malcolm Wiener Lecture — John F. Kennedy School of Government — Harvard University]
WTO News -- Speech by DG Pascal Lamy
November 1, 2006 (Cambridge, Massachusetts)
http://www.wto.org/english/news_e/sppl_e/sppl47_e.htm

[Director-General Pascal Lamy, in the Malcolm Wiener Lecture at the John F. Kennedy School of Government, Harvard University at Cambridge, Massachusetts on 1 November 2006.]
I am happy to be with you today and, in my first trip to Boston as WTO Director-General, to share with you some thoughts on global governance and the contribution that the World Trade Organization can make. And what better place to do this than here, at the John F. Kennedy School of Government, in the Malcolm Wiener lecture. Malcolm Wiener, the author of numerous works on the ancient Mediterranean and Egyptian world but also of more recent realities such as the transformation of the Soviet Union or the US economy is indeed a good source of inspiration for tonight's discussion: how globalization obliges us to look for new forms of addressing global challenges, beyond the traditional nation-states.

Globalization raises global governance issues …….

Globalization has enabled individuals, corporations and nation-states to influence actions and events around the world — faster, deeper and cheaper than ever before — and equally to derive benefits from them. It has the potential for expanding freedom, democracy, innovation, social and cultural exchanges while offering outstanding opportunities for dialogue and understanding.

But the global nature of an increasing number of worrisome phenomena — the scarcity of energy resources, the deterioration of the environment and natural disasters, the spread of pandemics, the growing interdependence of economies and financial markets and the migratory movements provoked by insecurity, poverty or political instability are also a product of globalization.

At the same time, there is a widening gap between global challenges and the traditional ways of working out solutions, our traditional institutions. Globalization is at the same time a reality and an on-going process that cannot be met by nation-states alone. We therefore need to contemplate new forms of governance at the global level.

But what do I mean by governance and what is the difference with government?

The term "governance" was first used in 12th century France, where it was a technical term designating the administration of baillages, or bailiwicks. As with the word government, it comes from the Latin word for "rudder", conveying the idea of "steering". From France it crossed the Channel and in England came to designate the method of organizing feudal power. Underlying feudal power were adjacent "suzerainties" among which there had to be coherence. There was no central power as such, but a body, primus inter pares, whose purpose was to settle disputes peacefully and see that any conflicting interests were reconciled by consultation with those involved.

Governance thus focused on unity — not uniqueness — of interests. If we liken the international society to a medieval society in its lack of any organized central power, then it needs governance. In other words a concept that affords a basis for the organization of power, or the elements of consultation and dialogue necessary to securing greater harmony.

The concept of governance disappeared in the 16th century with the emergence of the State, because the two notions "governance" and "government" are profoundly different. Governance removes the political dimension from government. The latter belongs to Westphalia Nation States and their particular modes of government, legitimacy and representativeness. Governance is a decision-making process that through consultation, dialogue, exchange and mutual respect, seeks to ensure coexistence and in some cases coherence between different and sometimes divergent points of view. This involves seeking some common ground and extending it to the point where joint action can be envisaged.

Globalization reveals a new sphere of common interests that transcends States, cultures and national histories. We need to go beyond the classical inter-nations system. Indeed, the disproportion between the enforcement role of States and their actual capacity to handle issues calls for new forms of governance.

Specific challenges of global governance ……..

As with any system of power within the nation-state, what is needed is "good" global governance, that is a system that offers a good balance between efficiency and legitimacy, adapted to this new universal context.

What then are the specific challenges of global governance as opposed to the classical systems of national governance?

In my view, elements of *legitimacy* must be based on institutions and procedures. Classical legitimacy entails citizens choosing their representatives collectively by voting for them. But it also relies on the political capacity of the system to bring forward public discourse and proposals that produce coherent majorities and provide citizens with the feeling that they can debate the issues. In other words, the political system must represent the society, and allow it to see itself as a whole, with all its members using the same language and experiencing the same feelings.

Since legitimacy depends on the closeness of the relationship between the individual and the decision-making process, the first challenge of global governance is *distance.*

The other legitimacy challenge refers to the so-called *democratic deficit* and the *accountability deficit,* which arise when there are no means for individuals to challenge international decision-making.

Although transparency remains crucial to ensure that governments are both accountable and challengeable at home, classical definitions of domestic accountability and democracy cannot be simply transposed and applied in the international institutions context. We have to explore how to ensure that citizens have the *feeling* that they belong, that they can influence the choices made by their society, and that they can recognize themselves in their representatives.

The specific challenge of legitimacy in global governance is therefore to deal with the perceived too distant, non-accountable and non-directly challengeable decision-making at the international level.
The second element in the validation of power is *efficiency*. Citizens expect governments to be able to identify the problems and expect results from institutions with political responsibilities. But quantifying efficiency in concrete terms is not easy. When power is remote and when there are multiple levels of government, the task becomes even more complicated.

The first efficiency challenge of any global governance system stems from the fact that the classical Westphalian order is based on the full sovereignty monopoly of nation states. We must find ways to address the opposition from sovereign nation-states who resist more or less intensely — depending on the state and on the subject matter — transferring or sharing with international institutions their jurisdiction over certain matters.

The second specific challenge is that of the *lack of coherence among international institutions.* Even when traditional state power is (partly) transferred to an international institution, it is handed over only to very specialized international institutions whose mandates are limited and whose direction/instructions come solely from nation-states' authorities. As the saying goes, "coherence begins at home": it lies first and foremost with States. But we all know that States are often not coherent and do not act coherently, so how can the actions of their institutions be coherent? The overall specific efficiency challenge of global governance is to deal with partial and incoherent efficiency.

Handling global problems in relying on classical models of domestic democracy has important limitations. Yet we need to ensure feelings of legitimacy and efficiency otherwise citizens will lose trust in their local/national government if trans-national issues that affect them daily cannot be adequately dealt with. In this sense there is a continuum between the credibility of domestic democracies, which is at risk if global governance does not find its own democratic credentials.

Pragmatic steps towards elements of global governance ……

Growing interdependence and global governance involve the recognition of the role and responsibilities of new actors, openness of processes, authentic and effective participation, accountability of those acting and coherence.

How can the interdependence of our world be better managed? In my view, four elements should guide us.

First of all, values. Values allow our feeling of belonging to a world community, embryonic as it may be, to coexist alongside national specificities. We must identify common values alongside common interests. Second, we need actors who have sufficient legitimacy to get public opinion interested in the debate, who are capable of taking responsibility for its outcome and who are held accountable. Third, we need fora for discussions and negotiations with transparency. Fourth, we need monitoring, surveillance and enforcement of States' actions performed in a legitimate manner.

I am not proposing an institutional revolution but, rather, a combination of global ambition and pragmatic suggestions. Building global governance is a gradual process, involving changes to long-standing practices, entrenched interests, cultural habits and social norms and values.

And the WTO in all this? …….

Where does the WTO feature in this landscape and in this process? The main mission of the WTO is to open markets and regulate world trade for the benefit of all people. To perform our task we use four main channels: first, we offer a forum where our members negotiate international agreements which are then adopted; second, we have monitoring and surveillance mechanisms — including peer reviews — of Members' actions; third, we have a strong mechanism of adjudication and enforcement of Members' obligations; finally, we have a mandate to ensure coherence with some other international organizations.

Let's assess the WTO's operations against the four elements of governance I mentioned earlier.

The basic value underpinning the WTO is that market opening is good. T he multilateral trading system helps to increase economic efficiency and it can also help reduce corruption and bad government. At the same time the WTO also recognizes the importance of values other than market opening and trade efficiency. First, in its Preamble the WTO agreement recognizes sustainable development as one of its objectives. This calls for the consideration of fundamental values other than those of market opening to include, for instance, the protection of the environment, development as well as social values. WTO Members have the right to deviate from market opening obligations to favour values of public morals, the protection of health of people, animals or the conservation of natural resources. Moreover, pursuant to the WTO agreement, each Member is free to determine the values to which it gives priority and the level of protection it deems adequate for such values.

Concerning the actors, the WTO is a classic international organization where governments are Members. Many argue that the WTO has problems of accountability. I believe that accountability with our Members is high. The old club of the GATT has now given way to new groupings of states and coalitions: a new G-6 (Australia, Brazil, EU, India, Japan, USA) has replaced the old QUAD (Canada, EU, Japan, US). The proposals of the G-20 — an alliance of developing countries on agriculture — are now the benchmarks in many areas of the on-going negotiations. There are also important new actors such as the G33 group of developing countries or the African Group of nations. Those who attack small format meetings — such as "green room" meetings — ignore the fact that, with around 150 Members today, decisions to be taken by the entire membership need first to be prepared in smaller formats, like committees in a parliament. Consensus among all Members for the adoption of decisions ensures legitimacy.

Vis-à-vis non-state actors, however, the situation is more problematic. Indeed, we have no mandate from our Members to enlarge the WTO family beyond governmental representation. Yet, we have made efforts within the current system. We now have annual Public Fora open to all participants, States and non-States, regular WTO briefings are held for NGOs and parliamentarians. Members of civil society can send *amicus curiae* briefs to WTO adjudicating bodies (Panels and the Appellate Body) during dispute settlement procedures. Just this year for the first time, some hearings in on-going panels have been open to the public.

Regarding the WTO as a locus for discussion, it is important to note that the WTO provides a permanent forum for negotiations among its Members concerning their multilateral trade relations.

Global governance requires intense discussions and negotiations and, from that perspective, the institutional structure of the WTO is well developed. We have various levels and forms of decision-making that can be multi-stage and sequential. All in all, it ensures that issues brought to the WTO cannot simply be swept away.

Finally, on the WTO monitoring/surveillance and enforcement mechanisms, there are numerous WTO committees and councils where Members' legislation is subject to peer review. The WTO Trade Policy Review Mechanism enables the regular collective evaluation and appreciation of WTO Members' trade policies and practices and their impact on the functioning of the multilateral trading system. Through greater transparency and understanding of trade policies, this review mechanism contributes to improved adherence by all Members to rules, disciplines and commitments made under the WTO agreements. The on-going negotiations will reinforce this surveillance in the crucial area of regional trade agreements concluded by our Members. The WTO will also soon host a surveillance forum Aid for Trade provided bilaterally, regionally and multilaterally.

In the WTO, the non-observance of the rules may give rise to litigation and the litigants are bound to accept the decision of panels or the Appellate Body. Otherwise, sanctions can be imposed. For many critics, the existence of sanctions allows trade to take precedence over other sectors of international governance, including health, the environment or fundamental human and social rights. The experience of ten years of dispute settlement shows that, on the contrary, the WTO has been sensitive to maintaining the balance between trade and non-trade values.

Although far from being a perfect model, the WTO is nevertheless a laboratory for harnessing globalization and contributing to the construction of a system of global governance. A place where evolving global governance can find some roots in ensuring legitimate decision-making. As well as an institution that can also evolve in providing for the increasing participation of non-traditional international and domestic actors. A fora where values can be discussed, and this is crucial as trade restrictions will become more and more value-based. Given its economic and political dimensions, the WTO can be a fundamental player in the building of a system of global governance. I very much hope that all WTO Members consider the contribution that the WTO can make to ensuring that globalization works to the benefit of one and all peoples, as they reflect on the resumption of the negotiations under the Doha Development Agenda.

Understanding the WTO (WTO, 2005).

http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm (2006)

What is the World Trade Organization?

There are a number of ways of looking at the WTO. It's an organization for liberalizing trade. It's a forum for governments to negotiate trade agreements. It's a place for them to settle trade disputes. It operates a system of trade rules. (But it's not Superman, just in case anyone thought it could solve — or cause — all the world's problems!)

Above all, it's a negotiating forum … Essentially, the WTO is a place where member governments go, to try to sort out the trade problems they face with each other. The first step is to talk. The WTO was born out of negotiations, and everything the WTO does is the result of negotiations. The bulk of the WTO's current work comes from the 1986-94 negotiations called the Uruguay Round and earlier negotiations under the General Agreement on Tariffs and Trade (GATT). The WTO is currently the host to new negotiations, under the "Doha Development Agenda" launched in 2001.

Where countries have faced trade barriers and wanted them lowered, the negotiations have helped to liberalize trade. But the WTO is not just about liberalizing trade, and in some circumstances its rules support maintaining trade barriers — for example to protect consumers or prevent the spread of disease.

It's a set of rules … At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations. These documents provide the legal ground-rules for international commerce. They are essentially contracts, binding governments to keep their trade policies within agreed limits. Although negotiated and signed by governments, the goal is to help producers of goods and services, exporters, and importers conduct their business, while allowing governments to meet social and environmental objectives.

The system's overriding purpose is to help trade flow as freely as possible — so long as there are no undesirable side-effects. That partly means removing obstacles. It also means ensuring that individuals, companies and governments know what the trade rules are around the world, and giving them the confidence that there will be no sudden changes of policy. In other words, the rules have to be "transparent" and predictable.

And it helps to settle disputes … This is a third important side to the WTO's work. Trade relations often involve conflicting interests. Agreements, including those painstakingly negotiated in the WTO system, often need interpreting. The most harmonious way to settle these differences is through some

neutral procedure based on an agreed legal foundation. That is the purpose behind the dispute settlement process written into the WTO agreements.

The WTO began life on 1 January 1995, but its trading system is half a century older. Since 1948, the General Agreement on Tariffs and Trade (GATT) had provided the rules for the system. (The second WTO ministerial meeting, held in Geneva in May 1998, included a celebration of the 50th anniversary of the system.)

It did not take long for the General Agreement to give birth to an unofficial, *de facto* international organization, also known informally as GATT. Over the years GATT evolved through several rounds of negotiations.

The last and largest GATT round, was the Uruguay Round which lasted from 1986 to 1994 and led to the WTO's creation. Whereas GATT had mainly dealt with trade in goods, the WTO and its agreements now cover trade in services, and in traded inventions, creations and designs (intellectual property).

***Principles of the trading system*.**

***Most-favoured-nation (MFN)*: Treating other people equally. Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members.**

This principle is known as most-favoured-nation (MFN) treatment. It is so important that it is the first article of the General Agreement on Tariffs and Trade (GATT), which governs trade in goods. MFN is also a priority in the General Agreement on Trade in Services (GATS) (Article 2) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Article 4), although in each agreement the principle is handled slightly differently. Together, those three agreements cover all three main areas of trade handled by the WTO.

Some exceptions are allowed. For example, countries can set up a free trade agreement that applies only to goods traded within the group — discriminating against goods from outside. Or they can give developing countries special access to their markets. Or a country can raise barriers against products that are considered to be traded unfairly from specific countries. And in services, countries are allowed, in limited circumstances, to discriminate. But the agreements only permit these exceptions under strict conditions. In general, MFN means that every time a country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its trading partners — whether rich or poor, weak or strong.

***National treatment*: Treating foreigners and locals equally. Imported and locally-produced goods should be treated equally — at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents. This principle of "national treatment" (giving others the same treatment as one's own nationals) is also found in all the three main WTO agreements (Article 3 of GATT, Article 17 of GATS and Article 3 of TRIPS), although once again the principle is handled slightly differently in each of these.**
National treatment only applies once a product, service or item of intellectual property has entered the market. Therefore, charging customs duty on an import is not a violation of national treatment even if locally-produced products are not charged an equivalent tax.

Lowering trade barriers is one of the most obvious means of encouraging trade. The barriers concerned include customs duties (or tariffs) and measures such as import bans or quotas that restrict quantities selectively. From time to time other issues such as red tape and exchange rate policies have also been discussed.

Since GATT's creation in 1947-48 there have been eight rounds of trade negotiations. A ninth round, under the Doha Development Agenda, is now underway. At first these focused on lowering tariffs (customs duties) on imported goods. As a result of the negotiations, by the mid-1990s industrial countries' tariff rates on industrial goods had fallen steadily to less than 4%.

But by the 1980s, the negotiations had expanded to cover non-tariff barriers on goods, and to the new areas such as services and intellectual property.

Opening markets can be beneficial, but it also requires adjustment. The WTO agreements allow countries to introduce changes gradually, through "progressive liberalization". Developing countries are usually given longer to fulfill their obligations.

Sometimes, promising not to raise a trade barrier can be as important as lowering one, because the promise gives businesses a clearer view of their future opportunities. With stability and predictability, investment is encouraged, jobs are created and consumers can fully enjoy the benefits of competition — choice and lower prices. The multilateral trading system is an attempt by governments to make the business environment stable and predictable.

In the WTO, when countries agree to open their markets for goods or services, they "bind" their commitments. For goods, these bindings amount to ceilings on customs tariff rates. Sometimes countries tax imports at rates that are lower than the bound rates. Frequently this is the case in developing countries. In developed countries the rates actually charged and the bound rates tend to be the same.

A country can change its bindings, but only after negotiating with its trading partners, which could mean compensating them for loss of trade. One of the achievements of the Uruguay Round of multilateral trade talks was to increase the amount of trade under binding commitments. In agriculture, 100% of products now have bound tariffs. The result of all this: a substantially higher degree of market security for traders and investors.

The system tries to improve predictability and stability in other ways as well. One way is to discourage the use of quotas and other measures used to set limits on quantities of imports — administering quotas can lead to more red-tape and accusations of unfair play. Another is to make countries' trade rules as clear and public ("transparent") as possible. Many WTO agreements require governments to disclose their policies and practices publicly within the country or by notifying the WTO. The regular surveillance of national trade policies through the Trade Policy Review Mechanism provides a further means of encouraging transparency both domestically and at the multilateral level.

The WTO is sometimes described as a "free trade" institution, but that is not entirely accurate. The system does allow tariffs and, in limited circumstances, other forms of protection. More accurately, it is a system of rules dedicated to open, fair and undistorted competition.

The rules on non-discrimination — MFN and national treatment — are designed to secure fair conditions of trade. So too are those on dumping (exporting at below cost to gain market share) and

subsidies. The issues are complex, and the rules try to establish what is fair or unfair, and how governments can respond, in particular by charging additional import duties calculated to compensate for damage caused by unfair trade.

Many of the other WTO agreements aim to support fair competition: in agriculture, intellectual property, services, for example. The agreement on government procurement (a "plurilateral" agreement because it is signed by only a few WTO members) extends competition rules to purchases by thousands of government entities in many countries. And so on.

The WTO system contributes to development. On the other hand, developing countries need flexibility in the time they take to implement the system's agreements. And the agreements themselves inherit the earlier provisions of GATT that allow for special assistance and trade concessions for developing countries.

Over three quarters of WTO members are developing countries and countries in transition to market economies. During the seven and a half years of the Uruguay Round, over 60 of these countries implemented trade liberalization programmes autonomously. At the same time, developing countries and transition economies were much more active and influential in the Uruguay Round negotiations than in any previous round, and they are even more so in the current Doha Development Agenda.

At the end of the Uruguay Round, developing countries were prepared to take on most of the obligations that are required of developed countries. But the agreements did give them transition periods to adjust to the more unfamiliar and, perhaps, difficult WTO provisions — particularly so for the poorest, "least-developed" countries. A ministerial decision adopted at the end of the round says better-off countries should accelerate implementing market access commitments on goods exported by the least-developed countries, and it seeks increased technical assistance for them. More recently, developed countries have started to allow duty-free and quota-free imports for almost all products from least-developed countries. On all of this, the WTO and its members are still going through a learning process. The current Doha Development Agenda includes developing countries' concerns about the difficulties they face in implementing the Uruguay Round agreements.

THE AGREEMENTS

The WTO agreements cover goods, services and intellectual property. They spell out the principles of liberalization, and the permitted exceptions. They include individual countries' commitments to lower customs tariffs and other trade barriers, and to open and keep open services markets. They set procedures for settling disputes. They prescribe special treatment for developing countries. They require governments to make their trade policies transparent by notifying the WTO about laws in force and measures adopted, and through regular reports by the secretariat on countries' trade policies.

These agreements are often called the WTO's trade rules, and the WTO is often described as "rules-based", a system based on rules. But it's important to remember that the rules are actually agreements that governments negotiated.
This chapter focuses on the Uruguay Round agreements, which are the basis of the present WTO system. Additional work is also now underway in the WTO. This is the result of decisions taken at Ministerial Conferences, in particular the meeting in Doha, November 2001, when new negotiations and other work were launched. (More on the Doha Agenda, later.)

The table of contents of "The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts" is a daunting list of about 60 agreements, annexes, decisions and understandings. In fact, the agreements fall into a simple structure with six main parts: an umbrella agreement (the Agreement Establishing the WTO); agreements for each of the three broad areas of trade that the WTO covers (goods, services and intellectual property); dispute settlement; and reviews of governments' trade policies.

The agreements for the two largest areas — goods and services — share a common three-part outline, even though the detail is sometimes quite different.

- **They start with broad principles: the General Agreement on Tariffs and Trade (GATT) (for goods), and the General Agreement on Trade in Services (GATS). (The third area, Trade-Related Aspects of Intellectual Property Rights (TRIPS), also falls into this category although at present it has no additional parts.)**
- **Then come extra agreements and annexes dealing with the special requirements of specific sectors or issues.**
- **Finally, there are the detailed and lengthy schedules (or lists) of commitments made by individual countries allowing specific foreign products or service-providers access to their markets. For GATT, these take the form of binding commitments on tariffs for goods in general, and combinations of tariffs and quotas for some agricultural goods. For GATS, the commitments state how much access foreign service providers are allowed for specific sectors, and they include lists of types of services where individual countries say they are not applying the "most-favoured-nation" principle of non-discrimination.**

Underpinning these are dispute settlement, which is based on the agreements and commitments, and trade policy reviews, an exercise in transparency.

Much of the Uruguay Round dealt with the first two parts: general principles and principles for specific sectors. At the same time, market access negotiations were possible for industrial goods. Once the principles had been worked out, negotiations could proceed on the commitments for sectors such as agriculture and services.

In a nutshell

The basic structure of the WTO agreements: how the six main areas fit together — the umbrella WTO Agreement, goods, services, intellectual property, disputes and trade policy reviews.

Umbrella	**AGREEMENT ESTABLISHING WTO**		
	Goods	**Services**	**Intellectual property**
Basic principles	**GATT**	**GATS**	**TRIPS**
Additional details	**Other goods agreements and annexes**	**Services annexes**	
Market access commitments	**Countries' schedules of commitments**	**Countries' schedules of commitments(and MFN exemptions)**	
Dispute settlement	**DISPUTE SETTLEMENT**		
Transparency	**TRADE POLICY REVIEWS**		

Another group of agreements not included in the diagram is also important: the two "plurilateral" agreements not signed by all members: civil aircraft and government procurement.

These agreements are not static; they are renegotiated from time to time and new agreements can be added to the package. Many are now being negotiated under the Doha Development Agenda, launched by WTO trade ministers in Doha, Qatar, in November 2001.

The Agriculture Agreement: new rules and commitments.

The original GATT did apply to agricultural trade, but it contained loopholes. For example, it allowed countries to use some non-tariff measures such as import quotas, and to subsidize. Agricultural trade became highly distorted, especially with the use of export subsidies which would not normally have been allowed for industrial products. The Uruguay Round produced the first multilateral agreement dedicated to the sector. It was a significant first step towards order, fair competition and a less distorted sector. It was implemented over a six year period (and is still being implemented by developing countries under their 10-year period), that began in 1995. The Uruguay Round agreement included a commitment to continue the reform through new negotiations. These were launched in 2000, as required by the Agriculture Agreement.

The objective of the Agriculture Agreement is to reform trade in the sector and to make policies more market-oriented. This would improve predictability and security for importing and exporting countries alike.

The new rules and commitments apply to:

- **market access — various trade restrictions confronting imports**
- **domestic support — subsidies and other programmes, including those that raise or guarantee farmgate prices and farmers' incomes**
- **export subsidies and other methods used to make exports artificially competitive.**

The agreement does allow governments to support their rural economies, but preferably through policies that cause less distortion to trade. It also allows some flexibility in the way commitments are implemented. Developing countries do not have to cut their subsidies or lower their tariffs as much as

developed countries, and they are given extra time to complete their obligations. Least-developed countries don't have to do this at all. Special provisions deal with the interests of countries that rely on imports for their food supplies, and the concerns of least-developed economies.

"Peace" provisions within the agreement aim to reduce the likelihood of disputes or challenges on agricultural subsidies over a period of nine years, until the end of 2003.

The new rule for market access in agricultural products is "tariffs only". Before the Uruguay Round, some agricultural imports were restricted by quotas and other non-tariff measures. These have been replaced by tariffs that provide more-or-less equivalent levels of protection — if the previous policy meant domestic prices were 75% higher than world prices, then the new tariff could be around 75%. (Converting the quotas and other types of measures to tariffs in this way was called "tariffication".)

The tariffication package contained more. It ensured that quantities imported before the agreement took effect could continue to be imported, and it guaranteed that some new quantities were charged duty rates that were not prohibitive. This was achieved by a system of "tariff-quotas" — lower tariff rates for specified quantities, higher (sometimes much higher) rates for quantities that exceed the quota.

The newly committed tariffs and tariff quotas, covering all agricultural products, took effect in 1995. Uruguay Round participants agreed that developed countries would cut the tariffs (the higher out-of-quota rates in the case of tariff-quotas) by an average of 36%, in equal steps over six years. Developing countries would make 24% cuts over 10 years. Several developing countries also used the option of offering ceiling tariff rates in cases where duties were not "bound" (i.e. committed under GATT or WTO regulations) before the Uruguay Round. Least-developed countries do not have to cut their tariffs. (These figures do not actually appear in the Agriculture Agreement. Participants used them to prepare their schedules — i.e. lists of commitments. It is the commitments listed in the schedules that are legally binding.)

For products whose non-tariff restrictions have been converted to tariffs, governments are allowed to take special emergency actions ("special safeguards") in order to prevent swiftly falling prices or surges in imports from hurting their farmers. But the agreement specifies when and how those emergency actions can be introduced (for example, they cannot be used on imports within a tariff-quota).

Four countries used "special treatment" provisions to restrict imports of particularly sensitive products (mainly rice) during the implementation period (to 2000 for developed countries, to 2004 for developing nations), but subject to strictly defined conditions, including minimum access for overseas suppliers. The four were: Japan, Rep. of Korea, and the Philippines for rice; and Israel for sheep meat, whole milk powder and certain cheeses. Japan and Israel have now given up this right, but Rep. of Korea and the Philippines have extended their special treatment for rice. A new member, Chinese Taipei, gave special treatment to rice in its first year of membership, 2002.

Domestic support:

The main complaint about policies which support domestic prices, or subsidize production in some other way, is that they encourage over-production. This squeezes out imports or leads to export subsidies and low-priced dumping on world markets. The Agriculture Agreement distinguishes between support programmes that stimulate production directly, and those that are considered to have no direct effect.

Domestic policies that do have a direct effect on production and trade have to be cut back. WTO members calculated how much support of this kind they were providing per year for the agricultural sector (using calculations known as "total aggregate measurement of support" or "Total AMS") in the base years of 1986-88. Developed countries agreed to reduce these figures by 20% over six years starting in 1995. Developing countries agreed to make 13% cuts over 10 years. Least-developed countries do not need to make any cuts. (This category of domestic support is sometimes called the "amber box", a reference to the amber colour of traffic lights, which means "slow down".)

Measures with minimal impact on trade can be used freely — they are in a "green box" ("green" as in traffic lights). They include government services such as research, disease control, infrastructure and food security. They also include payments made directly to farmers that do not stimulate production, such as certain forms of direct income support, assistance to help farmers restructure agriculture, and direct payments under environmental and regional assistance programmes.

Also permitted, are certain direct payments to farmers where the farmers are required to limit production (sometimes called "blue box" measures), certain government assistance programmes to encourage agricultural and rural development in developing countries, and other support on a small scale ("de minimis") when compared with the total value of the product or products supported (5% or less in the case of developed countries and 10% or less for developing countries).

Export subsidies:

The Agriculture Agreement prohibits export subsidies on agricultural products unless the subsidies are specified in a member's lists of commitments. Where they are listed, the agreement requires WTO members to cut both the amount of money they spend on export subsidies and the quantities of exports that receive subsidies. Taking averages for 1986-90 as the base level, developed countries agreed to cut the value of export subsidies by 36% over the six years starting in 1995 (24% over 10 years for developing countries). Developed countries also agreed to reduce the quantities of subsidized exports by 21% over the six years (14% over 10 years for developing countries). Least-developed countries do not need to make any cuts.

During the six-year implementation period, developing countries are allowed under certain conditions to use subsidies to reduce the costs of marketing and transporting exports.

The least-developed and those depending on food imports.

Under the Agriculture Agreement, WTO members have to reduce their subsidized exports. But some importing countries depend on supplies of cheap, subsidized food from the major industrialized nations. They include some of the poorest countries, and although their farming sectors might receive a boost from higher prices caused by reduced export subsidies, they might need temporary assistance to make the necessary adjustments to deal with higher priced imports, and eventually to export. A special ministerial decision sets out objectives, and certain measures, for the provision of food aid and aid for agricultural development. It also refers to the possibility of assistance from the International Monetary Fund and the World Bank to finance commercial food imports.

Standards and safety Agreement.

Article 20 of the General Agreement on Tariffs and Trade (GATT) allows governments to act on trade in order to protect human, animal or plant life or health, provided they do not discriminate or use this as disguised protectionism. In addition, there are two specific WTO agreements dealing with food safety and animal and plant health and safety, and with product standards.

Problem: How do you ensure that your country's consumers are being supplied with food that is safe to eat — "safe" by the standards you consider appropriate? And at the same time, how can you ensure that strict health and safety regulations are not being used as an excuse for protecting domestic producers?

A separate agreement on food safety and animal and plant health standards (the Sanitary and Phytosanitary Measures Agreement or SPS) sets out the basic rules.

It allows countries to set their own standards. But it also says regulations must be based on science. They should be applied only to the extent necessary to protect human, animal or plant life or health. And they should not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail.

Member countries are encouraged to use international standards, guidelines and recommendations where they exist. However, members may use measures which result in higher standards if there is scientific justification. They can also set higher standards based on appropriate assessment of risks so long as the approach is consistent, not arbitrary. And they can to some extent apply the "precautionary principle", a kind of "safety first" approach to deal with scientific uncertainty. Article 5.7 of the SPS Agreement allows temporary "precautionary" measures.

The agreement still allows countries to use different standards and different methods of inspecting products. So how can an exporting country be sure the practices it applies to its products are acceptable in an importing country? If an exporting country can demonstrate that the measures it applies to its exports achieve the same level of health protection as in the importing country, then the importing country is expected to accept the exporting country's standards and methods.

The agreement includes provisions on control, inspection and approval procedures. Governments must provide advance notice of new or changed sanitary and phytosanitary regulations, and establish a national enquiry point to provide information. The agreement complements that on technical barriers to trade.

Technical regulations and standards Agreement.

Technical regulations and industrial standards are important, but they vary from country to country. Having too many different standards makes life difficult for producers and exporters. If the standards are set arbitrarily, they could be used as an excuse for protectionism. Standards can become obstacles to trade.

The Technical Barriers to Trade Agreement (TBT) tries to ensure that regulations, standards, testing and certification procedures do not create unnecessary obstacles.

The agreement recognizes countries' rights to adopt the standards they consider appropriate — for example, for human, animal or plant life or health, for the protection of the environment or to meet other consumer interests. Moreover, members are not prevented from taking measures necessary to ensure their standards are met. In order to prevent too much diversity, the agreement encourages countries to use international standards where these are appropriate, but it does not require them to change their levels of protection as a result.

The agreement sets out a code of good practice for the preparation, adoption and application of standards by central government bodies. It also includes provisions describing how local government and non-governmental bodies should apply their own regulations — normally they should use the same principles as apply to central governments.

The agreement says the procedures used to decide whether a product conforms with national standards have to be fair and equitable. It discourages any methods that would give domestically produced goods an unfair advantage. The agreement also encourages countries to recognize each other's testing procedures. That way, a product can be assessed to see if it meets the importing country's standards through testing in the country where it is made.

Manufacturers and exporters need to know what the latest standards are in their prospective markets. To help ensure that this information is made available conveniently, all WTO member governments are required to establish national enquiry points.

Textiles Agreement: back in the mainstream.

Textiles, like agriculture, was one of the hardest-fought issues in the WTO, as it was in the former GATT system. It has now completed fundamental change under a 10-year schedule agreed in the Uruguay Round. The system of import quotas that dominated the trade since the early 1960s have now been phased out. From 1974 until the end of the Uruguay Round, the trade was governed by the Multifibre Arrangement (MFA). This was a framework for bilateral agreements or unilateral actions that established quotas limiting imports into countries whose domestic industries were facing serious damage from rapidly increasing imports.

The quotas were the most visible feature. They conflicted with GATT's general preference for customs tariffs instead of measures that restrict quantities. They were also exceptions to the GATT principle of treating all trading partners equally because they specified how much the importing country was going to accept from individual exporting countries.

Since 1995, the WTO's Agreement on Textiles and Clothing (ATC) took over from the Multifibre Arrangement. By 1 January 2005, the sector was fully integrated into normal GATT rules. In particular, the quotas came to an end, and importing countries are no longer be able to discriminate between exporters. The Agreement on Textiles and Clothing no longer exists: it's the only WTO agreement that had self-destruction built in.

Integration:

Textiles and clothing products were returned to GATT rules over the 10-year period. This happened gradually, in four steps, to allow time for both importers and exporters to adjust to the new situation. Some of these products were previously under quotas. Any quotas that were in place on 31 December

1994 were carried over into the new agreement. For products that had quotas, the result of integration into GATT was the removal of these quotas.

The agreement stated the percentage of products that had to be brought under GATT rules at each step. If any of these products came under quotas, then the quotas had to be removed at the same time. The percentages were applied to the importing country's textiles and clothing trade levels in 1990. The agreement also said the quantities of imports permitted under the quotas had to grow annually, and that the rate of expansion had to increase at each stage. How fast that expansion would be was set out in a formula based on the growth rate that existed under the old Multifibre Arrangement (*see table*).

Products brought under GATT rules at each of the first three stages had to cover the four main types of textiles and clothing: tops and yarns; fabrics; made-up textile products; and clothing. Any other restrictions that did not come under the Multifibre Arrangement and did not conform with regular WTO agreements by 1996 had to conform by 2005.

If further cases of damage to the industry arose during the transition, the agreement allowed additional restrictions to be imposed temporarily under strict conditions. These "transitional safeguards" were not the same as the safeguard measures normally allowed under GATT because they can be applied on imports from specific exporting countries. But the importing country had to show that its domestic industry was suffering serious damage or was threatened with serious damage. And it had to show that the damage was the result of two things: increased imports of the product in question from all sources, and a sharp and substantial increase from the specific exporting country. The safeguard restriction could be implemented either by mutual agreement following consultations, or unilaterally. It was subject to review by the Textiles Monitoring Body.

In any system where quotas are set for individual exporting countries, exporters might try to get around the quotas by shipping products through third countries or making false declarations about the products' country of origin. The agreement included provisions to cope with these cases.

The agreement envisaged special treatment for certain categories of countries — for example, new market entrants, small suppliers, and least-developed countries.

A Textiles Monitoring Body (TMB) supervised the agreement's implementation. It consisted of a chairman and 10 members acting in their personal capacity. It monitored actions taken under the agreement to ensure that they were consistent, and it reported to the Goods Council which reviewed the operation of the agreement before each new step of the integration process. The Textiles Monitoring Body also dealt with disputes under the Agreement on Textiles and Clothing. If they remained unresolved, the disputes could be brought to the WTO's regular Dispute Settlement Body. When the Textiles and Clothing Agreement expired on 1 January 2005, the Textiles Monitoring Body also ceased to exist.

Services Agreement : rules for growth and investment.

The General Agreement on Trade in Services (GATS) is the first and only set of multilateral rules governing international trade in services. Negotiated in the Uruguay Round, it was developed in response to the huge growth of the services economy over the past 30 years and the greater potential for trading services brought about by the communications revolution.

Services represent the fastest growing sector of the global economy and account for two thirds of global output, one third of global employment and nearly 20% of global trade.

When the idea of bringing rules on services into the multilateral trading system was floated in the early to mid 1980s, a number of countries were skeptical and even opposed. They believed such an agreement could undermine governments' ability to pursue national policy objectives and constrain their regulatory powers. The agreement that was developed, however, allows a high degree of flexibility, both within the framework of rules and also in terms of the market access commitments.
The General Agreement on Trade in Services has three elements: the main text containing general obligations and disciplines; annexes dealing with rules for specific sectors; and individual countries' specific commitments to provide access to their markets, including indications of where countries are temporarily not applying the "most-favoured-nation" principle of non-discrimination.

General obligations and disciplines:

Total coverage The agreement covers all internationally-traded services — for example, banking, telecommunications, tourism, professional services, etc. It also defines four ways (or "modes") of trading services:

- **services supplied from one country to another (e.g. international telephone calls), officially known as "cross-border supply" (in WTO jargon, "mode 1")**
- **consumers or firms making use of a service in another country (e.g. tourism), officially "consumption abroad" ("mode 2")**
- **a foreign company setting up subsidiaries or branches to provide services in another country (e.g. foreign banks setting up operations in a country), officially "commercial presence" ("mode3")**
- **individuals travelling from their own country to supply services in another (e.g. fashion models or consultants), officially "presence of natural persons" ("mode 4")**

Most-favoured-nation (MFN) treatment. **Favour one, favour all. MFN means treating one's trading partners equally on the principle of non-discrimination. Under GATS, if a country allows foreign competition in a sector, equal opportunities in that sector should be given to service providers from all other WTO members. (This applies even if the country has made no specific commitment to provide foreign companies access to its markets under the WTO.)**

MFN applies to all services, but some special temporary exemptions have been allowed. When GATS came into force, a number of countries already had preferential agreements in services that they had signed with trading partners, either bilaterally or in small groups. WTO members felt it was necessary to maintain these preferences temporarily. They gave themselves the right to continue giving more favourable treatment to particular countries in particular services activities by listing "MFN exemptions" alongside their first sets of commitments. In order to protect the general MFN principle, the exemptions could only be made once; nothing can be added to the lists. They are currently being reviewed as mandated, and will normally last no more than ten years.

Commitments on market access and national treatment. **Individual countries' commitments to open markets in specific sectors — and how open those markets will be — are the outcome of negotiations. The commitments appear in "schedules" that list the sectors being opened, the extent of market access being given in those sectors (e.g. whether there are any restrictions on foreign ownership), and any limitations on national treatment (whether some rights granted to local companies will not be granted to foreign companies). So, for example, if a government commits itself to allow foreign banks to operate in its domestic market, that is a market-access commitment. And if the government limits the**

number of licences it will issue, then that is a market-access limitation. If it also says foreign banks are only allowed one branch while domestic banks are allowed numerous branches, that is an exception to the national treatment principle.

These clearly defined commitments are "bound": like bound tariffs for trade in goods, they can only be modified after negotiations with affected countries. Because "unbinding" is difficult, the commitments are virtually guaranteed conditions for foreign exporters and importers of services and investors in the sector to do business.

Governmental services are explicitly carved out of the agreement and there is nothing in GATS that forces a government to privatize service industries. In fact the word "privatize" does not even appear in GATS. Nor does it outlaw government or even private monopolies.

The carve-out is an explicit commitment by WTO governments to allow publicly funded services in core areas of their responsibility. Governmental services are defined in the agreement as those that are not supplied commercially and do not compete with other suppliers. These services are not subject to any GATS disciplines, they are not covered by the negotiations, and commitments on market access and national treatment (treating foreign and domestic companies equally) do not apply to them.

GATS' approach to making commitments means that members are not obliged to do so on the whole universe of services sectors. A government may not want to make a commitment on the level of foreign competition in a given sector, because it considers the sector to be a core governmental function or indeed for any other reason. In this case, the government's only obligations are minimal, for example to be transparent in regulating the sector, and not to discriminate between foreign suppliers.

Transparency. **GATS says governments must publish all relevant laws and regulations, and set up enquiry points within their bureaucracies. Foreign companies and governments can then use these inquiry points to obtain information about regulations in any service sector. And they have to notify the WTO of any changes in regulations that apply to the services that come under specific commitments.**

Regulations: **objective and reasonable Since domestic regulations are the most significant means of exercising influence or control over services trade, the agreement says governments should regulate services reasonably, objectively and impartially. When a government makes an administrative decision that affects a service, it should also provide an impartial means for reviewing the decision (for example a tribunal).**

GATS does not require any service to be deregulated. Commitments to liberalize do not affect governments' right to set levels of quality, safety, or price, or to introduce regulations to pursue any other policy objective they see fit. A commitment to national treatment, for example, would only mean that the same regulations would apply to foreign suppliers as to nationals. Governments naturally retain their right to set qualification requirements for doctors or lawyers, and to set standards to ensure consumer health and safety.

Recognition: **When two (or more) governments have agreements recognizing each other's qualifications (for example, the licensing or certification of service suppliers), GATS says other members must also be given a chance to negotiate comparable pacts. The recognition of other countries' qualifications must not be discriminatory, and it must not amount to protectionism in disguise. These recognition agreements have to be notified to the WTO.**

International payments and transfers: **Once a government has made a commitment to open a service sector to foreign competition, it must not normally restrict money being transferred out of the country as payment for services supplied ("current transactions") in that sector. The only exception is when there are balance-of-payments difficulties, and even then the restrictions must be temporary and subject to other limits and conditions.**

Progressive liberalization: **The Uruguay Round was only the beginning. GATS requires more negotiations, which began in early 2000 and are now part of the Doha Development Agenda. The goal is to take the liberalization process further by increasing the level of commitments in schedules.**

The annexes: services are not all the same.

International trade in goods is a relatively simple idea to grasp: a product is transported from one country to another. Trade in services is much more diverse. Telephone companies, banks, airlines and accountancy firms provide their services in quite different ways. The GATS annexes reflect some of the diversity.

Movement of natural persons. **This annex deals with negotiations on individuals' rights to stay temporarily in a country for the purpose of providing a service. It specifies that the agreement does not apply to people seeking permanent employment or to conditions for obtaining citizenship, permanent residence or permanent employment.**

Financial services. **Instability in the banking system affects the whole economy. The financial services annex gives governments very wide latitude to take prudential measures, such as those for the protection of investors, depositors and insurance policy holders, and to ensure the integrity and stability of the financial system. The annex also excludes from the agreement services provided when a government is exercising its authority over the financial system, for example central banks' services.**

Telecommunications. **The telecommunications sector has a dual role: it is a distinct sector of economic activity; and it is an underlying means of supplying other economic activities (for .example electronic money transfers). The annex says governments must ensure that foreign service suppliers are given access to the public telecommunications networks without discrimination.**

Air transport services. **Under this annex, traffic rights and directly related activities are excluded from GATS's coverage. They are handled by other bilateral agreements. However, the annex establishes that the GATS will apply to aircraft repair and maintenance services, marketing of air transport services and computer-reservation services. Members are currently reviewing the annex.**

Intellectual property Agreement: protection and enforcement.

The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), negotiated in the 1986-94 Uruguay Round, introduced intellectual property rules into the multilateral trading system for the first time.

Ideas and knowledge are an increasingly important part of trade. Most of the value of new medicines and other high technology products lies in the amount of invention, innovation, research, design and testing involved. Films, music recordings, books, computer software and on-line services are bought and sold because of the information and creativity they contain, not usually because of the plastic,

metal or paper used to make them. Many products that used to be traded as low-technology goods or commodities now contain a higher proportion of invention and design in their value — for example brand named clothing or new varieties of plants.

Creators can be given the right to prevent others from using their inventions, designs or other creations — and to use that right to negotiate payment in return for others using them. These are "intellectual property rights". They take a number of forms. For example books, paintings and films come under copyright; inventions can be patented; brandnames and product logos can be registered as trademarks; and so on. Governments and parliaments have given creators these rights as an incentive to produce ideas that will benefit society as a whole.

The extent of protection and enforcement of these rights varied widely around the world; and as intellectual property became more important in trade, these differences became a source of tension in international economic relations. New internationally-agreed trade rules for intellectual property rights were seen as a way to introduce more order and predictability, and for disputes to be settled more systematically.

The Uruguay Round achieved that. The WTO's TRIPS Agreement is an attempt to narrow the gaps in the way these rights are protected around the world, and to bring them under common international rules. It establishes minimum levels of protection that each government has to give to the intellectual property of fellow WTO members. In doing so, it strikes a balance between the long term benefits and possible short term costs to society. Society benefits in the long term when intellectual property protection encourages creation and invention, especially when the period of protection expires and the creations and inventions enter the public domain. Governments are allowed to reduce any short term costs through various exceptions, for example to tackle public health problems. And, when there are trade disputes over intellectual property rights, the WTO's dispute settlement system is now available.

The agreement covers five broad issues:

- **how basic principles of the trading system and other international intellectual property agreements should be applied**
- **how to give adequate protection to intellectual property rights**
- **how countries should enforce those rights adequately in their own territories**
- **how to settle disputes on intellectual property between members of the WTO**
- **special transitional arrangements during the period when the new system is being introduced.**

Basic principles: national treatment, MFN, and balanced protection:

As in GATT and GATS, the starting point of the intellectual property agreement is basic principles. And as in the two other agreements, non-discrimination features prominently: national treatment (treating one's own nationals and foreigners equally), and most-favoured-nation treatment (equal treatment for nationals of all trading partners in the WTO). National treatment is also a key principle in other intellectual property agreements outside the WTO.

The TRIPS Agreement has an additional important principle: intellectual property protection should contribute to technical innovation and the transfer of technology. Both producers and users should benefit, and economic and social welfare should be enhanced, the agreement says.

How to protect intellectual property: common ground-rules.

The second part of the TRIPS agreement looks at different kinds of intellectual property rights and how to protect them. The purpose is to ensure that adequate standards of protection exist in all member countries. Here the starting point is the obligations of the main international agreements of the World Intellectual Property Organization (WIPO) that already existed before the WTO was created:

- **the Paris Convention for the Protection of Industrial Property (patents, industrial designs, etc)**
- **the Berne Convention for the Protection of Literary and Artistic Works (copyright).**

Some areas are not covered by these conventions. In some cases, the standards of protection prescribed were thought inadequate. So the TRIPS agreement adds a significant number of new or higher standards.

Copyright.

The TRIPS agreement ensures that computer programs will be protected as literary works under the Berne Convention and outlines how databases should be protected.

It also expands international copyright rules to cover rental rights. Authors of computer programs and producers of sound recordings must have the right to prohibit the commercial rental of their works to the public. A similar exclusive right applies to films where commercial rental has led to widespread copying, affecting copyright-owners' potential earnings from their films.

The agreement says performers must also have the right to prevent unauthorized recording, reproduction and broadcast of live performances (bootlegging) for no less than 50 years. Producers of sound recordings must have the right to prevent the unauthorized reproduction of recordings for a period of 50 years.

Trademarks.

The agreement defines what types of signs must be eligible for protection as trademarks, and what the minimum rights conferred on their owners must be. It says that service marks must be protected in the same way as trademarks used for goods. Marks that have become well-known in a particular country enjoy additional protection.

Geographical indications.

A place name is sometimes used to identify a product. This "geographical indication" does not only say where the product was made. More importantly, it identifies the product's special characteristics, which are the result of the product's origins.

Well-known examples include "Champagne", "Scotch", "Tequila", and "Roquefort" cheese. Wine and spirits makers are particularly concerned about the use of place-names to identify products, and the TRIPS Agreement contains special provisions for these products. But the issue is also important for other types of goods.

Using the place name when the product was made elsewhere or when it does not have the usual characteristics can mislead consumers, and it can lead to unfair competition. The TRIPS Agreement says countries have to prevent this misuse of place names.

For wines and spirits, the agreement provides higher levels of protection, i.e. even where there is no danger of the public being misled.

Some exceptions are allowed, for example if the name is already protected as a trademark or if it has become a generic term. For example, "cheddar" now refers to a particular type of cheese not necessarily made in Cheddar, in the UK. But any country wanting to make an exception for these reasons must be willing to negotiate with the country which wants to protect the geographical indication in question.

The agreement provides for further negotiations in the WTO to establish a multilateral system of notification and registration of geographical indications for wines. These are now part of the Doha Development Agenda and they include spirits. Also debated in the WTO is whether to negotiate extending this higher level of protection beyond wines and spirits.

Industrial designs.

Under the TRIPS Agreement, industrial designs must be protected for at least 10 years. Owners of protected designs must be able to prevent the manufacture, sale or importation of articles bearing or embodying a design which is a copy of the protected design.

Patents.

The agreement says patent protection must be available for inventions for at least 20 years. Patent protection must be available for both products and processes, in almost all fields of technology. Governments can refuse to issue a patent for an invention if its commercial exploitation is prohibited for reasons of public order or morality. They can also exclude diagnostic, therapeutic and surgical methods, plants and animals (other than microorganisms), and biological processes for the production of plants or animals (other than microbiological processes).

Plant varieties, however, must be protectable by patents or by a special system (such as the breeder's rights provided in the conventions of UPOV — the International Union for the Protection of New Varieties of Plants).

The agreement describes the minimum rights that a patent owner must enjoy. But it also allows certain exceptions. A patent owner could abuse his rights, for example by failing to supply the product on the market. To deal with that possibility, the agreement says governments can issue "compulsory licences", allowing a competitor to produce the product or use the process under licence. But this can only be done under certain conditions aimed at safeguarding the legitimate interests of the patent-holder.

If a patent is issued for a production process, then the rights must extend to the product directly obtained from the process. Under certain conditions alleged infringers may be ordered by a court to prove that they have not used the patented process.

An issue that has arisen recently is how to ensure patent protection for pharmaceutical products does not prevent people in poor countries from having access to medicines — while at the same time maintaining the patent system's role in providing incentives for research and development into new medicines. Flexibilities such as compulsory licensing are written into the TRIPS Agreement, but some governments were unsure of how these would be interpreted, and how far their right to use them would be respected.

A large part of this was settled when WTO ministers issued a special declaration at the Doha Ministerial Conference in November 2001. They agreed that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. They underscored countries' ability to use the flexibilities that are built into the TRIPS Agreement. And they agreed to extend exemptions on pharmaceutical patent protection for least-developed countries until 2016. On one remaining question, they assigned further work to the TRIPS Council — to sort out how to provide extra flexibility, so that countries unable to produce pharmaceuticals domestically can import patented drugs made under compulsory licensing. A waiver providing this flexibility was agreed on 30 August 2003.

Integrated circuits layout designs.

The basis for protecting integrated circuit designs ("topographies") in the TRIPS agreement is the Washington Treaty on Intellectual Property in Respect of Integrated Circuits, which comes under the World Intellectual Property Organization. This was adopted in 1989 but has not yet entered into force. The TRIPS agreement adds a number of provisions: for example, protection must be available for at least 10 years.

Undisclosed information and trade secrets.

Trade secrets and other types of "undisclosed information" which have commercial value must be protected against breach of confidence and other acts contrary to honest commercial practices. But reasonable steps must have been taken to keep the information secret. Test data submitted to governments in order to obtain marketing approval for new pharmaceutical or agricultural chemicals must also be protected against unfair commercial use.

Curbing anti-competitive licensing contracts.

The owner of a copyright, patent or other form of intellectual property right can issue a licence for someone else to produce or copy the protected trademark, work, invention, design, etc. The agreement recognizes that the terms of a licensing contract could restrict competition or impede technology transfer. It says that under certain conditions, governments have the right to take action to prevent anti-competitive licensing that abuses intellectual property rights. It also says governments must be prepared to consult each other on controlling anti-competitive licensing.

Enforcement: tough but fair.

Having intellectual property laws is not enough. They have to be enforced. This is covered in Part 3 of TRIPS. The agreement says governments have to ensure that intellectual property rights can be enforced under their laws, and that the penalties for infringement are tough enough to deter further violations. The procedures must be fair and equitable, and not unnecessarily complicated or costly.

They should not entail unreasonable time-limits or unwarranted delays. People involved should be able to ask a court to review an administrative decision or to appeal a lower court's ruling.

The agreement describes in some detail how enforcement should be handled, including rules for obtaining evidence, provisional measures, injunctions, damages and other penalties. It says courts should have the right, under certain conditions, to order the disposal or destruction of pirated or counterfeit goods. Willful trademark counterfeiting or copyright piracy on a commercial scale should be criminal offences. Governments should make sure that intellectual property rights owners can receive the assistance of customs authorities to prevent imports of counterfeit and pirated goods.

Technology transfer.

Developing countries in particular, see technology transfer as part of the bargain in which they have agreed to protect intellectual property rights. The TRIPS Agreement includes a number of provisions on this. For example, it requires developed countries' governments to provide incentives for their companies to transfer technology to least-developed countries.

Transition arrangements: 1, 5 or 11 years or more.

When the WTO agreements took effect on 1 January 1995, developed countries were given one year to ensure that their laws and practices conform with the TRIPS agreement. Developing countries and (under certain conditions) transition economies were given five years, until 2000. Least-developed countries have 11 years, until 2006 — now extended to 2016 for pharmaceutical patents.

If a developing country did not provide product patent protection in a particular area of technology when the TRIPS Agreement came into force (1 January 1995), it had up to 10 years to introduce the protection. But for pharmaceutical and agricultural chemical products, the country had to accept the filing of patent applications from the beginning of the transitional period, though the patent did not need to be granted until the end of this period. If the government allowed the relevant pharmaceutical or agricultural chemical to be marketed during the transition period, it had to — subject to certain conditions — provide an exclusive marketing right for the product for five years, or until a product patent was granted, whichever was shorter.

Subject to certain exceptions, the general rule is that obligations in the agreement apply to intellectual property rights that existed at the end of a country's transition period as well as to new ones.

Anti-dumping, subsidies, safeguards: contingencies.

Binding tariffs, and applying them equally to all trading partners (most-favoured-nation treatment, or MFN) are key to the smooth flow of trade in goods. The WTO agreements uphold the principles, but they also allow exceptions — in some circumstances. Three of these issues are:

- **actions taken against dumping (selling at an unfairly low price)**
- **subsidies and special "countervailing" duties to offset the subsidies**
- **emergency measures to limit imports temporarily, designed to "safeguard" domestic industries.**

Anti-dumping Agreement.

If a company exports a product at a price lower than the price it normally charges on its own home market, it is said to be "dumping" the product. Is this unfair competition? Opinions differ, but many governments take action against dumping in order to defend their domestic industries. The WTO agreement does not pass judgement. Its focus is on how governments can or cannot react to dumping — it disciplines anti-dumping actions, and it is often called the "Anti-Dumping Agreement". (This focus only on the reaction to dumping contrasts with the approach of the Subsidies and Countervailing Measures Agreement.)

The legal definitions are more precise, but broadly speaking the WTO agreement allows governments to act against dumping where there is genuine ("material") injury to the competing domestic industry. In order to do that the government has to be able to show that dumping is taking place, calculate the extent of dumping (how much lower the export price is compared to the exporter's home market price), and show that the dumping is causing injury or threatening to do so.

GATT (Article 6) allows countries to take action against dumping. The Anti-Dumping Agreement clarifies and expands Article 6, and the two operate together. They allow countries to act in a way that would normally break the GATT principles of binding a tariff and not discriminating between trading partners — typically anti-dumping action means charging extra import duty on the particular product from the particular exporting country in order to bring its price closer to the "normal value" or to remove the injury to domestic industry in the importing country.

There are many different ways of calculating whether a particular product is being dumped heavily or only lightly. The agreement narrows down the range of possible options. It provides three methods to calculate a product's "normal value". The main one is based on the price in the exporter's domestic market. When this cannot be used, two alternatives are available — the price charged by the exporter in another country, or a calculation based on the combination of the exporter's production costs, other expenses and normal profit margins. And the agreement also specifies how a fair comparison can be made between the export price and what would be a normal price.

Calculating the extent of dumping on a product is not enough. Anti-dumping measures can only be applied if the dumping is hurting the industry in the importing country. Therefore, a detailed investigation has to be conducted according to specified rules first. The investigation must evaluate all relevant economic factors that have a bearing on the state of the industry in question. If the investigation shows dumping is taking place and domestic industry is being hurt, the exporting company can undertake to raise its price to an agreed level in order to avoid anti-dumping import duty.

Detailed procedures are set out on how anti-dumping cases are to be initiated, how the investigations are to be conducted, and the conditions for ensuring that all interested parties are given an opportunity to present evidence. Anti-dumping measures must expire five years after the date of imposition, unless an investigation shows that ending the measure would lead to injury.

Anti-dumping investigations are to end immediately in cases where the authorities determine that the margin of dumping is insignificantly small (defined as less than 2% of the export price of the product). Other conditions are also set. For example, the investigations also have to end if the volume of dumped imports is negligible (i.e. if the volume from one country is less than 3% of total imports of that product — although investigations can proceed if several countries, each supplying less than 3% of the imports, together account for 7% or more of total imports).

The agreement says member countries must inform the Committee on Anti-Dumping Practices about all preliminary and final anti-dumping actions, promptly and in detail. They must also report on all investigations twice a year. When differences arise, members are encouraged to consult each other. They can also use the WTO's dispute settlement procedure.

Subsidies and countervailing measures agreement.

This agreement does two things: it disciplines the use of subsidies, and it regulates the actions countries can take to counter the effects of subsidies. It says a country can use the WTO's dispute settlement procedure to seek the withdrawal of the subsidy or the removal of its adverse effects. Or the country can launch its own investigation and ultimately charge extra duty (known as "countervailing duty") on subsidized imports that are found to be hurting domestic producers.

The agreement contains a definition of subsidy. It also introduces the concept of a "specific" subsidy — i.e. a subsidy available only to an enterprise, industry, group of enterprises, or group of industries in the country (or state, etc) that gives the subsidy. The disciplines set out in the agreement only apply to specific subsidies. They can be domestic or export subsidies.

The agreement defines two categories of subsidies: prohibited and actionable. It originally contained a third category: non-actionable subsidies. This category existed for five years, ending on 31 December 1999, and was not extended. The agreement applies to agricultural goods as well as industrial products, except when the subsidies are exempt under the Agriculture Agreement's "peace clause", due to expire at the end of 2003.

- **Prohibited subsidies: subsidies that require recipients to meet certain export targets, or to use domestic goods instead of imported goods. They are prohibited because they are specifically designed to distort international trade, and are therefore likely to hurt other countries' trade. They can be challenged in the WTO dispute settlement procedure where they are handled under an accelerated timetable. If the dispute settlement procedure confirms that the subsidy is prohibited, it must be withdrawn immediately. Otherwise, the complaining country can take counter measures. If domestic producers are hurt by imports of subsidized products, countervailing duty can be imposed.**
- **Actionable subsidies: in this category the complaining country has to show that the subsidy has an adverse effect on its interests. Otherwise the subsidy is permitted. The agreement defines three types of damage they can cause. One country's subsidies can hurt a domestic industry in an importing country. They can hurt rival exporters from another country when the two compete in third markets. And domestic subsidies in one country can hurt exporters trying to compete in the subsidizing country's domestic market. If the Dispute Settlement Body rules that the subsidy does have an adverse effect, the subsidy must be withdrawn or its adverse effect must be removed. Again, if domestic producers are hurt by imports of subsidized products, countervailing duty can be imposed.**

Some of the disciplines are similar to those of the Anti-Dumping Agreement. Countervailing duty (the parallel of anti-dumping duty) can only be charged after the importing country has conducted a detailed investigation similar to that required for anti-dumping action. There are detailed rules for deciding whether a product is being subsidized (not always an easy calculation), criteria for determining whether imports of subsidized products are hurting ("causing injury to") domestic industry, procedures for initiating and conducting investigations, and rules on the implementation and duration (normally five years) of countervailing measures. The subsidized exporter can also agree to raise its export prices as an alternative to its exports being charged countervailing duty.

Subsidies may play an important role in developing countries and in the transformation of centrally-planned economies to market economies. Least-developed countries and developing countries with less than $1,000 per capita GNP are exempted from disciplines on prohibited export subsidies. Other developing countries are given until 2003 to get rid of their export subsidies. Least-developed countries must eliminate import-substitution subsidies (i.e. subsidies designed to help domestic production and avoid importing) by 2003 — for other developing countries the deadline was 2000. Developing countries also receive preferential treatment if their exports are subject to countervailing duty investigations. For transition economies, prohibited subsidies had to be phased out by 2002.

Safeguards Agreement: emergency protection from imports.

A WTO member may restrict imports of a product temporarily (take "safeguard" actions) if its domestic industry is injured or threatened with injury caused by a surge in imports. Here, the injury has to be serious. Safeguard measures were always available under GATT (Article 19). However, they were infrequently used, some governments preferring to protect their domestic industries through "gray area" measures — using bilateral negotiations outside GATT's auspices, they persuaded exporting countries to restrain exports "voluntarily" or to agree to other means of sharing markets. Agreements of this kind were reached for a wide range of products: automobiles, steel, and semiconductors, for example.

The WTO agreement broke new ground. It prohibits "gray-area" measures, and it sets time limits (a "sunset clause") on all safeguard actions. The agreement says members must not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. The bilateral measures that were not modified to conform with the agreement were phased out at the end of 1998. Countries were allowed to keep one of these measures an extra year (until the end of 1999), but only the European Union — for restrictions on imports of cars from Japan — made use of this provision.

An import "surge" justifying safeguard action can be a real increase in imports (an *absolute increase*); or it can be an increase in the imports' share of a shrinking market, even if the import quantity has not increased (*relative increase*).

Industries or companies may request safeguard action by their government. The WTO agreement sets out requirements for safeguard investigations by national authorities. The emphasis is on transparency and on following established rules and practices — avoiding arbitrary methods. The authorities conducting investigations have to announce publicly when hearings are to take place and provide other appropriate means for interested parties to present evidence. The evidence must include arguments on whether a measure is in the public interest.

The agreement sets out criteria for assessing whether "serious injury" is being caused or threatened, and the factors which must be considered in determining the impact of imports on the domestic industry. When imposed, a safeguard measure should be applied only to the extent necessary to prevent or remedy serious injury and to help the industry concerned to adjust. Where quantitative restrictions (quotas) are imposed, they normally should not reduce the quantities of imports below the annual average for the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury.

In principle, safeguard measures cannot be targeted at imports from a particular country. However, the agreement does describe how quotas can be allocated among supplying countries, including in the exceptional circumstance where imports from certain countries have increased disproportionately

quickly. A safeguard measure should not last more than four years, although this can be extended up to eight years, subject to a determination by competent national authorities that the measure is needed and that there is evidence the industry is adjusting. Measures imposed for more than a year must be progressively liberalized.

When a country restricts imports in order to safeguard its domestic producers, in principle it must give something in return. The agreement says the exporting country (or exporting countries) can seek compensation through consultations. If no agreement is reached the exporting country can retaliate by taking equivalent action — for instance, it can raise tariffs on exports from the country that is enforcing the safeguard measure. In some circumstances, the exporting country has to wait for three years after the safeguard measure was introduced before it can retaliate in this way — i.e. if the measure conforms with the provisions of the agreement and if it is taken as a result of an increase in the quantity of imports from the exporting country.

To some extent developing countries' exports are shielded from safeguard actions. An importing country can only apply a safeguard measure to a product from a developing country if the developing country is supplying more than 3% of the imports of that product, or if developing country members with less than 3% import share collectively account for more than 9% of total imports of the product concerned.

The WTO's Safeguards Committee oversees the operation of the agreement and is responsible for the surveillance of members' commitments. Governments have to report each phase of a safeguard investigation and related decision-making, and the committee reviews these reports.

Import licensing Agreement: keeping procedures clear.

Although less widely used now than in the past, import licensing systems are subject to disciplines in the WTO. The Agreement on Import Licensing Procedures says import licensing should be simple, transparent and predictable. For example, the agreement requires governments to publish sufficient information for traders to know how and why the licences are granted. It also describes how countries should notify the WTO when they introduce new import licensing procedures or change existing procedures. The agreement offers guidance on how governments should assess applications for licences.

Some licences are issued automatically if certain conditions are met. The agreement sets criteria for automatic licensing so that the procedures used do not restrict trade.

Other licences are not issued automatically. Here, the agreement tries to minimize the importers' burden in applying for licences, so that the administrative work does not in itself restrict or distort imports. The agreement says the agencies handling licensing should not normally take more than 30 days to deal with an application — 60 days when all applications are considered at the same time.

Customs Valuation Agreement -- Rules for the valuation of goods at customs.

For importers, the process of estimating the value of a product at customs presents problems that can be just as serious as the actual duty rate charged. The WTO agreement on customs valuation aims for a fair, uniform and neutral system for the valuation of goods for customs purposes — a system that conforms to commercial realities, and which outlaws the use of arbitrary or fictitious customs values.

The agreement provides a set of valuation rules, expanding and giving greater precision to the provisions on customs valuation in the original GATT.

Preshipment inspection agreement: a further check on imports.

Preshipment inspection is the practice of employing specialized private companies (or "independent entities") to check shipment details — essentially price, quantity and quality — of goods ordered overseas. Used by governments of developing countries, the purpose is to safeguard national financial interests (preventing capital flight, commercial fraud, and customs duty evasion, for instance) and to compensate for inadequacies in administrative infrastructures.

The Preshipment Inspection Agreement recognizes that GATT principles and obligations apply to the activities of preshipment inspection agencies mandated by governments. The obligations placed on governments which use preshipment inspections include non-discrimination, transparency, protection of confidential business information, avoiding unreasonable delay, the use of specific guidelines for conducting price verification and avoiding conflicts of interest by the inspection agencies. The obligations of exporting members towards countries using preshipment inspection include non-discrimination in the application of domestic laws and regulations, prompt publication of those laws and regulations and the provision of technical assistance where requested.

The agreement establishes an independent review procedure. This is administered jointly by the International Federation of Inspection Agencies (IFIA), representing inspection agencies, and the International Chamber of Commerce (ICC), representing exporters. Its purpose is to resolve disputes between an exporter and an inspection agency.

Rules of origin agreement: made in ... where?

"Rules of origin" are the criteria used to define where a product was made. They are an essential part of trade rules because a number of policies discriminate between exporting countries: quotas, preferential tariffs, anti-dumping actions, countervailing duty (charged to counter export subsidies), and more. Rules of origin are also used to compile trade statistics, and for "made in ..." labels that are attached to products. This is complicated by globalization and the way a product can be processed in several countries before it is ready for the market.

The Rules of Origin Agreement requires WTO members to ensure that their rules of origin are transparent; that they do not have restricting, distorting or disruptive effects on international trade; that they are administered in a consistent, uniform, impartial and reasonable manner; and that they are based on a positive standard (in other words, they should state what *does confer origin rather than what does not*).

For the longer term, the agreement aims for common ("harmonized") rules of origin among all WTO members, except in some kinds of preferential trade — for example, countries setting up a free trade area are allowed to use different rules of origin for products traded under their free trade agreement. The agreement establishes a harmonization work programme, based upon a set of principles, including making rules of origin objective, understandable and predictable. The work was due to end in July 1998, but several deadlines have been missed. It is being conducted by a Committee on Rules of Origin in the WTO and a Technical Committee under the auspices of the World Customs Organization in Brussels. The outcome will be a single set of rules of origin to be applied under non-preferential trading conditions by all WTO members in all circumstances.

An annex to the agreement sets out a "common declaration" dealing with the operation of rules of origin on goods which qualify for preferential treatment.

Investment measures agreement: reducing trade distortions.

The Trade-Related Investment Measures (TRIMs) Agreement applies only to measures that affect trade in goods. It recognizes that certain measures can restrict and distort trade, and states that no member shall apply any measure that discriminates against foreigners or foreign products (i.e. violates "national treatment" principles in GATT). It also outlaws investment measures that lead to restrictions in quantities (violating another principle in GATT). An illustrative list of TRIMs agreed to be inconsistent with these GATT articles is appended to the agreement. The list includes measures which require particular levels of local procurement by an enterprise ("local content requirements"). It also discourages measures which limit a company's imports or set targets for the company to export ("trade balancing requirements").

Under the agreement, countries must inform fellow-members through the WTO of all investment measures that do not conform with the agreement. Developed countries had to eliminate these in two years (by the end of 1996); developing countries had five years (to the end of 1999); and least-developed countries seven. In July 2001, the Goods Council agreed to extend this transition period for a number of requesting developing countries.

The agreement establishes a Committee on TRIMs to monitor the implementation of these commitments. The agreement also says that WTO members should consider, by 1 January 2000, whether there should also be provisions on investment policy and competition policy. This discussion is now part of the Doha Development Agenda.

Plurilaterals: of minority interest.

For the most part, all WTO members subscribe to all WTO agreements. After the Uruguay Round, however, there remained four agreements, originally negotiated in the Tokyo Round, which had a narrower group of signatories and are known as "plurilateral agreements". All other Tokyo Round agreements became multilateral obligations (i.e. obligations for all WTO members) when the World Trade Organization was established in 1995. The four were:

- **trade in civil aircraft**
- **government procurement**
- **dairy products**
- **bovine meat.**

The bovine meat and dairy agreements were terminated in 1997.

Fair trade -- Civil Aircraft Agreement.

The Agreement on Trade in Civil Aircraft entered into force on 1 January 1980. It now has 30 signatories. The agreement eliminates import duties on all aircraft, other than military aircraft, as well as on all other products covered by the agreement — civil aircraft engines and their parts and components, all components and sub-assemblies of civil aircraft, and flight simulators and their parts and components. It contains disciplines on government-directed procurement of civil aircraft and inducements to purchase, as well as on government financial support for the civil aircraft sector.

Government procurement agreement: opening up for competition.

In most countries the government, and the agencies it controls, are together the biggest purchasers of goods of all kinds, ranging from basic commodities to high-technology equipment. At the same time, the political pressure to favour domestic suppliers over their foreign competitors can be very strong.

An Agreement on Government Procurement was first negotiated during the Tokyo Round and entered into force on 1 January 1981. Its purpose is to open up as much of this business as possible to international competition. It is designed to make laws, regulations, procedures and practices regarding government procurement more transparent and to ensure they do not protect domestic products or suppliers, or discriminate against foreign products or suppliers.

The agreement has 28 members. It has two elements — general rules and obligations, and schedules of national entities in each member country whose procurement is subject to the agreement. A large part of the general rules and obligations concern tendering procedures.

The present agreement and commitments were negotiated in the Uruguay Round. These negotiations achieved a 10-fold expansion of coverage, extending international competition to include national and local government entities whose collective purchases are worth several hundred billion dollars each year. The new agreement also extends coverage to services (including construction services), procurement at the sub-central level (for example, states, provinces, departments and prefectures), and procurement by public utilities. The new agreement took effect on 1 January 1996.

It also reinforces rules guaranteeing fair and non-discriminatory conditions of international competition. For example, governments will be required to put in place domestic procedures by which aggrieved private bidders can challenge procurement decisions and obtain redress in the event such decisions were made inconsistently with the rules of the agreement.

The agreement applies to contracts worth more than specified threshold values. For central government purchases of goods and services, the threshold is SDR 130,000 (some $185,000 in June 2003). For purchases of goods and services by sub-central government entities the threshold varies but is generally in the region of SDR 200,000. For utilities, thresholds for goods and services is generally in the area of SDR 400,000 and for construction contracts, in general the threshold value is SDR 5,000,000.

Dairy and bovine meat agreements: ended in 1997

The International Dairy Agreement and International Bovine Meat Agreement were scrapped at the end of 1997. Countries that had signed the agreements decided that the sectors were better handled under the Agriculture and Sanitary and Phytosanitary agreements. Some aspects of their work had been handicapped by the small number of signatories. For example, some major exporters of dairy products did not sign the Dairy Agreement, and the attempt to cooperate on minimum prices therefore failed — minimum pricing was suspended in 1995.

A unique contribution – Dispute Settlement Understanding.

Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system

is based on clearly-defined rules, with timetables for completing a case. First rulings are made by a panel and endorsed (or rejected) by the WTO's full membership. Appeals based on points of law are possible.

However, the point is not to pass judgement. The priority is to settle disputes, through consultations if possible. By July 2005, only about 130 of the nearly 332 cases had reached the full panel process. Most of the rest have either been notified as settled "out of court" or remain in a prolonged consultation phase — some since 1995.

Principles: equitable, fast, effective, mutually acceptable.

Disputes in the WTO are essentially about broken promises. WTO members have agreed that if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures, and respecting judgements.

A dispute arises when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements, or to be a failure to live up to obligations. A third group of countries can declare that they have an interest in the case and enjoy some rights.

A procedure for settling disputes existed under the old GATT, but it had no fixed timetables, rulings were easier to block, and many cases dragged on for a long time inconclusively. The Uruguay Round agreement introduced a more structured process with more clearly defined stages in the procedure. It introduced greater discipline for the length of time a case should take to be settled, with flexible deadlines set in various stages of the procedure. The agreement emphasizes that prompt settlement is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a first ruling, it should not normally take more than about one year — 15 months if the case is appealed. The agreed time limits are flexible, and if the case is considered urgent (e.g. if perishable goods are involved), it is accelerated as much as possible.

The Uruguay Round agreement also made it impossible for the country losing a case to block the adoption of the ruling. Under the previous GATT procedure, rulings could only be adopted by consensus, meaning that a single objection could block the ruling. Now, rulings are automatically adopted unless there is a consensus to reject a ruling — any country wanting to block a ruling has to persuade all other WTO members (including its adversary in the case) to share its view.

Although much of the procedure does resemble a court or tribunal, the preferred solution is for the countries concerned to discuss their problems and settle the dispute by themselves. The first stage is therefore consultations between the governments concerned, and even when the case has progressed to other stages, consultation and mediation are still always possible.

How are disputes settled?

Settling disputes is the responsibility of the Dispute Settlement Body (the General Council in another guise), which consists of all WTO members. The Dispute Settlement Body has the sole authority to establish "panels" of experts to consider the case, and to accept or reject the panels' findings or the

results of an appeal. It monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a ruling.

Either side can appeal a panel's ruling. Sometimes both sides do so. Appeals have to be based on points of law such as legal interpretation — they cannot reexamine existing evidence or examine new issues.

Each appeal is heard by three members of a permanent seven-member Appellate Body set up by the Dispute Settlement Body and broadly representing the range of WTO membership. Members of the Appellate Body have four-year terms. They have to be individuals with recognized standing in the field of law and international trade, not affiliated with any government.

The appeal can uphold, modify or reverse the panel's legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum of 90 days.

The Dispute Settlement Body has to accept or reject the appeals report within 30 days — and rejection is only possible by consensus.

The case has been decided: what next?

Go directly to jail. Do not pass Go, do not collect … . Well, not exactly. But the sentiments apply. If a country has done something wrong, it should swiftly correct its fault. And if it continues to break an agreement, it should offer compensation or suffer a suitable penalty that has some bite.

Even once the case has been decided, there is more to do before trade sanctions (the conventional form of penalty) are imposed. The priority at this stage is for the losing "defendant" to bring its policy into line with the ruling or recommendations. The dispute settlement agreement stresses that "prompt compliance with recommendations or rulings of the DSB [Dispute Settlement Body] is essential in order to ensure effective resolution of disputes to the benefit of all Members".

If the country that is the target of the complaint loses, it must follow the recommendations of the panel report or the appeals report. It must state its intention to do so at a Dispute Settlement Body meeting held within 30 days of the report's adoption. If complying with the recommendation immediately proves impractical, the member will be given a "reasonable period of time" to do so. If it fails to act within this period, it has to enter into negotiations with the complaining country (or countries) in order to determine mutually-acceptable compensation — for instance, tariff reductions in areas of particular interest to the complaining side.

If after 20 days, no satisfactory compensation is agreed, the complaining side may ask the Dispute Settlement Body for permission to impose limited trade sanctions ("suspend concessions or obligations") against the other side. The Dispute Settlement Body must grant this authorization within 30 days of the expiry of the "reasonable period of time" unless there is a consensus against the request.

In principle, the sanctions should be imposed in the same sector as the dispute. If this is not practical or if it would not be effective, the sanctions can be imposed in a different sector of the same agreement. In turn, if this is not effective or practicable and if the circumstances are serious enough,

the action can be taken under another agreement. The objective is to minimize the chances of actions spilling over into unrelated sectors while at the same time allowing the actions to be effective.

In any case, the Dispute Settlement Body monitors how adopted rulings are implemented. Any outstanding case remains on its agenda until the issue is resolved.

CROSS-CUTTING AND NEW ISSUES.

The WTO's work is not confined to specific agreements with specific obligations. Member governments also discuss a range of other issues, usually in special committees or working groups. Some are old, some are new to the GATT-WTO system. Some are issues in their own right, some cut across several WTO topics. Some could lead to negotiations.

Regionalism: friends or rivals?

The European Union, the North American Free Trade Agreement, the Association of Southeast Asian Nations, the South Asian Association for Regional Cooperation, the Common Market of the South (MERCOSUR), the Australia-New Zealand Closer Economic Relations Agreement, and so on.

By July 2005, only one WTO members — Mongolia, — was not party to a regional trade agreement. The surge in these agreements has continued unabated since the early 1990s. By July 2005, a total of 330 had been notified to the WTO (and its predecessor, GATT). Of these: 206 were notified after the WTO was created in January 1995; 180 are currently in force; several others are believed to be operational although not yet notified.

One of the most frequently asked questions is whether these regional groups help or hinder the WTO's multilateral trading system. A committee is keeping an eye on developments.

They seem to be contradictory, but often regional trade agreements can actually support the WTO's multilateral trading system. Regional agreements have allowed groups of countries to negotiate rules and commitments that go beyond what was possible at the time multilaterally. In turn, some of these rules have paved the way for agreement in the WTO. Services, intellectual property, environmental standards, investment and competition policies are all issues that were raised in regional negotiations and later developed into agreements or topics of discussion in the WTO.

The groupings that are important for the WTO are those that abolish or reduce barriers on trade within the group. The WTO agreements recognize that regional arrangements and closer economic integration can benefit countries. It also recognizes that under some circumstances regional trading arrangements could hurt the trade interests of other countries. Normally, setting up a customs union or free trade area would violate the WTO's principle of equal treatment for all trading partners ("most-favoured-nation"). But GATT's Article 24 allows regional trading arrangements to be set up as a special exception, provided certain strict criteria are met.

In particular, the arrangements should help trade flow more freely among the countries in the group without barriers being raised on trade with the outside world. In other words, regional integration should complement the multilateral trading system and not threaten it.

Article 24 says if a free trade area or customs union is created, duties and other trade barriers should be reduced or removed on substantially all sectors of trade in the group. Non-members should not find trade with the group any more restrictive than before the group was set up.

Similarly, Article 5 of the General Agreement on Trade in Services provides for economic integration agreements in services. Other provisions in the WTO agreements allow developing countries to enter into regional or global agreements that include the reduction or elimination of tariffs and non-tariff barriers on trade among themselves.

On 6 February 1996, the WTO General Council created the Regional Trade Agreements Committee. Its purpose is to examine regional groups and to assess whether they are consistent with WTO rules. The committee is also examining how regional arrangements might affect the multilateral trading system, and what the relationship between regional and multilateral arrangements might be.

The environment: a specific concern.

The WTO has no specific agreement dealing with the environment. However, a number of the WTO agreements include provisions dealing with environmental concerns. The objectives of sustainable development and environmental protection are stated in the preamble to the Agreement Establishing the WTO.

The increased emphasis on environmental policies is relatively recent. At the end of the Uruguay Round in 1994, trade ministers from participating countries decided to begin a comprehensive work programme on trade and environment in the WTO. They created the Trade and Environment Committee. This has brought environmental and sustainable development issues into the mainstream of WTO work.

WTO and environmental agreements: how are they related?

How do the WTO trading system and "green" trade measures relate to each other? What is the relationship between the WTO agreements and various international environmental agreements and conventions?

There are about 200 international agreements (outside the WTO) dealing with various environmental issues currently in force. They are called multilateral environmental agreements (MEAs).

About 20 of these include provisions that can affect trade: for example they ban trade in certain products, or allow countries to restrict trade in certain circumstances. Among them are the Montreal Protocol for the protection of the ozone layer, the Basel Convention on the trade or transportation of hazardous waste across international borders, and the Convention on International Trade in Endangered Species (CITES).

Briefly, the WTO's committee says the basic WTO principles of non-discrimination and transparency do not conflict with trade measures needed to protect the environment, including actions taken under the environmental agreements. It also notes that clauses in the agreements on goods, services and intellectual property allow governments to give priority to their domestic environmental policies.

The WTO's committee says the most effective way to deal with international environmental problems is through the environmental agreements. It says this approach complements the WTO's work in

seeking internationally agreed solutions for trade problems. In other words, using the provisions of an international environmental agreement is better than one country trying on its own to change other countries' environmental policies (*see shrimp-turtle and dolphin-tuna case studies*).

The committee notes that actions taken to protect the environment and having an impact on trade can play an important role in some environmental agreements, particularly when trade is a direct cause of the environmental problems. But it also points out that trade restrictions are not the only actions that can be taken, and they are not necessarily the most effective. Alternatives include: helping countries acquire environmentally-friendly technology, giving them financial assistance, providing training, etc.

The problem should not be exaggerated. So far, no action affecting trade and taken under an international environmental agreement has been challenged in the GATT-WTO system. There is also a widely held view that actions taken under an environmental agreement are unlikely to become a problem in the WTO if the countries concerned have signed the environmental agreement, although the question is not settled completely. The Trade and Environment Committee is more concerned about what happens when one country invokes an environmental agreement to take action against another country that has not signed the environmental agreement.

Disputes: where should they be handled?

Suppose a trade dispute arises because a country has taken action on trade (for example imposed a tax or restricted imports) under an environmental agreement outside the WTO and another country objects. Should the dispute be handled under the WTO or under the other agreement? The Trade and Environment Committee says that if a dispute arises over a trade action taken under an environmental agreement, and if both sides to the dispute have signed that agreement, then they should try to use the environmental agreement to settle the dispute. But if one side in the dispute has not signed the environment agreement, then the WTO would provide the only possible forum for settling the dispute. The preference for handling disputes under the environmental agreements does not mean environmental issues would be ignored in WTO disputes. The WTO agreements allow panels examining a dispute to seek expert advice on environmental issues.

A WTO dispute: The 'shrimp-turtle' case.

This was a case brought by India, Malaysia, Pakistan and Thailand against the US. The appellate and panel reports were adopted on 6 November 1998. The official title is "United States — Import Prohibition of Certain Shrimp and Shrimp Products", the official WTO case numbers are 58 and 61.

What was it all about?

Seven species of sea turtles have been identified. They are distributed around the world in subtropical and tropical areas. They spend their lives at sea, where they migrate between their foraging and nesting grounds.

Sea turtles have been adversely affected by human activity, either directly (their meat, shells and eggs have been exploited), or indirectly (incidental capture in fisheries, destroyed habitats, polluted oceans).

In early 1997, India, Malaysia, Pakistan and Thailand brought a joint complaint against a ban imposed by the US on the importation of certain shrimp and shrimp products. The protection of sea turtles was at the heart of the ban.

The US Endangered Species Act of 1973 listed as endangered or threatened the five species of sea turtles that occur in US waters, and prohibited their "take" within the US, in its territorial sea and the high seas. ("Take" means harassment, hunting, capture, killing or attempting to do any of these.) Under the act, the US required US shrimp trawlers to use "turtle excluder devices" (TEDs) in their nets when fishing in areas where there is a significant likelihood of encountering sea turtles.

Section 609 of US Public Law 101-102, enacted in 1989, dealt with imports. It said, among other things, that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the US — unless the harvesting nation was certified to have a regulatory programme and an incidental take-rate comparable to that of the US, or that the particular fishing environment of the harvesting nation did not pose a threat to sea turtles.

In practice, countries that had any of the five species of sea turtles within their jurisdiction, and harvested shrimp with mechanical means, had to impose on their fishermen requirements comparable to those borne by US shrimpers if they wanted to be certified to export shrimp products to the US. Essentially this meant the use of TEDs at all times.
The ruling.

In its report, the Appellate Body made clear that under WTO rules, countries have the right to take trade action to protect the environment (in particular, human, animal or plant life and health) and endangered species and exhaustible resources). The WTO does not have to "allow" them this right.

It also said measures to protect sea turtles would be legitimate under GATT Article 20 which deals with various exceptions to the WTO's trade rules, provided certain criteria such as non-discrimination were met.

The US lost the case, not because it sought to protect the environment but because it discriminated between WTO members. It provided countries in the western hemisphere — mainly in the Caribbean — technical and financial assistance and longer transition periods for their fishermen to start using turtle-excluder devices.

It did not give the same advantages, however, to the four Asian countries (India, Malaysia, Pakistan and Thailand) that filed the complaint with the WTO.

The ruling also said WTO panels may accept "amicus briefs" (friends-of-the-court submissions) from NGOs or other interested parties.

What we have not decided ...'

This is part of what the Appellate Body said:

"185. In reaching these conclusions, we wish to underscore what we have not decided in this appeal. We have not decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international

fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.

"186. What we have decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX [i.e. 20] of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in United States — Gasoline [adopted 20 May 1996, WT/DS2/AB/R, p. 30], WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the WTO Agreement."

A GATT dispute: The tuna-dolphin dispute.

This case still attracts a lot of attention because of its implications for environmental disputes. It was handled under the old GATT dispute settlement procedure. Key questions are:

- **can one country tell another what its environmental regulations should be? and**
- **do trade rules permit action to be taken against the method used to produce goods (rather than the quality of the goods themselves)?**

What was it all about?

In eastern tropical areas of the Pacific Ocean, schools of yellowfin tuna often swim beneath schools of dolphins. When tuna is harvested with purse seine nets, dolphins are trapped in the nets. They often die unless they are released.

The US Marine Mammal Protection Act sets dolphin protection standards for the domestic American fishing fleet and for countries whose fishing boats catch yellowfin tuna in that part of the Pacific Ocean. If a country exporting tuna to the United States cannot prove to US authorities that it meets the dolphin protection standards set out in US law, the US government must embargo all imports of the fish from that country. In this dispute, Mexico was the exporting country concerned. Its exports of tuna to the US were banned. Mexico complained in 1991 under the GATT dispute settlement procedure.

The embargo also applies to "intermediary" countries handling the tuna en route from Mexico to the United States. Often the tuna is processed and canned in an one of these countries. In this dispute, the "intermediary" countries facing the embargo were Costa Rica, Italy, Japan and Spain, and earlier France, the Netherlands Antilles, and the United Kingdom. Others, including Canada, Colombia, the Republic of Korea, and members of the Association of Southeast Asian Nations (ASEAN), were also named as "intermediaries".

The panel.

Mexico asked for a panel in February 1991. A number of "intermediary" countries also expressed an interest. The panel reported to GATT members in September 1991. It concluded:

- **that the US could not embargo imports of tuna products from Mexico simply because Mexican regulations on the way tuna was produced did not satisfy US regulations. (But the US could apply its regulations on the quality or content of the tuna imported.) This has become known as a "product" versus "process" issue.**
- **that GATT rules did not allow one country to take trade action for the purpose of attempting to enforce its own domestic laws in another country — even to protect animal health or exhaustible natural resources. The term used here is "extra-territoriality".**

What was the reasoning behind this ruling? If the US arguments were accepted, then any country could ban imports of a product from another country merely because the exporting country has different environmental, health and social policies from its own. This would create a virtually open-ended route for any country to apply trade restrictions unilaterally — and to do so not just to enforce its own laws domestically, but to impose its own standards on other countries. The door would be opened to a possible flood of protectionist abuses. This would conflict with the main purpose of the multilateral trading system — to achieve predictability through trade rules.

The panel's task was restricted to examining how GATT rules applied to the issue. It was not asked whether the policy was environmentally correct or not. It suggested that the US policy could be made compatible with GATT rules if members agreed on amendments or reached a decision to waive the rules specially for this issue. That way, the members could negotiate the specific issues, and could set limits that would prevent protectionist abuse.

The panel was also asked to judge the US policy of requiring tuna products to be labelled "dolphin-safe" (leaving to consumers the choice of whether or not to buy the product). It concluded that this did not violate GATT rules because it was designed to prevent deceptive advertising practices on all tuna products, whether imported or domestically produced.

(Singapore Issues) **-- Investment, competition, procurement, simpler procedures.**

Ministers from WTO member-countries decided at the 1996 Singapore Ministerial Conference to set up three new working groups: on trade and investment, on competition policy, and on transparency in government procurement. They also instructed the WTO Goods Council to look at possible ways of simplifying trade procedures, an issue sometimes known as "trade facilitation". Because the Singapore conference kicked off work in these four subjects, they are sometimes called the "Singapore issues".

These four subjects were originally included on the Doha Development Agenda. The carefully-negotiated mandate was for negotiations to start after the 2003 Cancún Ministerial Conference, "on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations". There was no consensus, and the members agreed on 1 August 2004 to proceed with negotiations in only one subject, trade facilitation. The other three were dropped from the Doha agenda.
Investment and competition: what role for the WTO?

Work in the WTO on investment and competition policy issues originally took the form of specific responses to specific trade policy issues, rather than a look at the broad picture.

Decisions reached at the 1996 Ministerial Conference in Singapore changed the perspective. The ministers decided to set up two working groups to look more generally at how trade relates to investment and competition policies.

The working groups' tasks were analytical and exploratory. They would not negotiate new rules or commitments without a clear consensus decision.
The ministers also recognized the work underway in the UN Conference on Trade and Development (UNCTAD) and other international organizations. The working groups were to cooperate with these organizations so as to make best use of available resources and to ensure that development issues are fully taken into account.

An indication of how closely trade is linked with investment is the fact that about one third of the $6.1 trillion total for world trade in goods and services in 1995 was trade within companies — for example between subsidiaries in different countries or between a subsidiary and its headquarters.

The close relationships between trade and investment and competition policy have long been recognized. One of the intentions, when GATT was drafted in the late 1940s, was for rules on investment and competition policy to exist alongside those for trade in goods. (The other two agreements were not completed because the attempt to create an International Trade Organization failed.)

Transparency in government purchases.

The WTO already has an Agreement on Government Procurement. It is plurilateral — only some WTO members have signed it so far. The agreement covers such issues as transparency and non-discrimination.

The decision by WTO ministers at the 1996 Singapore conference did two things. It set up a working group that was multilateral — it included all WTO members. And it focused the group's work on transparency in government procurement practices. The group did not look at preferential treatment for local suppliers, so long as the preferences were not hidden.

The first phase of the group's work was to study transparency in government procurement practices, taking into account national policies. The second phase was to develop elements for inclusion in an agreement.

Trade facilitation: a new high profile.

Once formal trade barriers come down, other issues become more important. For example, companies need to be able to acquire information on other countries' importing and exporting regulations and how customs procedures are handled. Cutting red-tape at the point where goods enter a country and providing easier access to this kind of information are two ways of "facilitating" trade.

The 1996 Singapore ministerial conference instructed the WTO Goods Council to start exploratory and analytical work "on the simplification of trade procedures in order to assess the scope for WTO rules in this area". Negotiations began after the General Council decision of 1 August 2004.

Electronic commerce.

A new area of trade involves goods crossing borders electronically. Broadly speaking, this is the production, advertising, sale and distribution of products via telecommunications networks. The most obvious examples of products distributed electronically are books, music and videos transmitted down telephone lines or through the Internet.

The declaration on global electronic commerce adopted by the Second (Geneva) Ministerial Conference on 20 May 1998 urged the WTO General Council to establish a comprehensive work programme to examine all trade-related issues arising from global electronic commerce. The General Council adopted the plan for this work programme on 25 September 1998, initiating discussions on issues of electronic commerce and trade by the Goods, Services and TRIPS (intellectual property) Councils and the Trade and Development Committee.

In the meantime, WTO members also agreed to continue their current practice of not imposing customs duties on electronic transmissions.

Labour standards: highly controversial.

Strictly speaking, this should not be mentioned here at all because there is no work on the subject in the WTO, and it would be wrong to assume that it is a subject that "lies ahead". But it has been discussed so extensively, that some clarification is needed. The key phrase is "core labour standards" — essential standards applied to the way workers are treated. The term covers a wide range of things: from use of child labour and forced labour, to the right to organize trade unions and to strike.

Trade and labour rights: deferred to the ILO.

Trade and labour standards is a highly controversial issue. At the 1996 Singapore Ministerial Conference, WTO members defined the organization's role more clearly, identifying the International Labour Organization (ILO) as the competent body to deal with labour standards. There is currently no work on the subject in the WTO. The debate outside the WTO has raised three broad questions.

- **The legal question: should trade action be permitted as a means of putting pressure on countries considered to be severely violating core labour rights?**
- **The analytical question: if a country has lower standards for labour rights, do its exports gain an unfair advantage?**
- **The institutional question: is the WTO the proper place to discuss labour?**

All three questions have a political angle: whether trade actions should be used to impose labour standards, or whether this would simply be an excuse for protectionism.

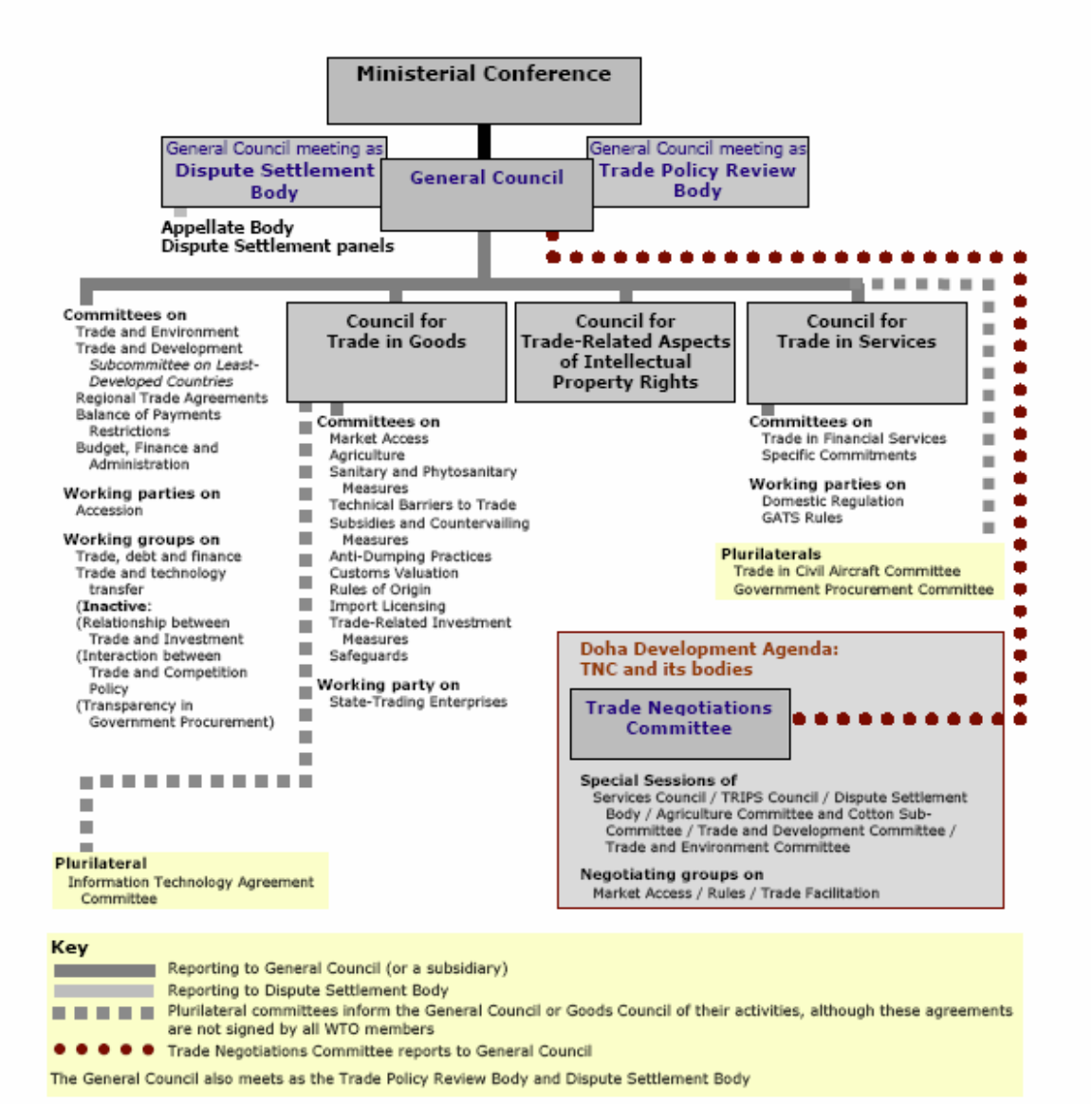
The WTO agreements do not deal with any core labour standards. But some industrial nations believe the issue should be studied by the WTO as a first step toward bringing the matter of core

labour standards into the organization. WTO rules and disciplines, they argue, would provide a powerful incentive for member nations to improve workplace conditions.

Many developing and some developed nations believe the issue has no place in the WTO framework. These nations argue that efforts to bring labour standards into the arena of multilateral trade negotiations are little more than a smokescreen for protectionism. Many officials in developing countries believe the campaign to bring labour issues into the WTO is actually a bid by industrial nations to undermine the comparative advantage of lower wage trading partners.

In the weeks leading up to the 1996 Singapore Ministerial Conference, and during the meeting itself, this was a hard-fought battle. In the end, WTO members said they were committed to recognized core labour standards, and that these standards should not be used for protectionism. The economic advantage of low-wage countries should not be questioned, but the WTO and ILO secretariats would continue their existing collaboration, the declaration said. The concluding remarks of the chairman, Singapore's trade and industry minister, Mr. Yeo Cheow Tong, added that the declaration does not put labour on the WTO's agenda. The countries concerned might continue their pressure for more work to be done in the WTO, but for the time being there are no committees or working parties dealing with the issue.

WTO ORGANIZATION CHART.



http://www.wto.org/english/thewto_e/whatis_e/tif_e/organigram_e.pdf

WTO Members and Observers.

[149 members on 11 December 2005, with dates of membership.]
http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

[Members & Dates of Membership.]
Albania 8 September 2000
Angola 23 November 1996
Antigua and Barbuda 1 January 1995
Argentina 1 January 1995
Armenia 5 February 2003
Australia 1 January 1995
Austria 1 January 1995
Bahrain, Kingdom of 1 January 1995
Bangladesh 1 January 1995
Barbados 1 January 1995
Belgium 1 January 1995
Belize 1 January 1995
Benin 22 February 1996
Bolivia 12 September 1995
Botswana 31 May 1995
Brazil 1 January 1995
Brunei Darussalam 1 January 1995
Bulgaria 1 December 1996
Burkina Faso 3 June 1995
Burundi 23 July 1995
Cambodia 13 October 2004
Cameroon 13 December 1995
Canada 1 January 1995
Central African Republic 31 May 1995
Chad 19 October 1996
Chile 1 January 1995
China 11 December 2001
Colombia 30 April 1995
Congo 27 March 1997
Costa Rica 1 January 1995
Côte d'Ivoire 1 January 1995
Croatia 30 November 2000
Cuba 20 April 1995

Cyprus 30 July 1995
Czech Republic 1 January 1995
Democratic Republic of the Congo 1 January 1997
Denmark 1 January 1995
Djibouti 31 May 1995
Dominica 1 January 1995
Dominican Republic 9 March 1995
Ecuador 21 January 1996
Egypt 30 June 1995
El Salvador 7 May 1995
Estonia 13 November 1999
European Communities 1 January 1995
Fiji 14 January 1996
Finland 1 January 1995
Former Yugoslav Republic of Macedonia (FYROM) 4 April 2003
France 1 January 1995
Gabon 1 January 1995
The Gambia 23 October 1996
Georgia 14 June 2000
Germany 1 January 1995
Ghana 1 January 1995
Greece 1 January 1995
Grenada 22 February 1996
Guatemala 21 July 1995
Guinea 25 October 1995
Guinea Bissau 31 May 1995
Guyana 1 January 1995
Haiti 30 January 1996
Honduras 1 January 1995
Hong Kong, China 1 January 1995
Hungary 1 January 1995
Iceland 1 January 1995
India 1 January 1995
Indonesia 1 January 1995
Ireland 1 January 1995
Israel 21 April 1995
Italy 1 January 1995
Jamaica 9 March 1995
Japan 1 January 1995
Jordan 11 April 2000
Kenya 1 January 1995
Korea, Republic of 1 January 1995
Kuwait 1 January 1995
Kyrgyz Republic 20 December 1998
Latvia 10 February 1999
Lesotho 31 May 1995
Liechtenstein 1 September 1995
Lithuania 31 May 2001
Luxembourg 1 January 1995
Macao, China 1 January 1995

Madagascar 17 November 1995
Malawi 31 May 1995
Malaysia 1 January 1995
Maldives 31 May 1995
Mali 31 May 1995
Malta 1 January 1995
Mauritania 31 May 1995
Mauritius 1 January 1995
Mexico 1 January 1995
Moldova 26 July 2001
Mongolia 29 January 1997
Morocco 1 January 1995
Mozambique 26 August 1995
Myanmar 1 January 1995
Namibia 1 January 1995
Nepal 23 April 2004
Netherlands — For the Kingdom in Europe and for the Netherlands Antilles 1 January 1995
New Zealand 1 January 1995
Nicaragua 3 September 1995
Niger 13 December 1996
Nigeria 1 January 1995
Norway 1 January 1995
Oman 9 November 2000
Pakistan 1 January 1995
Panama 6 September 1997
Papua New Guinea 9 June 1996
Paraguay 1 January 1995
Peru 1 January 1995
Philippines 1 January 1995
Poland 1 July 1995
Portugal 1 January 1995
Qatar 13 January 1996
Romania 1 January 1995
Rwanda 22 May 1996
Saint Kitts and Nevis 21 February 1996
Saint Lucia 1 January 1995
Saint Vincent & the Grenadines 1 January 1995
Saudi Arabia 11 December 2005
Senegal 1 January 1995
Sierra Leone 23 July 1995
Singapore 1 January 1995
Slovak Republic 1 January 1995
Slovenia 30 July 1995
Solomon Islands 26 July 1996
South Africa 1 January 1995
Spain 1 January 1995
Sri Lanka 1 January 1995
Suriname 1 January 1995
Swaziland 1 January 1995
Sweden 1 January 1995

Switzerland 1 July 1995
Chinese Taipei 1 January 2002
Tanzania 1 January 1995
Thailand 1 January 1995
Togo 31 May 1995
Trinidad and Tobago 1 March 1995
Tunisia 29 March 1995
Turkey 26 March 1995
Uganda 1 January 1995
United Arab Emirates 10 April 1996
United Kingdom 1 January 1995
United States of America 1 January 1995
Uruguay 1 January 1995
Venezuela (Bolivarian Republic of) 1 January 1995
Zambia 1 January 1995
Zimbabwe 5 March 1995

Observer Governments ……..

Afghanistan
Algeria
Andorra
Azerbaijan
Bahamas
Belarus
Bhutan
Bosnia and Herzegovina
Cape Verde
Equatorial Guinea
Ethiopia
Holy See (Vatican)
Iran
Iraq
Kazakhstan
Lao People's Democratic Republic
Lebanese Republic
Libya
Montenegro
Russian Federation
Samoa
Sao Tomé and Principe
Serbia
Seychelles
Sudan
Tajikistan
Tonga
Ukraine
Uzbekistan
Vanuatu
Viet Nam

Yemen

International intergovernmental organizations granted observer status to WTO bodies

General Council .....

Food and Agriculture Organization (FAO)
International Monetary Fund (IMF)
International Trade Centre (ITC)
Organization for Economic Cooperation and Development (OECD)
United Nations (UN)
United Nations Conference on Trade and Development (UNCTAD)
World Bank
World Intellectual Property Organization (WIPO)

Trade Policy Review Body ……..

European Bank for Reconstruction and Development (EBRD)
European Free Trade Association (EFTA)
Food and Agriculture Organization (FAO)
International Monetary Fund (IMF)
Organization for Economic Cooperation and Development (OECD)
United Nations Conference on Trade and Development (UNCTAD)
World Bank

Council for Trade in Goods ……

Food and Agriculture Organization (FAO)
International Monetary Fund (IMF)
International Textiles and Clothing Bureau (ITCB)
Organization for Economic Cooperation and Development (OECD)
United Nations (UN)
United Nations Conference on Trade and Development (UNCTAD)
World Bank
World Customs Organization (WCO)

Council for Trade in Services ……

International Monetary Fund (IMF)
International Telecommunication Union (ITU)
International Trade Centre (ITC)
United Nations (UN)
United Nations Conference on Trade and Development (UNCTAD)
World Bank
International intergovernmental organizations having ad hoc observer status
International Civil Aviation Organization (ICAO)
World Health Organization (WHO)
World Tourism Organization (WTO-OMT)
Council for Trade-related Aspects of Intellectual Property Rights ……

Food and Agriculture Organization (FAO)

International Monetary Fund (IMF)
International Union for the Protection of New Varieties of Plants (UPOV)
Organization for Economic Cooperation and Development (OECD)
United Nations (UN)
United Nations Conference on Trade and Development (UNCTAD)
World Bank
World Customs Organization (WCO)
World Intellectual Property Organization (WIPO)
International intergovernmental organizations having ad hoc observer status
World Health Organization (WHO)

Committee on Anti-dumping practices ……..

International Monetary Fund (IMF)
United Nations Conference on Trade and Development (UNCTAD)
World Bank
International intergovernmental organizations having ad hoc observer status African, Caribbean and Pacific Group of States (ACP)
Organization for Economic Cooperation and Development (OECD)

Committee on subsidies and countervailing measures …….

Food and Agriculture Organization (FAO)
International Monetary Fund (IMF)
United Nations Conference on Trade and Development (UNCTAD)
World Bank
International intergovernmental organizations having ad hoc observer status
African, Caribbean and Pacific Group of States (ACP)
Organization for Economic Cooperation and Development (OECD)

Committee on Safeguards ……..

International Monetary Fund (IMF)
United Nations Conference on Trade and Development (UNCTAD)
World Bank
International intergovernmental organizations having ad hoc observer status
African, Caribbean and Pacific Group of States (ACP)
Organization for Economic Cooperation and Development (OECD)

Committee on Agriculture …….
Food and Agriculture Organization (FAO)
International Grains Council (IGC)
International Monetary Fund (IMF)
Organization for Economic Cooperation and Development (OECD)
United Nations Conference on Trade and Development (UNCTAD)
United Nations World Food Programme (WFP)
World Bank

Committee on Sanitary and Phytosanitary Measures …….

FAO International Plant Protection Convention (IPPC)

FAO/WHO Joint Codex Alimentarius Commission (Codex)
Food and Agriculture Organization (FAO)
International Monetary Fund (IMF)
International Organization for Standardization (ISO)
International Trade Centre (ITC)
Office international des épizooties (OIE)
United Nations Conference on Trade and Development (UNCTAD)
World Bank
World Health Organization (WHO)
International intergovernmental organizations having ad hoc observer status on a meeting-by-meeting basis
African, Caribbean and Pacific Group of States (ACP)
European Free Trade Association (EFTA)
Inter-American Institute for Agricultural Cooperation (IICA)
Latin American Economic System (SELA)
Organization for Economic Cooperation and Development (OECD)
Regional International Organization for Plant Protection and Animal Health (OIRSA)

Committee on Balance of Payments Restrictions …….

African, Caribbean and Pacific Group of States (ACP)
European Bank for Reconstruction and Development (EBRD)
European Free Trade Association (EFTA)
International Monetary Fund (IMF)
Organization for Economic Cooperation and Development (OECD)
United Nations Conference on Trade and Development (UNCTAD)
World Bank

Committee on Regional Trade Agreements ……..

European Free Trade Association (EFTA)
Food and Agriculture Organization (FAO)
International Monetary Fund (IMF)
Organization of American States (OAS)
United Nations Conference on Trade and Development (UNCTAD)
World Bank
International intergovernmental organizations having ad hoc observer status on a meeting-by-meeting basis
Latin American Integration Association (ALADI)

Committee on Trade and Development ……

African, Caribbean and Pacific Group of States (ACP)
ANDEAN Community
Caribbean Community Secretariat (CARICOM)
Central African Economic and Monetary Community (CAEMC)
Commonwealth Secretariat
Cooperation Council for the Arab of States of the Gulf (GCC)
European Free Trade Association (EFTA)
Food and Agriculture Organization (FAO)

Inter-American Development Bank (IADB)
International Grains Council (IGC)
International Monetary Fund (IMF)
International Trade Centre (ITC)
Latin American Economic System (SELA)
Latin American Integration Association (ALADI)
Organization of American States (OAS)
Organization for Economic Cooperation and Development (OECD)
Permanent Secretariat of the General Treaty on Central American Economic Integration (SIECA)
Southern African Development Community (SADC)
United Nations (UN)
United Nations Conference on Trade and Development (UNCTAD)
United Nations Development Programme (UNDP)
United Nations Economic Commission for Africa (ECA)
United Nations Economic Commission for Europe (ECE)
United Nations Economic Commission for Latin America and the Caribbean (ECLAC)
United Nations Economic and Social Commission for Asia and the Pacific (ESCAP)
United Nations Industrial Development Organization (UNIDO)
World Bank
International intergovernmental organizations having ad hoc observer status on a meeting-by-meeting basis
African Union (AU)
Arab Maghreb Union (AMU)
Common Fund for Commodities (CFC) (1)
Economic Community of West African States (ECOWAS)
Economic Cooperation Organization (ECO)
Inter-Arab Investment Guarantee Cooperation (IAIGC)
Islamic Development Bank (IsDB)
Organization of the Islamic Conference (OIC)
Pacific Islands Forum
South Centre
United Nations Environment Programme (UNEP)
West African Economic and Monetary Union (WAEMU)
World Intellectual Property Organization (WIPO)

Committee on Trade and Environment …….

African, Caribbean and Pacific Group of States (ACP)
Convention on Biological Diversity (CBD)
Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)
European Free Trade Association (EFTA)
Food and Agriculture Organization (FAO)
International Commission for the Conservation of Atlantic Tunas (ICCAT)
International Monetary Fund (IMF)
International Organization for Standardization (ISO)
International Plant Genetic Resources Institute (IPGRI)
International Trade Centre (ITC)
Latin American Economic System (SELA)
Organization for Economic Cooperation and Development (OECD)
Pacific Islands Forum

United Nations (UN)
United Nations Commission for Sustainable Development (CSD)
United Nations Conference on Trade and Development (UNCTAD)
United Nations Development Programme (UNDP)
United Nations Environment Programme (UNEP)
United Nations Framework Convention on Climate Change (UNFCCC)
United Nations Industrial Development Organization (UNIDO)
World Bank
World Customs Organization (WCO)
World Intellectual Property Organization (WIPO)
International intergovernmental organizations having ad hoc observer status
Islamic Development Bank (IsDB)
Southeast Asian Fisheries Development Center (SEAFDEC)

Committee on Market Access …….

African, Caribbean and Pacific Group of States (ACP)
Food and Agriculture Organization (FAO)
Inter-American Development Bank (IADB)
International Monetary Fund (IMF)
International Textiles and Clothing Bureau (ITCB)
United Nations Conference on Trade and Development (UNCTAD)
World Bank
World Customs Organization (WCO)

Committee on import licensing ……..

International Monetary Fund (IMF)
United Nations Conference on Trade and Development (UNCTAD)
World Bank

Committee on Rules of Origin ……..

African, Caribbean and Pacific Group of States (ACP)
European Free Trade Association (EFTA)
Inter-American Development Bank (IADB)
International Monetary Fund (IMF)
International Textiles and Clothing Bureau (ITCB)
Organization for Economic Cooperation and Development (OECD)
United Nations Conference on Trade and Development (UNCTAD)
World Bank
World Customs Organization (WCO)

Committee on Technical Barriers to Trade ……..

FAO/WTO Joint Codex Alimentarius Commission (Codex)
Food and Agriculture Organization (FAO)
International Electrotechnical Commission (IEC)
International Monetary Fund (IMF)
International Office of Epizootics (OIE)

International Organization for Standardization (ISO)
International Trade Centre (ITC)
Organization for Economic Cooperation and Development (OECD)
United Nations Conference on Trade and Development (UNCTAD)
United Nations Economic Commission for Europe (ECE)
World Bank
World Health Organization (WHO)
International intergovernmental organizations having ad hoc observer status
African, Caribbean and Pacific Group of States (ACP)
European Free Trade Association (EFTA)
International Organization of Legal Metrology (OILM)
Latin American Integration Association (ALADI)
United Nations Industrial Development Organization (UNIDO)

Committee on Trade-Related Investment Measures …….

International Monetary Fund (IMF)
Organization for Economic Cooperation and Development (OECD)
United Nations (UN)
United Nations Conference on Trade and Development (UNCTAD)
World Bank

Committee on Customs Valuation ……..

African, Caribbean and Pacific Group of States (ACP)
Inter-American Development Bank (IADB)
International Monetary Fund (IMF)
United Nations Conference on Trade and Development (UNCTAD)
World Bank
World Customs Organization (WCO)

Committee on Trade in Financial Services ……..

African, Caribbean and Pacific Group of States (ACP)
International Monetary Fund (IMF)
Organization for Economic Cooperation and Development (OECD)
United Nations (UN)
United Nations Conference on Trade and Development (UNCTAD)
World Bank

Working Party on GATS Rules ……..

International Monetary Fund (IMF)
Organization for Economic Cooperation and Development (OECD)
United Nations (UN)
United Nations Conference on Trade and Development (UNCTAD)
World Bank
Working Party on Domestic Regulation …….
African, Caribbean and Pacific Group of States (ACP)
International Monetary Fund (IMF)
Organization for Economic Cooperation and Development (OECD)

United Nations (UN)
United Nations Conference on Trade and Development (UNCTAD)
World Bank

Committee on Specific Commitments ……

International Monetary Fund (IMF)
Organization for Economic Cooperation and Development (OECD)
United Nations (UN)
United Nations Conference on Trade and Development (UNCTAD)
World Bank

Working Group on Transparency in Government Procurement ……..

International Monetary Fund (IMF)
International Trade Centre (ITC)
United Nations Commission on International Trade Law (UNCITRAL)
United Nations Conference on Trade and Development (UNCTAD)
World Bank

Working Group on the Relationship Between Trade and Investment …….

International Monetary Fund (IMF)
United Nations Conference on Trade and Development (UNCTAD)
World Bank
International intergovernmental organizations having ad hoc observer status
Organization for Economic Cooperation and Development (OECD)
United Nations Industrial Development Organization (UNIDO)

Working Group on the Interaction Between Trade and Competition Policy ……

International Monetary Fund (IMF)
Organization for Economic Cooperation and Development (OECD)
United Nations Conference on Trade and Development (UNCTAD)
World Bank

Working Group on Trade, Debt and Finance ……

Food and Agriculture Organization (FAO)
International Monetary Fund (IMF)
International Trade Centre (ITC)
Organization for Economic Cooperation and Development (OECD)
United Nations (UN)
United Nations Conference on Trade and Development (UNCTAD)
World Bank
World Intellectual Property Organization (WIPO)

Working Group on Trade and Transfer of Technology …….

International Monetary Fund (IMF)
United Nations Conference on Trade and Development (UNCTAD)
United Nations Industrial Development Organization (UNIDO)
World Bank

Committee on Government Procurement ……

International Monetary Fund (IMF)
International Trade Centre (ITC)
Organization for Economic Cooperation and Development (OECD)
United Nations Conference on Trade and Development (UNCTAD)

Committee on Trade in Civil Aircraft **back to top**
International Monetary Fund (IMF)
United Nations Conference on Trade and Development (UNCTAD)

Committee of Participants on the Expansion of Trade in Information Technology Products ……..

International Trade Centre (ITC)
Organization for Economic Cooperation and Development (OECD)
World Customs Organization (WCO)

HONG KONG WTO MINISTERIAL 2005: BRIEFING NOTES

An informal guide to 'WTOspeak.'

http://www.wto.org/english/thewto_e/minist_e/min05_e/brief_e/brief26_e.htm (2006)

Accounting rate. In telecoms, the charge made by one country's telephone network operator for calls originating in another country.

Ad valorem tariff. A tariff rate charged as percentage of the price.

Agenda 21. The Agenda for the 21st Century — a declaration from the 1992 Earth Summit (UN Conference on the Environment and Development) held in Rio de Janeiro.

Agricultural product. Defined for the coverage of the WTO's Agriculture Agreement, by the agreement's Annex 1. This excludes, for example, fish and forestry products. It includes various degrees of processing for different commodities.

Anti-dumping duties. GATT's Article 6 allows anti-dumping duties to be imposed on goods that are deemed to be exported below their normal prices, thus causing injury to producers of competing products in the importing country. These duties are equal to the difference between the goods' export price and their normal value, if dumping causes injury.

Appellate Body. An independent seven-person body that considers appeals in WTO disputes. When one or more parties to the dispute appeals, the Appellate Body reviews the findings in panel reports.

Article XX (i.e. 20). A GATT article listing allowed exceptions to the trade rules.

ATC. The WTO Agreement on Textiles and Clothing, which integrated trade in this sector back to GATT rules on 1 January 2005. The ATC expired on 1 January 2005.

AVE. Ad-valorem equivalent: a specific or other non-ad-valorem duty that is converted to its percentage or ad valorem equivalent.

Automaticity. In disputes, the "automatic" chronological progression for settling trade disputes in regard to panel establishment, terms of reference, composition and adoption procedures.

Basel Convention. A multilateral environmental agreement dealing with hazardous waste.

Berne Convention. A treaty, administered by WIPO, for the protection of the rights of authors in their literary and artistic works.

Binding. bound See "tariff binding"

BIT. Bilateral investment treaties.

Border protection. Any measure which acts to restrain imports at point of entry.

Box. In agriculture, a category of domestic support. Green box: supports considered not to distort trade and therefore permitted with no limits. Blue box: permitted supports linked to production, but subject to production limits, and therefore minimally trade-distorting. Amber box: supports considered to distort trade and therefore subject to reduction commitments.

BSE. Bovine spongiform encephalopathy, or "mad cow disease".

BTA. Border tax adjustment

CAP. Common Agricultural Policy — The EU's comprehensive system of production targets and marketing mechanisms designed to manage agricultural trade within the EU and with the rest of the world.

Carry forward. When an exporting country uses part of the following year's quota during the current year.

Carry over. When an exporting country utilizes the previous year's unused quota.

CBD Convention on Biological Diversity. It aims for the equitable sharing of benefits arising out of the utilization of genetic resources, and includes provisions concerning the access to genetic resources and the transfer of relevant technologies.

Circumvention. Getting around commitments in the WTO such as commitments to limit agricultural export subsidies. Includes avoiding quotas and other restrictions by altering the country of origin of a product; measures taken by exporters to evade anti-dumping or countervailing duties.

CITES. Convention on International Trade in Endangered Species. A multilateral environmental agreement.

Codex Alimentarius. FAO/WHO commission that deals with international standards on food safety.

Commercial presence. Having an office, branch, or subsidiary in a foreign country. In services, "mode 3" (see "modes of delivery").

Compound tariff. A tariff expressed as a combination of an "ad valorem" duty and a "specific" duty, added together or one subtracted from the other.

Compulsory licensing. For patents: when the authorities license companies or individuals other than the patent owner to use the rights of the patent — to make, use, sell or import a product under patent

(i.e. a patented product or a product made by a patented process) — without the permission of the patent owner. Allowed under the WTO's TRIPS (intellectual property) Agreement provided certain procedures and conditions are fulfilled. See also government use.

Counterfeit. Unauthorized representation of a registered trademark carried on goods identical or similar to goods for which the trademark is registered, with a view to deceiving the purchaser into believing that he/she is buying the original goods.

Countervailing measures. Action taken by the importing country, usually in the form of increased duties, to offset subsidies given to producers or exporters in the exporting country.

CTD. The WTO Committee on Trade and Development

CTE. The WTO Committee on Trade and Environment.

CTG. Council for Trade in Goods — oversees WTO agreements on goods.

Customs union. Members apply a common external tariff (e.g. the European Union).

Deficiency payment. A type of agricultural domestic support, paid by governments to producers of certain commodities and based on the difference between a target price and the domestic market price or loan rate, whichever is the less.

De minimis. A minimal (i.e. small) permitted amount: for trade-distorting domestic support in agriculture (of the amber box type), developed countries are allowed up to 5% of their agricultural production, developing countries up to 10%.

Distortion. When prices and production are higher or lower than levels that would usually exist in a competitive market.

Domestic support. (Sometimes "internal support".) In agriculture, any domestic subsidy or other measure which acts to maintain producer prices at levels above those prevailing in international trade; direct payments to producers, including deficiency payments, and input and marketing cost reduction measures available only for agricultural production.

DSB Dispute Settlement Body. — when the WTO General Council meets to settle trade disputes.

DSU. Dispute Settlement Understanding, the WTO agreement that covers dispute settlement — in full, the Understanding on Rules and Procedures Governing the Settlement of Disputes.

Dumping. Occurs when goods are exported at a price less than their normal value, generally meaning they are exported for less than they are sold in the domestic market or third-country markets, or at less than production cost.

EEP Export. Enhancement Programme — programme of US export subsidies given generally to compete with subsidized agricultural exports from the EU on certain export markets.

Electronic commerce. The production, advertising, sale and distribution of products via telecommunications networks.

EST. Environmentally-sound technology.

EST&P. Environmentally-sound technology and products.

Ex ante. ex post Before and after a measure is applied. exhaustion In intellectual property protection, the principle that once a product has been sold on a market, the intellectual property owner no longer has any rights over it. (A debate among WTO member governments is whether this applies to products put on the market under compulsory licences.) Countries' laws vary as to whether the right continues to be exhausted if the product is imported from one market into another, which affects the owner's rights over trade in the protected product. See also parallel imports.

Export-performance measure. Requirement that a certain quantity of production must be exported.
FDI. Foreign direct investment.

Food security. Concept which discourages opening the domestic market to foreign agricultural products on the principle that a country must be as self-sufficient as possible for its basic dietary needs.

Framework (Sometimes Agreed Framework). Annexes of General Council decision of 1 August 2004 outlining key points of modalities in agriculture and non-agricultural market access.

Free trade area (FTA). Trade within the group is duty-free but members set their own tariffs on imports from non-members (e.g. NAFTA).

Free-rider. A casual term used to infer that a country which does not make any trade concessions, profits, nonetheless, from tariff cuts and concessions made by other countries in negotiations under the most-favoured-nation principle.

GATS. The WTO's General Agreement on Trade in Services.

GATT. General Agreement on Tariffs and Trade, which has been superseded as an international organization by the WTO. An updated General Agreement is now the WTO agreement governing trade in goods. GATT 1947: The official legal term for the old (pre-1994) version of the GATT. GATT 1994: The official legal term for new version of the General Agreement, incorporated into the WTO, and including GATT 1947.

General obligations. Obligations which should be applied to all services sectors at the entry into force of the GATS agreement. geographical indications Place names (or words associated with a place) used to identify products (for example, "Champagne", "Tequila" or "Roquefort") which have a particular quality, reputation or other characteristic because they come from that place.

Government use. For patents: when the government itself uses or authorizes other persons to use the rights over a patented product or process, for government purposes, without the permission of the patent owner. See also compulsory licensing.
GSP. Generalized System of Preferences — programmes by developed countries granting preferential tariffs to imports from developing countries.

Harmonized System. An international nomenclature developed by the World Customs Organization, which is arranged in six-digit codes allowing all participating countries to classify traded goods on a

common basis. Beyond the six-digit level, countries are free to introduce national distinctions for tariffs and many other purposes.

Harmonizing formula. Used in tariff negotiations for much steeper reductions in higher tariffs than in lower tariffs, the final rates being "harmonized" i.e. closer together. Examples include "Swiss formula" and "tiered formula".

Initial commitments. Trade liberalizing commitments in services which members are prepared to make early on.

Integration programme. In textiles and clothing, the phasing out of Multifibre Arrangement restrictions in four stages starting on 1 January 1995 and ending on 1 January 2005.

Intellectual property rights. Ownership of ideas, including literary and artistic works (protected by copyright), inventions (protected by patents), signs for distinguishing goods of an enterprise (protected by trademarks) and other elements of industrial property.

Internal support. See "domestic support" (agriculture).

International Office of Epizootics. (Now known in English as the World Organization for Animal Health.) Deals with international standards concerning animal health.

IPRs. Intellectual property rights.

ITA. Information Technology Agreement, or formally the Ministerial Declaration on Trade in Information Technology Products.

ITC. The International Trade Centre, originally established by the old GATT and is now operated jointly by the WTO and the UN, the latter acting through the UN Conference on Trade and Development (UNCTAD). Focal point for technical cooperation on trade promotion of developing countries.

July Package. Package of Doha Development Agenda issues negotiated in July 2004 and agreed by the General Council on 1 August 2004. The package sealed key issues that were deadlocked at the 2003 Cancún Ministerial Conference. Included frameworks or outlines of modalities in agriculture and non-agricultural market access.

LCA. Life cycle analysis — a method of assessing whether a good or service is environmentally friendly.

LDCs. Least-developed countries.

Linear formula. Tariff reduction formula in the form of a linear function. The simplest form is a straight percentage cut e.g. a cut of 80% or 32%. Linear formulas have less of a narrowing effect on the final range of tariffs.
Lisbon Agreement Treaty, administered by the World Intellectual Property Organization (WIPO), for the protection of geographical indications and their international registration.

Local-content requirement. Demand that the investor purchase a certain amount of local materials for incorporation in the product.

Madrid Agreement Treaty, administered by the World Intellectual Property Organization (WIPO), for the repression of false or deceptive indications of source on goods.

Mailbox. In intellectual property, refers to the requirement of the TRIPS Agreement applying to WTO members which do not yet provide product patent protection for pharmaceuticals and for agricultural chemicals. Since 1 January 1995, when the WTO agreements entered into force, these countries have to establish a means by which applications of patents for these products can be filed. (An additional requirement says they must also put in place a system for granting "exclusive marketing rights" for the products whose patent applications have been filed.)

MEA. Multilateral environmental agreement.

MFA Multifibre Arrangement (1974-94), under which countries whose markets are disrupted by increased imports of textiles and clothing from another country were able to negotiate quota restrictions.

MFN. Most-favoured-nation treatment (GATT Article 1, GATS Article 2 and TRIPS Article 4), the principle of not discriminating between trading partners.

Mixed tariff. A tariff expressed as a conditional combination of an "ad valorem" duty and a "specific" duty, one applying below a limit, the other applying above it.

Modality. A way to proceed. In WTO negotiations, modalities set broad outlines — such as formulas or approaches for tariff reductions — for final commitments.

Modes of delivery. How international trade in services is supplied and consumed. Mode 1: cross border supply; mode 2: consumption abroad; mode 3: foreign commercial presence; and mode 4: movement of natural persons.

Montreal Protocol. A multilateral environmental agreement dealing with the depletion of the earth's ozone layer.

Multifunctionality. Idea that agriculture has many functions in addition to producing food and fibre, e.g. environmental protection, landscape preservation, rural employment, food security, etc. See non-trade concerns.

Multi-modal. Transportation using more than one mode. In the GATS negotiations, essentially door-to-door services that include international shipping.

National schedules. In services, the equivalent of tariff schedules in GATT, laying down the commitments accepted — voluntarily or through negotiation — by WTO members.

National treatment. The principle of giving others the same treatment as one's own nationals. GATT Article 3 requires that imports be treated no less favourably than the same or similar domestically-produced goods once they have passed customs. GATS Article 17 and TRIPS Article 3 also deal with national treatment for services and intellectual property protection.

Natural persons. People, as distinct from juridical persons such as companies and organizations.

Non-ad-valorem tariff. A tariff that is not expressed as a percentage of the price or value. Can be "specific", "compound", "mixed" or some other form. These other forms can be determined by

complex technical factors; for example, the duty can be based on the percentage content of the agricultural component (sugar, milk, alcohol content, etc.) or its strength (e.g. the degree of sweetness).

Non-agricultural products. In the non-agricultural market access negotiations, products not covered by Annex 1 of the Agriculture Agreement. Fish and forestry products are therefore non-agricultural, along with industrial products in general.

Non-linear formula. For tariff reductions (or subsidy cuts), a formula in the form of a mathematical function that is non-linear, usually designed so that higher tariffs have proportionately steeper cuts. The "Swiss formula" is a particular kind of non-linear formula.

Non-trade concerns. Similar to multifunctionality. The preamble of the Agriculture Agreement specifies food security and environmental protection as examples. Also cited by members are rural development and employment, and poverty alleviation.

NTBs. Non-tariff barriers, such as quotas, import licensing systems, sanitary regulations, prohibitions, etc. Same as "non-tariff measures".

NTMs. Non-tariff measures, such as quotas, import licensing systems, sanitary regulations, prohibitions, etc. Same as "non-tariff barriers".

Nuisance tariff. Tariff so low that it costs the government more to collect it than the revenue it generates.

Nullification and impairment. Damage to a country's benefits and expectations from its WTO membership through another country's change in its trade regime or failure to carry out its WTO obligations.

Offer In a negotiation, a country's proposal for its own further liberalization, usually an offer to improve access to its markets.

Panel. In the WTO dispute settlement procedure, an independent body established by the Dispute Settlement Body, usually consisting of three experts, to examine and issue recommendations on a particular dispute in the light of WTO provisions.

Parallel imports. When a product made legally (i.e. not pirated) abroad is imported without the permission of the intellectual property right-holder (e.g. the trademark or patent owner). Some countries allow this, others do not.

Paris Convention Treaty, administered by the World Intellectual Property Organization (WIPO), for the protection of industrial intellectual property, i.e. patents, utility models, industrial designs, etc.
Peace clause. Provision in Article 13 of the Agriculture Agreement saying agricultural subsidies committed under the agreement cannot be challenged under other WTO agreements, in particular the Subsidies Agreement and GATT. Expired at the end of 2003.

Piracy. Unauthorized copying of materials protected by intellectual property rights (such as copyright, trademarks, patents, geographical indications, etc) for commercial purposes and unauthorized commercial dealing in copied materials.

PPM. Process and production method.

price undertaking Undertaking by an exporter to raise the export price of the product to avoid the possibility of an anti-dumping duty.

Product-mandating. Requirement that the investor export to certain countries or region.

Protocols. Additional agreements attached to the GATS. The Second Protocol deals with the 1995 commitments on financial services. The Third Protocol deals with movement of natural persons.

Prudence, prudential. In financial services, terms used to describe an objective of market regulation by authorities to protect investors and depositors, to avoid instability or crises.

PSI Preshipment inspection — the practice of employing specialized private companies to check shipment details of goods ordered overseas — i.e. price, quantity, quality, etc.

QRs Quantitative restrictions — specific limits on the quantity or value of goods that can be imported (or exported) during a specific time period.

Reform process/programme. The Uruguay Round Agriculture Agreement starts a reform process. It sets out a first step, in the process, i.e. a programme for reducing subsidies and protection and other reforms. Current negotiations launched under Article 20 are for continuing the reform process.

Rome Convention Treaty, administered by the World Intellectual Property Organization (WIPO), United Nations Educational, Scientific and Cultural Organization (UNESCO) and International Labour Organization (ILO), for the protection of the works of performers, broadcasting organizations and producers of phonograms.

Rules of origin. Laws, regulations and administrative procedures which determine a product's country of origin. A decision by a customs authority on origin can determine whether a shipment falls within a quota limitation, qualifies for a tariff preference or is affected by an anti-dumping duty. These rules can vary from country to country.

S&D. (Sometimes "SDT".) "Special and differential treatment" provisions for developing countries. Contained in several WTO agreements.

Safeguard measure. Action taken to protect a specific industry from an unexpected build-up of imports — generally governed by Article 19 of GATT. The Agriculture Agreement and Textiles and Clothing Agreement have different specific types of safeguards: "special safeguards" in agriculture, and "transitional safeguards" in textiles and clothing. See also SSM.

Schedule. In general, a WTO member's list of commitments on market access (bound tariff rates, access to services markets). Goods schedules can include commitments on agricultural subsidies and domestic support. Services commitments include bindings on national treatment. Also: "schedule of concessions", "schedule of specific commitments".

Schedule of concessions. List of bound tariff rates.

Sensitive products. In the agriculture negotiations, all countries will be allowed extra flexibility in market access for these products.

Singapore issues. Four issues introduced to the WTO agenda at the December 1996 Ministerial Conference in Singapore: trade and investment, trade and competition policy, transparency in government procurement, and trade facilitation. Currently only trade facilitation is part of the negotiations.

SP. Special products: products for which developing countries are to be given extra flexibility in market access for food and livelihood security and rural development. Agreed in the 1 August 2004 agriculture framework.

Specific commitments. See "schedule".

Specific tariff. A tariff rate charged as fixed amount per quantity such as $100 per ton. See "ad valorem tariff".

SPS. Sanitary and phytosanitary measures or regulations — implemented by governments to protect human, animal and plant life and health, and to help ensure that food is safe for consumption.

SSM. Special safeguard mechanism: in the agriculture negotiations, a safeguard that developing countries will be able to use to deal with import surges, price falls or both.

Subsidy. There are two general types of subsidies: export and domestic. An export subsidy is a benefit conferred on a firm by the government that is contingent on exports. A domestic subsidy is a benefit not directly linked to exports. See also "domestic support".

Swing. In textiles and clothing, when an exporting country transfers part of a quota from one product to another restrained product.

Swiss formula. A kind of "non-linear" tariff reduction formula — i.e. one that has proportionately steeper cuts on higher tariffs — whose coefficient also sets the maximum possible final tariff.

Tariff binding . Commitment not to increase a rate of duty beyond an agreed level. Once a rate of duty is bound, it may not be raised without compensating the affected parties.

Tariff escalation. Higher import duties on semi-processed products than on raw materials, and higher still on finished products. This practice protects domestic processing industries and discourages the development of processing activity in the countries where raw materials originate.

Tariff peaks. Relatively high tariffs, usually on "sensitive" products, amidst generally low tariff levels. For industrialized countries, tariffs of 15% and above are generally recognized as "tariff peaks".

Tariffication. Procedures relating to the agricultural market-access provision in which all non-tariff measures are converted into tariffs.

Tariffs. Customs duties on merchandise imports. Levied either on an ad valorem basis (percentage of value) or on a specific basis (e.g. $7 per 100 kgs.). Tariffs give price advantage to similar locally-produced goods and raise revenues for the government.

TBT. The WTO Agreement on Technical Barriers to Trade.

Tiered formula. Approach to tariff reductions that sets higher cuts for higher tariffs by grouping products into tiers according to the height of their tariffs. Agreed in the 1 August 2004 framework for agriculture, which also prescribes a tiered approach for reducing trade-distorting domestic supports.

TMB. The Textiles Monitoring Body, consisting of a chairman plus 10 members acting in a personal capacity, oversaw the implementation of commitments under the Agreement on Textiles and Clothing.

TPRB, TPRM. The Trade Policy Review Body is the General Council operating under special procedures to review trade policies and practices of individual WTO members under the Trade Policy Review Mechanism.

Trade facilitation. Removing obstacles to the movement of goods across borders (e.g. simplification of customs procedures).

Trade-balancing measure. Requirement that the investor use earnings from exports to pay for imports.

Transitional safeguard mechanism. In textiles and clothing, allows members to impose restrictions against individual exporting countries if the importing country can show that both overall imports of a product and imports from the individual countries are entering the country in such increased quantities as to cause — or threaten — serious damage to the relevant domestic industry.

transparency Degree to which trade policies and practices, and the process by which they are established, are open and predictable.

TRIMs. Trade-related investment measures (note small "s").

TRIPS. Trade-Related Aspects of Intellectual Property Rights (note capital "S").

UNCITRAL. United Nations Centre for International Trade Law, drafts model laws such as the one on government procurement.
UNCTAD. The UN Conference on Trade and Development.

UPOV. International Union for the Protection of New Varieties of Plants (Union internationale pour la protection des obtentions végétales)
Uruguay Round. Multilateral trade negotiations launched at Punta del Este, Uruguay in September 1986 and concluded in Geneva in December 1993. Signed by Ministers in Marrakesh, Morocco, in April 1994.

Uruguay Round approach. For tariff reductions, a flexible formula that specifies average percentage reductions, allowing variations around the average subject to a minimum percentage cut.

Variable levy. Customs duty rate which varies in response to domestic price criterion.

VRA, VER, OMA. Voluntary restraint arrangement, voluntary export restraint, orderly marketing arrangement. Bilateral arrangements whereby an exporting country (government or industry) agrees

to reduce or restrict exports without the importing country having to make use of quotas, tariffs or other import controls.

Waiver. Permission granted by WTO members allowing a WTO member not to comply with normal commitments. Waivers have time limits and extensions have to be justified.

Washington Treaty. Treaty for the protection of intellectual property in respect of lay-out designs of integrated circuits.

WCO. World Customs Organization, a multilateral body located in Brussels through which participating countries seek to simplify and rationalize customs procedures.

WIPO. World Intellectual Property Organization.

WTO DOHA MINISTERIAL DECLARATION.

Adopted on 14 November 2001

http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.doc

WT/MIN(01)/DEC/1

20 November 2001

1. The multilateral trading system embodied in the World Trade Organization has contributed significantly to economic growth, development and employment throughout the past fifty years. We are determined, particularly in the light of the global economic slowdown, to maintain the process of reform and liberalization of trade policies, thus ensuring that the system plays its full part in promoting recovery, growth and development. We therefore strongly reaffirm the principles and objectives set out in the Marrakesh Agreement Establishing the World Trade Organization, and pledge to reject the use of protectionism.

2. International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO Members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration. Recalling the Preamble to the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play.

3. We recognize the particular vulnerability of the least-developed countries and the special structural difficulties they face in the global economy. We are committed to addressing the marginalization of least-developed countries in international trade and to improving their effective participation in the multilateral trading system. We recall the commitments made by Ministers at our meetings in Marrakesh, Singapore and Geneva, and by the international community at the Third UN Conference on Least-Developed Countries in Brussels, to help least-developed countries secure beneficial and meaningful integration into the multilateral trading system and the global economy. We are determined that the WTO will play its part in building effectively on these commitments under the Work Programme we are establishing.

4. We stress our commitment to the WTO as the unique forum for global trade rule-making and liberalization, while also recognizing that regional trade agreements can play an important role in promoting the liberalization and expansion of trade and in fostering development.

5. We are aware that the challenges Members face in a rapidly changing international environment cannot be addressed through measures taken in the trade field alone. We shall continue to work with the Bretton Woods institutions for greater coherence in global economic policy-making.

6. We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive. We take note of the efforts by Members to conduct national environmental assessments of trade policies on a voluntary basis. We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements. We welcome the WTO´s continued cooperation with UNEP and other inter-governmental environmental organizations. We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations, especially in the lead-up to the World Summit on Sustainable Development to be held in Johannesburg, South Africa, in September 2002.

7. We reaffirm the right of Members under the General Agreement on Trade in Services to regulate, and to introduce new regulations on, the supply of services.

8. We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labour standards. We take note of work under way in the International Labour Organization (ILO) on the social dimension of globalization.

9. We note with particular satisfaction that this Conference has completed the WTO accession procedures for China and Chinese Taipei. We also welcome the accession as new Members, since our last Session, of Albania, Croatia, Georgia, Jordan, Lithuania, Moldova and Oman, and note the extensive market-access commitments already made by these countries on accession. These accessions will greatly strengthen the multilateral trading system, as will those of the 28 countries now negotiating their accession. We therefore attach great importance to concluding accession proceedings as quickly as possible. In particular, we are committed to accelerating the accession of least-developed countries.

10. Recognizing the challenges posed by an expanding WTO membership, we confirm our collective responsibility to ensure internal transparency and the effective participation of all Members. While emphasizing the intergovernmental character of the organization, we are committed to making the WTO's operations more transparent, including through more effective and prompt dissemination of information, and to improve dialogue with the public. We shall therefore at the national and multilateral levels continue to promote a better public understanding of the WTO and to communicate the benefits of a liberal, rules-based multilateral trading system.

11. In view of these considerations, we hereby agree to undertake the broad and balanced Work Programme set out below. This incorporates both an expanded negotiating agenda and other important decisions and activities necessary to address the challenges facing the multilateral trading system.

WORK PROGRAMME

IMPLEMENTATION-RELATED ISSUES AND CONCERNS

12. We attach the utmost importance to the implementation-related issues and concerns raised by Members and are determined to find appropriate solutions to them. In this connection, and having regard to the General Council Decisions of 3 May and 15 December 2000, we further adopt the Decision on Implementation-Related Issues and Concerns in document WT/MIN(01)/17 to address a number of implementation problems faced by Members. We agree that negotiations on outstanding implementation issues shall be an integral part of the Work Programme we are establishing, and that agreements reached at an early stage in these negotiations shall be treated in accordance with the provisions of paragraph 47 below. In this regard, we shall proceed as follows: (a) where we provide a specific negotiating mandate in this Declaration, the relevant implementation issues shall be addressed under that mandate; (b) the other outstanding implementation issues shall be addressed as a matter of priority by the relevant WTO bodies, which shall report to the Trade Negotiations Committee, established under paragraph 46 below, by the end of 2002 for appropriate action.

AGRICULTURE

13. We recognize the work already undertaken in the negotiations initiated in early 2000 under Article 20 of the Agreement on Agriculture, including the large number of negotiating proposals submitted on behalf of a total of 121 Members. We recall the long-term objective referred to in the Agreement to establish a fair and market-oriented trading system through a programme of fundamental reform encompassing strengthened rules and specific commitments on support and protection in order to correct and prevent restrictions and distortions in world agricultural markets. We reconfirm our commitment to this programme. Building on the work carried out to date and without prejudging the outcome of the negotiations we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development. We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture.

14. Modalities for the further commitments, including provisions for special and differential treatment, shall be established no later than 31 March 2003. Participants shall submit their comprehensive draft Schedules based on these modalities no later than the date of the Fifth Session of the Ministerial Conference. The negotiations, including with respect to rules and disciplines and related legal texts, shall be concluded as part and at the date of conclusion of the negotiating agenda as a whole.

SERVICES

15. The negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries. We recognize the work already undertaken in the negotiations, initiated in January 2000 under Article

XIX of the General Agreement on Trade in Services, and the large number of proposals submitted by Members on a wide range of sectors and several horizontal issues, as well as on movement of natural persons. We reaffirm the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on 28 March 2001 as the basis for continuing the negotiations, with a view to achieving the objectives of the General Agreement on Trade in Services, as stipulated in the Preamble, Article IV and Article XIX of that Agreement. Participants shall submit initial requests for specific commitments by 30 June 2002 and initial offers by 31 March 2003.

MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS

16. We agree to negotiations which shall aim, by modalities to be agreed, to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. Product coverage shall be comprehensive and without *a priori* exclusions. The negotiations shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments, in accordance with the relevant provisions of Article XXVIII *bis* of GATT 1994 and the provisions cited in paragraph 50 below. To this end, the modalities to be agreed will include appropriate studies and capacity-building measures to assist least-developed countries to participate effectively in the negotiations.

TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

17. We stress the importance we attach to implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines and, in this connection, are adopting a separate Declaration.

18. With a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) on the implementation of Article 23.4, we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference. We note that issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPS pursuant to paragraph 12 of this Declaration.

19. We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.

RELATIONSHIP BETWEEN TRADE AND INVESTMENT

20. Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-

building in this area as referred to in paragraph 21, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

21. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

22. In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between Members. Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable Members to undertake obligations and commitments commensurate with their individual needs and circumstances. Due regard should be paid to other relevant WTO provisions. Account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.

INTERACTION BETWEEN TRADE AND COMPETITION POLICY

23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

TRANSPARENCY IN GOVERNMENT PROCUREMENT

26. Recognizing the case for a multilateral agreement on transparency in government procurement and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations. These negotiations will build on the progress made in the Working Group on Transparency in Government Procurement by that time and take into account participants' development priorities, especially those of least-developed country participants. Negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers. We commit ourselves to ensuring adequate technical assistance and support for capacity building both during the negotiations and after their conclusion.

TRADE FACILITATION

27. Recognizing the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations. In the period until the Fifth Session, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of Members, in particular developing and least-developed countries. We commit ourselves to ensuring adequate technical assistance and support for capacity building in this area.

WTO RULES

28. In the light of experience and of the increasing application of these instruments by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries. We note that fisheries subsidies are also referred to in paragraph 31.
29. We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.

DISPUTE SETTLEMENT UNDERSTANDING

30. We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by Members, and aim to agree on improvements and clarifications not later than May 2003, at which time we will take steps to ensure that the results enter into force as soon as possible thereafter.

TRADE AND ENVIRONMENT

31. With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

(i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;
(ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;
(iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

We note that fisheries subsidies form part of the negotiations provided for in paragraph 28.

32. We instruct the Committee on Trade and Environment, in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to:

(i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development;
(ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and
(iii) labelling requirements for environmental purposes.

Work on these issues should include the identification of any need to clarify relevant WTO rules. The Committee shall report to the Fifth Session of the Ministerial Conference, and make recommendations, where appropriate, with respect to future action, including the desirability of negotiations. The outcome of this work as well as the negotiations carried out under paragraph 31(i) and (ii) shall be compatible with the open and non-discriminatory nature of the multilateral trading system, shall not add to or diminish the rights and obligations of Members under existing WTO agreements, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures, nor alter the balance of these rights and obligations, and will take into account the needs of developing and least-developed countries.

33. We recognize the importance of technical assistance and capacity building in the field of trade and environment to developing countries, in particular the least-developed among them. We also encourage that expertise and experience be shared with Members wishing to perform environmental reviews at the national level. A report shall be prepared on these activities for the Fifth Session.

ELECTRONIC COMMERCE

34. We take note of the work which has been done in the General Council and other relevant bodies since the Ministerial Declaration of 20 May 1998 and agree to continue the Work Programme on Electronic Commerce. The work to date demonstrates that electronic commerce creates new challenges and opportunities for trade for Members at all stages of development, and we recognize the importance of creating and maintaining an environment which is favourable to the future development of electronic commerce. We instruct the General Council to consider the most appropriate institutional arrangements for handling the Work Programme, and to report on further progress to the Fifth Session of the Ministerial Conference. We declare that Members will maintain their current practice of not imposing customs duties on electronic transmissions until the Fifth Session.

SMALL ECONOMIES

35. We agree to a work programme, under the auspices of the General Council, to examine issues relating to the trade of small economies. The objective of this work is to frame responses to the trade-related issues identified for the fuller integration of small, vulnerable economies into the multilateral trading system, and not to create a sub-category of WTO Members. The General Council shall review the work programme and make recommendations for action to the Fifth Session of the Ministerial Conference.

TRADE, DEBT AND FINANCE

36. We agree to an examination, in a Working Group under the auspices of the General Council, of the relationship between trade, debt and finance, and of any possible recommendations on steps that might be taken within the mandate and competence of the WTO to enhance the capacity of the multilateral trading system to contribute to a durable solution to the problem of external indebtedness of developing and least-developed countries, and to strengthen the coherence of international trade and financial policies, with a view to safeguarding the multilateral trading system from the effects of financial and monetary instability. The General Council shall report to the Fifth Session of the Ministerial Conference on progress in the examination.

TRADE AND TRANSFER OF TECHNOLOGY

37. We agree to an examination, in a Working Group under the auspices of the General Council, of the relationship between trade and transfer of technology, and of any possible recommendations on steps that might be taken within the mandate of the WTO to increase flows of technology to developing countries. The General Council shall report to the Fifth Session of the Ministerial Conference on progress in the examination.

TECHNICAL COOPERATION AND CAPACITY BUILDING

38. We confirm that technical cooperation and capacity building are core elements of the development dimension of the multilateral trading system, and we welcome and endorse the New Strategy for WTO Technical Cooperation for Capacity Building, Growth and Integration. We instruct the Secretariat, in coordination with other relevant agencies, to support domestic efforts for mainstreaming trade into national plans for economic development and strategies for poverty

reduction. The delivery of WTO technical assistance shall be designed to assist developing and least-developed countries and low-income countries in transition to adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership, including drawing on the benefits of an open, rules-based multilateral trading system. Priority shall also be accorded to small, vulnerable, and transition economies, as well as to Members and Observers without representation in Geneva. We reaffirm our support for the valuable work of the International Trade Centre, which should be enhanced.

39. We underscore the urgent necessity for the effective coordinated delivery of technical assistance with bilateral donors, in the OECD Development Assistance Committee and relevant international and regional intergovernmental institutions, within a coherent policy framework and timetable. In the coordinated delivery of technical assistance, we instruct the Director-General to consult with the relevant agencies, bilateral donors and beneficiaries, to identify ways of enhancing and rationalizing the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries and the Joint Integrated Technical Assistance Programme (JITAP).

40. We agree that there is a need for technical assistance to benefit from secure and predictable funding. We therefore instruct the Committee on Budget, Finance and Administration to develop a plan for adoption by the General Council in December 2001 that will ensure long-term funding for WTO technical assistance at an overall level no lower than that of the current year and commensurate with the activities outlined above.

41. We have established firm commitments on technical cooperation and capacity building in various paragraphs in this Ministerial Declaration. We reaffirm these specific commitments contained in paragraphs 16, 21, 24, 26, 27, 33, 38-40, 42 and 43, and also reaffirm the understanding in paragraph 2 on the important role of sustainably financed technical assistance and capacity-building programmes. We instruct the Director-General to report to the Fifth Session of the Ministerial Conference, with an interim report to the General Council in December 2002 on the implementation and adequacy of these commitments in the identified paragraphs.

LEAST-DEVELOPED COUNTRIES

42. We acknowledge the seriousness of the concerns expressed by the least-developed countries (LDCs) in the Zanzibar Declaration adopted by their Ministers in July 2001. We recognize that the integration of the LDCs into the multilateral trading system requires meaningful market access, support for the diversification of their production and export base, and trade-related technical assistance and capacity building. We agree that the meaningful integration of LDCs into the trading system and the global economy will involve efforts by all WTO Members. We commit ourselves to the objective of duty-free, quota-free market access for products originating from LDCs. In this regard, we welcome the significant market access improvements by WTO Members in advance of the Third UN Conference on LDCs (LDC-III), in Brussels, May 2001. We further commit ourselves to consider additional measures for progressive improvements in market access for LDCs. Accession of LDCs remains a priority for the Membership. We agree to work to facilitate and accelerate negotiations with acceding LDCs. We instruct the Secretariat to reflect the priority we attach to LDCs' accessions in the annual plans for technical assistance. We reaffirm the commitments we undertook at LDC-III, and agree that the WTO should take into account, in designing its work programme for LDCs, the trade-related elements of the Brussels Declaration and Programme of Action, consistent with the WTO's mandate, adopted at LDC-III. We instruct the Sub-Committee for Least-Developed Countries to design such a work programme and to report on the agreed work programme to the General Council at its first meeting in 2002.

43. We endorse the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries (IF) as a viable model for LDCs' trade development. We urge development partners to significantly increase contributions to the IF Trust Fund and WTO extra-budgetary trust funds in favour of LDCs. We urge the core agencies, in coordination with development partners, to explore the enhancement of the IF with a view to addressing the supply-side constraints of LDCs and the extension of the model to all LDCs, following the review of the IF and the appraisal of the ongoing Pilot Scheme in selected LDCs. We request the Director-General, following coordination with heads of the other agencies, to provide an interim report to the General Council in December 2002 and a full report to the Fifth Session of the Ministerial Conference on all issues affecting LDCs.

SPECIAL AND DIFFERENTIAL TREATMENT

44. We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.

ORGANIZATION AND MANAGEMENT OF THE WORK PROGRAMME

45. The negotiations to be pursued under the terms of this Declaration shall be concluded not later than 1 January 2005. The Fifth Session of the Ministerial Conference will take stock of progress in the negotiations, provide any necessary political guidance, and take decisions as necessary. When the results of the negotiations in all areas have been established, a Special Session of the Ministerial Conference will be held to take decisions regarding the adoption and implementation of those results.

46. The overall conduct of the negotiations shall be supervised by a Trade Negotiations Committee under the authority of the General Council. The Trade Negotiations Committee shall hold its first meeting not later than 31 January 2002. It shall establish appropriate negotiating mechanisms as required and supervise the progress of the negotiations.

47. With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations.

48. Negotiations shall be open to:

- **(i) all Members of the WTO; and**
- **(ii) States and separate customs territories currently in the process of accession and those that inform Members, at a regular meeting of the General Council, of their intention to negotiate the terms of their membership and for whom an accession working party is established.**

Decisions on the outcomes of the negotiations shall be taken only by WTO Members.

49. The negotiations shall be conducted in a transparent manner among participants, in order to facilitate the effective participation of all. They shall be conducted with a view to ensuring benefits to all participants and to achieving an overall balance in the outcome of the negotiations.

50. The negotiations and the other aspects of the Work Programme shall take fully into account the principle of special and differential treatment for developing and least-developed countries embodied in: Part IV of the GATT 1994; the Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries; the Uruguay Round Decision on Measures in Favour of Least-Developed Countries; and all other relevant WTO provisions.

51. The Committee on Trade and Development and the Committee on Trade and Environment shall, within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected.

52. Those elements of the Work Programme which do not involve negotiations are also accorded a high priority. They shall be pursued under the overall supervision of the General Council, which shall report on progress to the Fifth Session of the Ministerial Conference.

UNDERSTANDING THE WTO: SETTLING DISPUTES

A Unique Contribution.

http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm#top (2006).

Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case. First rulings are made by a panel and endorsed (or rejected) by the WTO's full membership. Appeals based on points of law are possible.

However, the point is not to pass judgement. The priority is to settle disputes, through consultations if possible. By July 2005, only about 130 of the nearly 332 cases had reached the full panel process. Most of the rest have either been notified as settled "out of court" or remain in a prolonged consultation phase — some since 1995.

Principles: equitable, fast, effective, mutually acceptable.

How long to settle a dispute? **These approximate periods for each stage of a dispute settlement procedure are target figures — the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.**	
60 days	**Consultations, mediation, etc**
45 days	**Panel set up and panellists appointed**
6 months	**Final panel report to parties**
3 weeks	**Final panel report to WTO members**
60 days	**Dispute Settlement Body adopts report (if no appeal)**
Total = 1 year	**(without appeal)**
60-90 days	**Appeals report**
30 days	**Dispute Settlement Body adopts appeals report**
Total = 1y 3m	**(with appeal)**

How are disputes settled?

Settling disputes is the responsibility of the Dispute Settlement Body (the General Council in another guise), which consists of all WTO members. The Dispute Settlement Body has the sole authority to establish "panels" of experts to consider the case, and to accept or reject the panels' findings or the results of an appeal. It monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a ruling.

- **First stage: consultation (up to 60 days). Before taking any other actions the countries in dispute have to talk to each other to see if they can settle their differences by themselves. If that fails, they can also ask the WTO director-general to mediate or try to help in any other way.**
- **Second stage: the panel (up to 45 days for a panel to be appointed, plus 6 months for the panel to conclude). If consultations fail, the complaining country can ask for a panel to be appointed. The country "in the dock" can block the creation of a panel once, but when the Dispute Settlement Body meets for a second time, the appointment can no longer be blocked (unless there is a consensus against appointing the panel).**

Officially, the panel is helping the Dispute Settlement Body make rulings or recommendations. But because the panel's report can only be rejected by consensus in the Dispute Settlement Body, its conclusions are difficult to overturn. The panel's findings have to be based on the agreements cited. The panel's final report should normally be given to the parties to the dispute within six months. In cases of urgency, including those concerning perishable goods, the deadline is shortened to three months.

The agreement describes in some detail how the panels are to work. The main stages are:

- **Before the first hearing: each side in the dispute presents its case in writing to the panel.**
- **First hearing: the case for the complaining country and defence: the complaining country (or countries), the responding country, and those that have announced they have an interest in the dispute, make their case at the panel's first hearing.**
- **Rebuttals: the countries involved submit written rebuttals and present oral arguments at the panel's second meeting.**
- **Experts: if one side raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report.**
- **First draft: the panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment. This report does not include findings and conclusions.**
- **Interim report: The panel then submits an interim report, including its findings and conclusions, to the two sides, giving them one week to ask for a review.**
- **Review: The period of review must not exceed two weeks. During that time, the panel may hold additional meetings with the two sides.**
- **Final report: A final report is submitted to the two sides and three weeks later, it is circulated to all WTO members. If the panel decides that the disputed trade measure does break a WTO agreement or an obligation, it recommends that the measure be made to conform with WTO rules. The panel may suggest how this could be done.**
- **The report becomes a ruling: The report becomes the Dispute Settlement Body's ruling or recommendation within 60 days unless a consensus rejects it. Both sides can appeal the report (and in some cases both sides do).**

Appeals.

Either side can appeal a panel's ruling. Sometimes both sides do so. Appeals have to be based on points of law such as legal interpretation — they cannot reexamine existing evidence or examine new issues.

Each appeal is heard by three members of a permanent seven-member Appellate Body set up by the Dispute Settlement Body and broadly representing the range of WTO membership. Members of the Appellate Body have four-year terms. They have to be individuals with recognized standing in the field of law and international trade, not affiliated with any government.

The appeal can uphold, modify or reverse the panel's legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum of 90 days.

The Dispute Settlement Body has to accept or reject the appeals report within 30 days — and rejection is only possible by consensus.

The case has been decided: what next?

Go directly to jail. Do not pass Go, do not collect … . Well, not exactly. But the sentiments apply. If a country has done something wrong, it should swiftly correct its fault. And if it continues to break an agreement, it should offer compensation or suffer a suitable penalty that has some bite.

Even once the case has been decided, there is more to do before trade sanctions (the conventional form of penalty) are imposed. The priority at this stage is for the losing "defendant" to bring its policy into line with the ruling or recommendations. The dispute settlement agreement stresses that "prompt compliance with recommendations or rulings of the DSB [Dispute Settlement Body] is essential in order to ensure effective resolution of disputes to the benefit of all Members".

If the country that is the target of the complaint loses, it must follow the recommendations of the panel report or the appeals report. It must state its intention to do so at a Dispute Settlement Body meeting held within 30 days of the report's adoption. If complying with the recommendation immediately proves impractical, the member will be given a "reasonable period of time" to do so. If it fails to act within this period, it has to enter into negotiations with the complaining country (or countries) in order to determine mutually-acceptable compensation — for instance, tariff reductions in areas of particular interest to the complaining side.

If after 20 days, no satisfactory compensation is agreed, the complaining side may ask the Dispute Settlement Body for permission to impose limited trade sanctions ("suspend concessions or obligations") against the other side. The Dispute Settlement Body must grant this authorization within 30 days of the expiry of the "reasonable period of time" unless there is a consensus against the request.

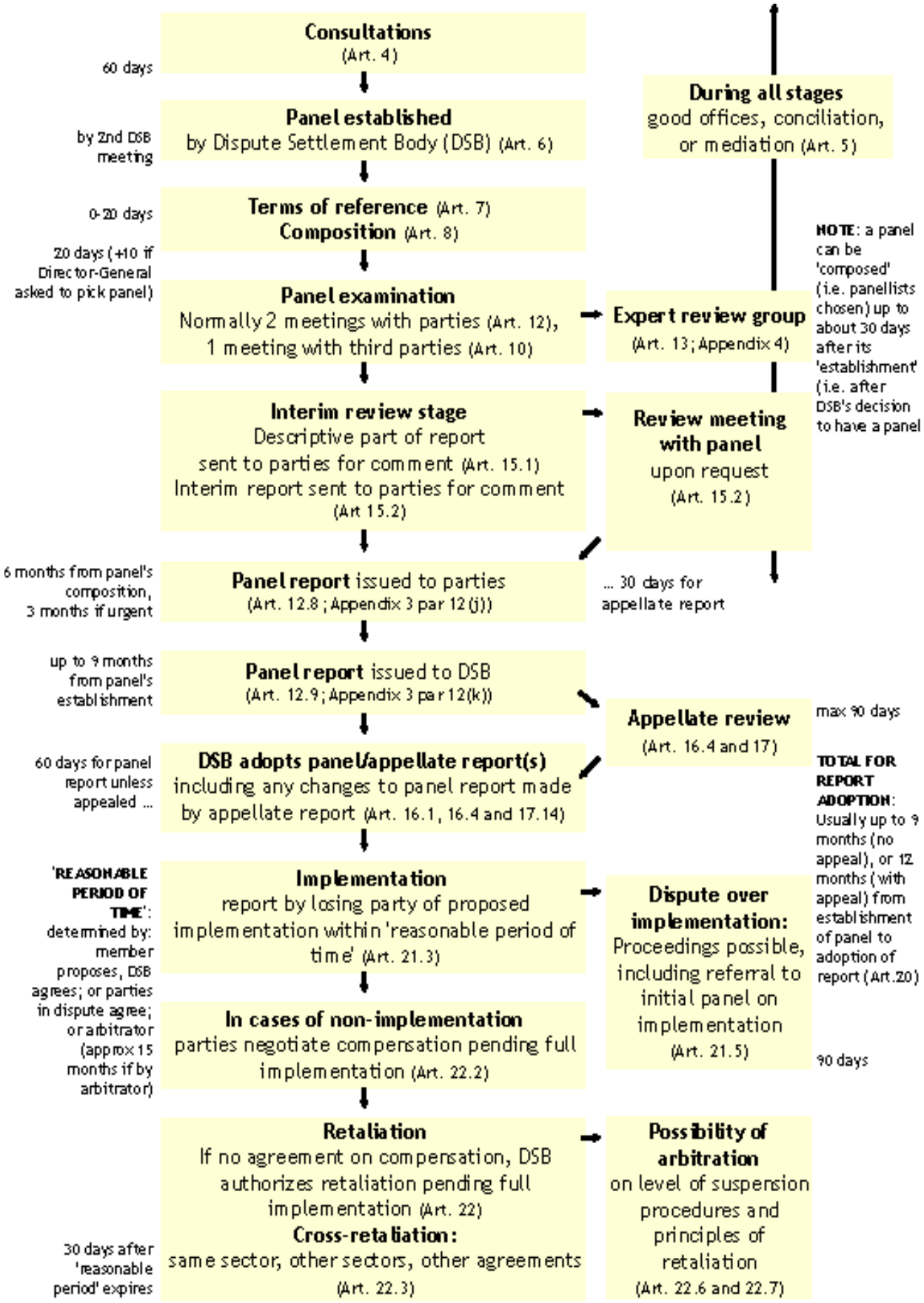
In principle, the sanctions should be imposed in the same sector as the dispute. If this is not practical or if it would not be effective, the sanctions can be imposed in a different sector of the same agreement. In turn, if this is not effective or practicable and if the circumstances are serious enough, the action can be taken under another agreement. The objective is to minimize the chances of actions spilling over into unrelated sectors while at the same time allowing the actions to be effective.

In any case, the Dispute Settlement Body monitors how adopted rulings are implemented. Any outstanding case remains on its agenda until the issue is resolved.

The panel process.

The various stages a dispute can go through in the WTO. At all stages, countries in dispute are encouraged to consult each other in order to settle "out of court". At all stages, the WTO director-general is available to offer his good offices, to mediate or to help achieve a conciliation.

Note: some specified times are maximums, some are minimums, some binding, some not.


Consultations
(Art. 4)
60 days
Panel established
by Dispute Settlement Body (DSB) (Art. 6)
by 2nd DSB meeting
Terms of reference (Art. 7)
Composition (Art. 8)
0-20 days
20 days (+10 if Director-General asked to pick panel)
Panel examination
Normally 2 meetings with parties (Art. 12), 1 meeting with third parties (Art. 10)
Interim review stage
Descriptive part of report sent to parties for comment (Art. 15.1)
Interim report sent to parties for comment (Art 15.2)
Panel report issued to parties
(Art. 12.8 ; Appendix 3 par 12(j))
6 months from panel's composition, 3 months if urgent
Panel report issued to DSB
(Art. 12.9; Appendix 3 par 12(k))
up to 9 months from panel's establishment
DSB adopts panel/appellate report(s)
including any changes to panel report made by appellate report (Art. 16.1, 16.4 and 17.14)
60 days for panel report unless appealed ...
Implementation
report by losing party of proposed implementation within 'reasonable period of time' (Art. 21.3)
'REASONABLE PERIOD OF TIME': determined by: member proposes, DSB agrees; or parties in dispute agree; or arbitrator (approx 15 months if by arbitrator)
In cases of non-implementation
parties negotiate compensation pending full implementation (Art. 22.2)
Retaliation
If no agreement on compensation, DSB authorizes retaliation pending full implementation (Art. 22)
Cross-retaliation:
same sector, other sectors, other agreements
(Art. 22.3)
30 days after 'reasonable period' expires
During all stages
good offices, conciliation, or mediation (Art. 5)
Expert review group
(Art. 13; Appendix 4)
NOTE: a panel can be 'composed' (i.e. panellists chosen) up to about 30 days after its 'establishment' (i.e. after DSB's decision to have a panel
Review meeting with panel
upon request
(Art. 15.2)
... 30 days for appellate report
Appellate review
(Art. 16.4 and 17)
max 90 days
TOTAL FOR REPORT ADOPTION: Usually up to 9 months (no appeal), or 12 months (with appeal) from establishment of panel to adoption of report (Art.20)
Dispute over implementation:
Proceedings possible, including referral to initial panel on implementation
(Art. 21.5)
90 days
Possibility of arbitration
on level of suspension procedures and principles of retaliation
(Art. 22.6 and 22.7)

UPDATE OF WTO DISPUTE SETTLEMENT CASES.

WT/DS/OV/25 (12 December 2005) (Secretariat)

STATISTICAL OVERVIEW

	Complaints notified to the WTO[1]	Active Panels[2]	Appellate Body and Panel Reports Adopted[3]	Mutually Agreed Solutions	Other Settled or Inactive[4] Disputes
Reporting period/ date	since 1.1.1995	on reporting date	since 1.1.1995	since 1.1.1995	since 1.1.1995
Number	335	20	95	52	29

EXPLANATORY NOTES:

[1] This category encompasses all requests for consultations notified to the WTO, including those requests which have led to panel and appellate review proceedings.
[2] This category encompasses pending or suspended panel proceedings or appellate review proceedings, with the exception of proceedings pursuant to Article 21.5 of the DSU.
[3] This category does not include reports resulting from proceedings pursuant to Article 21.5 of the DSU.
[4] This category includes cases where the contested measure has been terminated, a panel request was withdrawn, etc.

	Active Compliance Panels[1]	Adopted Appellate Body and Panel Compliance Reports[2]	Arbitrations on Level of Suspension of Concessions[3]	WTO Authorizations of Suspension of Concessions[4]
Reporting period/ date	on reporting date	since 1.1.1995	since 1.1.1995	since 1.1.1995
Number	3	14	16	15

EXPLANATORY NOTES:

[1] This category encompasses pending or suspended panel or appellate review proceedings pursuant to Article 21.5 of the DSU.
[2] This category includes reports resulting from proceedings under Article 21.5 of the DSU.
[3] This category covers arbitration proceedings pursuant to Article 22.6 and 22.7 of the DSU and Article 4.11 of the Subsidies Agreement.
[4] This category covers authorizations granted by the WTO pursuant to Article 22.7 of the DSU and Article 4.10 of the Subsidies Agreement.

ANALYSIS OF COMPLAINTS BY DEVELOPED/DEVELOPING MEMBERS.

COMPLAINTS BY DEVELOPED COUNTRY MEMBERS	
Respondents – Developed	127
Respondents – Developing	77
COMPLAINTS BY DEVELOPING COUNTRY MEMBERS	
Respondents – Developed	72
Respondents – Developing	53
COMPLAINTS BY BOTH DEVELOPED AND DEVELOPING COUNTRY MEMBERS	
Respondents – Developed	6
Respondents – Developing	0

World Trade Organization -- *Economic Research and Statistics Division.*

Staff Working Paper ERSD-2006-09 November 2006

POLITICAL & QUASI-ADJUDICATIVE DISPUTE SETTLEMENT MODELS -- Is the quasi-adjudicative model a trend or is it just another model?

http://www.wto.org/english/res_e/reser_e/ersd200609_e.pdf

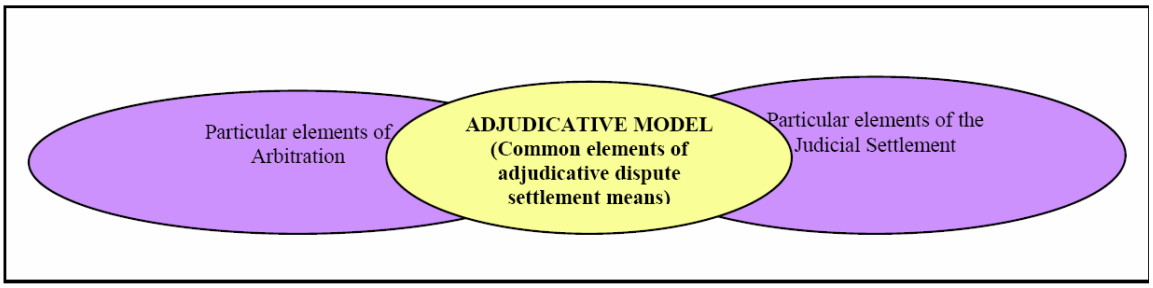
ADJUDICATIVE AND QUASI-ADJUDICATIVE MODELS OF DISPUTE SETTLEMENT.

1. Adjudicative dispute settlement means in Public International Law and their common elements.

This section contains the key elements which comprise an adjudicative model of Dispute Settlement in Public International Law. This model was reflected in two peaceful dispute settlement means which were stated in the United Nations Charter, Article 33. The adjudicative means for solving disputes are arbitration and judicial settlement. Briefly recall that both means have particular features which make them different from each other. For example, whereas in arbitration the Parties constitute a panel appointing arbitrators of their own choice, in judicial settlement the Parties rely on pre-established tribunals or courts. Also, in arbitration the procedures are not pre-established because, in the arbitral commitment, the Parties decide on them whereas in the judicial settlement they are already pre-established. Two common elements between them are; first, the decision is binding and second, a third authority intervenes with the Parties' consent to solve the dispute with a decision issued on the basis of law. These two elements compose the adjudicative model in Public International Law.

POLITICAL & QUASI-ADJUDICATIVE DISPUTE SETTLEMENT MODELS
IN EUROPEAN UNION FREE TRADE AGREEMENTS

Diagram 3. Adjudicative Model of Dispute Settlement in Public International Law



As with the DSU, the above elements have been incorporated between States at either bilateral or multilateral level in numerous dispute settlement mechanisms.

2. Adjudicative elements of the quasi-adjudicative model of WTO Dispute Settlement Understanding.

The DSU encompasses stages in the process of dispute settlement such as consultations, a panel review process and an appellate stage. These last two stages embody the adjudicative nature of the system and will now be analysed.

The panel review process includes detailed rules, procedures and timeframes.109 The DSU regulates the establishment of the panels (Article 6), their terms of reference (Article 7), their composition (Article 8), the procedures for multiple complainants (Article 9), third Parties rights (Article 10), the function of the panels (Article 11), the panel procedures (Article 12), the right to seek information (Article 13), confidentiality (Article 14), the interim review stage (Article 15) and the adoption of the panel report (Article 16). In addition, there are procedures that survey the implementation of recommendations and rulings (or compliance proceedings) (Article 21) and the regulation of compensation and retaliatory measures (Article 22). With regards to the appellate stage, it is highly regulated and incorporates rules for: the appellate review, its procedures and for the adoption of Appellate Body reports (Article 17). It also includes provisions for both the panel and the Appellate Body in relation to the confidentiality character of the Parties' communications (Article 18). Issues concerning the recommendations of the panels and the Appellate Body (Article 19) are also considered.

Within the DSU are procedures which have been greatly influenced by particular adjudicative elements of arbitration and judicial settlement respectively. Arbitration influenced the panel review process since the adjudicator is appointed by the Parties. However, it cannot be considered arbitration since the Director General has also the possibility to appoint the members of the panel. The same happens with the arbitration that establishes a reasonable period of time for implementing recommendations and rulings.110 If the Parties do not agree on appointing an arbitrator within 10 days, the Director General will appoint one, who until now has been an Appellate Body Member. The arbitration that objects the level of suspension of concessions proposed or the correct follow up of principles or procedures on suspending concessions, is performed by the original panel or by an arbitrator that is designated by the Director General. In this last arbitration the parties do not designate their adjudicator and thus cannot be considered arbitration. The only pure arbitration is the one stated in the 25.1 of the DSU, as an alternative mean of dispute settlement to the panel

process. The judicial settlement influenced the appellate stage since the adjudicator of the decision is a pre-constituted permanent body, giving a quasi-judicial nature to the system. The DSU is also influenced by the common elements found in arbitration and judicial. In the panel review and appellate stage the decisions are binding and the third authority that solves the dispute does it on the basis of law.

The strengths of the panel review procedure have often been considered responsible for the success of the WTO. For the purpose of this article, these strengths are classified into different groups. These groups are considered the elements of the adjudicative part of the quasi-adjudicative model of dispute settlement in the WTO. These elements are: compulsory jurisdiction, final decisions, decision making process under negative consensus and pre-established and detailed legal stages.

a) Compulsory jurisdiction.

There is a compulsory jurisdiction of the Dispute Settlement Body for all of the Members. This means that if a Member brings a dispute against another, the respondent Party cannot refuse to be judged by a panel and the Appellate Body.

b) Final decisions.

- **i) Independent bodies (i.e. panel and Appellate Body) made the reports on a legal basis.**
- **ii) The report of the panel takes a final and definitive nature when it reaches the Appellate Stage and/or is adopted by the Members. The arbitrations contemplated in the DSU (Articles 21.3, 22.6 or 25.1) have in common that their awards cannot be appealed, consequently they are final.**
- **iii) The decisions of the panel and Appellate Body are used as valuable interpretations for future cases.**

c) Decision making process under negative consensus.

This element encompasses the following strengths, which due to the negative consensus is possible:

- **i) The quasi-automatic adoption of the panel and Appellate Body rulings, making them binding.**
- **ii) Not blocking the establishment of a panel.**
- **iii) The quasi-automatic authorization of retaliation.**

d) Pre-established and detailed legal stages.

- **i) Precise legal stages have been established (i.e. consultations, panel review and appellate stage).**
- **ii) Precise and detailed rules. The stages of the panel are rule based (i.e. panel mandates, conclusions, surveillance and compliance and rules for the panel members).**
- **iii) Time frames for the procedures are included in the legal stages. Almost every stage of the procedure has precise time frames to comply with.**
- **iv) Pre-established procedures. Examples are the working procedures for the panel and Appellate Body (see table 6).**

Table 6. Quasi-adjudicative model of dispute settlement in WTO

Procedural Strengths of the WTO dispute settlement system	Elements of the WTO quasi-adjudicative dispute settlement model
- Consultations	Consultations
- Compulsory jurisdiction	Compulsory Jurisdiction
- Resolutions made on a legal basis by a third authority - Appellate stage - Consistent interpretations	Final decisions
- Quasi-automatic adoption of the panels and Appellate Body rulings - Quasi-automatic establishment of the panel - Quasi-automatic authorization of retaliation	Decision making process under negative consensus
- Precise legal stages - Precise and detailed rules - Time frames in the stages of the procedure - Procedures for each legal stage	Pre-established and detailed procedures

Consequently, the adjudicative elements (as listed above) form the dispute settlement system of the WTO which, with the consultations stage, is a quasi-adjudicative model.

Annual Report of AB (2005).

WT/AB/5 (25 January 2006)

http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm

ANNEX 2

APPEALS FILED: 1995–2005

Year	Number of Notices of Appeal filed
1995	0
1996	4
1997	6[a]
1998	8
1999	9[b]
2000	13[c]
2001	9[d]
2002	7[e]
2003	6[f]
2004	5
2005	10
Total	**77**

ANNEX 3
PERCENTAGE OF PANEL REPORTS APPEALED: 1996–2005[a]

	All Panel Reports			Panel Reports other than Article 21.5 Reports[b]			Article 21.5 Panel Reports		
Year of adoption	*Panel Reports adopted* [c]	*Panel Reports appealed* [d]	*Percentage appealed* [e]	*Panel Reports adopted*	*Panel Reports appealed*	*Percentage appealed*	*Panel Reports adopted*	*Panel Reports appealed*	*Percentage appealed*
1996	2	2	100%	2	2	100%	0	0	–
1997	5	5	100%	5	5	100%	0	0	–
1998	12	9	75%	12	9	75%	0	0	–
1999	10	7	70%	9	7	78%	1	0	0%
2000	19	11	58%	15	9	60%	4	2	50%
2001	17	12	71%	13	9	69%	4	3	75%
2002	12	6	50%	11	5	45%	1	1	100%
2003	10	7	70%	8	5	63%	2	2	100%
2004	8	6	75%	8	6	75%	0	0	–
2005	20	12	60%	17	11	65%	3	1	33%
Total	**115**	**77**	**67%**	**100**	**68**	**68%**	**15**	**9**	**60%**

ANNEX 4
PARTICIPANTS AND THIRD PARTICIPANTS IN APPEALS CIRCULATED THROUGH 2005.

As of the end of 2005, there were 149 WTO Members, of which 66 (44 per cent) have participated in appeals in which Appellate Body Reports were circulated between 1996 and 2005.

I. STATISTICAL SUMMARY

WTO Member	Appellant	Other Appellant	Appellee	Third Participant	Total
Antigua & Barbuda	1	–	1	–	1
Argentina	2	1	3	4	10
Australia	2	1	5	11	19
Barbados	–	–	–	1	1
Belize	–	–	–	2	2
Benin	–	–	–	1	1
Bolivia	–	–	–	1	1
Brazil	8	3	10	9	30
Cameroon	–	–	–	1	1
Canada	8	6	14	12	40
Chad	–	–	–	1	1

WTO Member	Appellant	Other Appellant	Appellee	Third Participant	Total
Chile	2	–	1	4	7
China	–	1	1	8	10
Colombia	–	–	–	4	4
Costa Rica	1	–	–	3	4
Côte d'Ivoire	–	–	–	2	2
Cuba	–	–	–	3	3
Dominica	–	–	–	2	2
Dominican Republic	1	–	1	1	3
Ecuador	–	1	1	5	7
Egypt	–	–	–	1	1
El Salvador	–	–	–	2	2
European Communities	10	11	26	33	80
Fiji	–	–	–	1	1
Ghana	–	–	–	1	1
Grenada	–	–	–	1	1
Guatemala	1	1	1	2	5
Guyana	–	–	–	1	1
Honduras	1	1	2	1	5
Hong Kong, China	–	–	–	4	4
India	5	1	5	13	24
Indonesia	–	–	1	1	2
Israel	–	–	–	1	1
Jamaica	–	–	–	3	3
Japan	4	4	8	19	35
Kenya	–	–	–	1	1
Korea	4	2	5	6	17
Madagascar	–	–	–	1	1
Malaysia	1	–	1	–	2
Mauritius	–	–	–	2	2
Malawi	–	–	–	1	1
Mexico	3	1	4	13	21
New Zealand	–	2	5	6	13
Nicaragua	–	–	–	2	2
Nigeria	–	–	–	1	1
Norway	–	1	1	6	8
Pakistan	–	–	2	2	4
Panama	–	–	–	1	1
Paraguay	–	–	–	4	4
Peru	–	–	1	1	2
Philippines	1	–	1	1	3
Poland	–	–	1	–	1
Senegal	–	–	–	1	1
St Lucia	–	–	–	2	2
St Kitts & Nevis	–	–	–	1	1
St Vincent & the Grenadines	–	–	–	1	1
Suriname	–	–	–	1	1
Swaziland	–	–	–	1	1
Switzerland	–	1	1	–	2

WTO Member	Appellant	Other Appellant	Appellee	Third Participant	Total
Chinese Taipei	–	–	–	7	7
Tanzania	–	–	–	1	1
Thailand	3	–	4	3	10
Trinidad &Tobago	–	–	–	1	1
Turkey	1	–	–	1	2
United States	23	8	41	23	95
Venezuela	–	–	1	6	7
Total	**82**	**46**	**148**	**255**	**531**

ANNEX 6
WTO AGREEMENTS COVERED IN APPELLATE BODY REPORTS CIRCULATED THROUGH 2005 [a]

	All Panel Reports			Panel Reports other than Article 21.5 Reports[b]			Article 21.5 Panel Reports		
Year of adoption	*Panel Reports adopted* [c]	*Panel Reports appealed* [d]	*Percentage appealed* [e]	*Panel Reports adopted*	*Panel Reports appealed*	*Percentage appealed*	*Panel Reports adopted*	*Panel Reports appealed*	*Percentage appealed*
1996	2	2	100%	2	2	100%	0	0	–
1997	5	5	100%	5	5	100%	0	0	–
1998	12	9	75%	12	9	75%	0	0	–
1999	10	7	70%	9	7	78%	1	0	0%
2000	19	11	58%	15	9	60%	4	2	50%
2001	17	12	71%	13	9	69%	4	3	75%
2002	12	6	50%	11	5	45%	1	1	100%
2003	10	7	70%	8	5	63%	2	2	100%
2004	8	6	75%	8	6	75%	0	0	–
2005	20	12	60%	17	11	65%	3	1	33%
Total	**115**	**77**	**67%**	**100**	**68**	**68%**	**15**	**9**	**60%**

DISPUTE SETTLEMENT SYSTEM TRAINING MODULE.

http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/signin_e.htm (2006)

Preface.

There has been over 300 disputes brought to the World Trade Organization (WTO) since its creation in January 1995 and these disputes cover a wide range of economic activities.

The WTO dispute settlement system is the backbone of today's multilateral trading regime. It was created by Member governments during the Uruguay Round in the conviction that a stronger, more binding system to settle disputes would help to ensure that the WTO's carefully negotiated trading rules are respected and enforced. The system, sometimes referred to as the "WTO's unique contribution to the stability of the global economy", is based on, but constitutes a major improvement over, the previous GATT dispute settlement system. As such, it has greatly enhanced the stability and predictability of the rules of international trade to the benefit of businesses, farmers, workers and consumers around the world.

The primary purpose of this training guide is to explain the WTO dispute settlement system to an interested person with little or no knowledge of how this system functions. However, with its detailed content, it could also serve as a very useful "handbook" to experienced practitioners of WTO law. It explains the historic evolution of the current system and explores the practices that have arisen in its operation since its entry into force on 1 January 1995.

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Chapter 1 -- Introduction to the WTO dispute settlement system.

1.1 Importance of the WTO dispute settlement system.

The best international agreement is not worth very much if its obligations cannot be enforced when one of the signatories fails to comply with such obligations. An effective mechanism to settle disputes thus increases the practical value of the commitments the signatories undertake in an international agreement. The fact that the Members of the (WTO) established the current dispute settlement system during the Uruguay Round of Multilateral Trade Negotiations underscores the high

importance they attach to compliance by all Members with their obligations under the WTO Agreement.

Settling disputes in a timely and structured manner is important. It helps to prevent the detrimental effects of unresolved international trade conflicts and to mitigate the imbalances between stronger and weaker players by having their disputes settled on the basis of rules rather than having power determine the outcome. Most people consider the WTO dispute settlement system to be one of the major results of the Uruguay Round. After the entry into force of the WTO Agreement in 1995, the dispute settlement system soon gained practical importance as Members frequently resorted to using this system.

1.2 The Dispute Settlement Understanding.

The current dispute settlement system was created as part of the WTO Agreement during the Uruguay Round. It is embodied in the Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding and abbreviated "DSU" (referred to as such in this guide). The DSU, which constitutes Annex 2 of the WTO Agreement, sets out the procedures and rules that define today's dispute settlement system. It should however be noted that, to a large degree, the current dispute settlement system is the result of the evolution of rules, procedures and practices developed over almost half a century under the GATT 1947.

Explanatory note: The annexes of the WTO Agreement contain all the specific multilateral agreements. In other words, the WTO Agreement incorporates all agreements that have been concluded in the Uruguay Round. References in this guide to the "WTO Agreement" in general, therefore, include the totality of these rules. However, the WTO Agreement itself, if taken in isolation from its annexes, is a short Agreement containing 16 Articles that set out the institutional framework of the (WTO) as an international organization. Specific references to the WTO Agreement (e.g. "Article XVI of the WTO Agreement") relate to these rules.

1.3 Functions, objectives and key features of the dispute settlement system.

Providing security and predictability to the multilateral trading system ……..

A central objective of the (WTO) dispute settlement system is to provide security and predictability to the multilateral trading system (Article 3.2 of the DSU). Although international trade is understood in the WTO as the flow of goods and services between Members, such trade is typically not conducted by States, but rather by private economic operators. These market participants need stability and predictability in the government laws, rules and regulations applying to their commercial activity, especially when they conduct trade on the basis of long-term transactions. In light of this, the DSU aims to provide a fast, efficient, dependable and rule-oriented system to resolve disputes about the application of the provisions of the WTO Agreement. By reinforcing the rule of law, the dispute settlement system makes the trading system more secure and predictable. Where non-compliance with the WTO Agreement has been alleged by a WTO Member, the dispute settlement system provides for a relatively rapid resolution of the matter through an independent ruling that must be implemented promptly, or the non-implementing Member will face possible trade sanctions.

Preserving the rights and obligations of WTO Members …….

Typically, a dispute arises when one WTO Member adopts a trade policy measure that one or more other Members consider to be inconsistent with the obligations set out in the WTO Agreement. In such a case, any Member that feels aggrieved is entitled to invoke the procedures and provisions of the dispute settlement system in order to challenge that measure.

If the parties to the dispute do not manage to reach a mutually agreed solution, the complainant is guaranteed a rules-based procedure in which the merits of its claims will be examined by an independent body (panels and the Appellate Body). If the complainant prevails, the desired outcome is to secure the withdrawal of the measure found to be inconsistent with the WTO Agreement. Compensation and countermeasures (the suspension of obligations) are available only as secondary and temporary responses to a contravention of the WTO Agreement (Article 3.7 of the DSU).

Thus, the dispute settlement system provides a mechanism through which WTO Members can ensure that their rights under the WTO Agreement can be enforced. This system is equally important from the perspective of the respondent whose measure is under challenge, since it provides a forum for the respondent to defend itself if it disagrees with the claims raised by the complainant. In this way, the dispute settlement system serves to preserve the Members' rights and obligations under the WTO Agreement (Article 3.2 of the DSU). The rulings of the bodies involved (the DSB the Appellate Body, panels and arbitrations[1]) are intended to reflect and correctly apply the rights and obligations as they are set out in the WTO Agreement. They must not change the WTO law that is applicable between the parties or, in the words of the DSU, add to or diminish the rights and obligations provided in the WTO Agreements (Articles 3.2 and 19.2 of the DSU).

Clarification of rights and obligations through interpretation ……..

The precise scope of the rights and obligations contained in the WTO Agreement is not always evident from a mere reading of the legal texts. Legal provisions are often drafted in general terms so as to be of general applicability and to cover a multitude of individual cases, not all of which can be specifically regulated. Whether the existence of a certain set of facts gives rise to a violation of a legal requirement contained in a particular provision is, therefore, a question that is not always easy to answer. In most cases, the answer can be found only after interpreting the legal terms contained in the provision at issue.

In addition, legal provisions in international agreements often lack clarity because they are compromise formulations resulting from multilateral negotiations. The various participants in a negotiating process often reconcile their diverging positions by agreeing to a text that can be understood in more than one way so as to satisfy the demands of different domestic constituents. The negotiators may thus understand a particular provision in different and opposing ways.

For those reasons, as in any legal setting, individual cases often require an interpretation of the pertinent provisions. One might think that such an interpretation cannot occur in (WTO) dispute settlement proceedings because Article IX:2 of the WTO Agreement provides that the Ministerial Conference and the General Council of the WTO have the "exclusive authority to adopt interpretations" of the WTO Agreement. However, the DSU expressly states that the dispute settlement system is intended to clarify the provisions of the WTO Agreement "in accordance with customary rules of interpretation of public international law" (Article 3.2 of the DSU).

The DSU, therefore, recognizes the need to clarify WTO rules and mandates that this clarification take place pursuant to customary rules of interpretation. In addition, Article 17.6 of the DSU implicitly recognizes that panels may develop legal interpretations. The "exclusive authority" of Article IX:2 of the WTO Agreement must therefore be understood as the possibility to adopt "authoritative" interpretations that are of general validity for all WTO Members — unlike interpretations by panels and the Appellate Body, which are applicable only to the parties and to the subject matter of a specific dispute. Accordingly, the DSU mandate to clarify WTO rules is without prejudice to the rights of Members to seek authoritative interpretations under Article IX:2 of the WTO Agreement (Article 3.9 of the DSU).

As regards the methods of interpretation, the DSU refers to the "customary rules of interpretation of public international law" (Article 3.2 of the DSU). While customary international law is normally unwritten, there is an international convention that has codified some of these customary rules of treaty interpretation. Notably, Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties embody many of the customary rules of interpretation of public international law. While the reference in Article 3.2 of the DSU does not refer directly to these Articles, the Appellate Body has ruled that they can serve as a point of reference for discerning the applicable customary rules[1].The three Articles read as follows:

Article 31.
General rule of interpretation.

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- **a. any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;**
- **b. any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.**

3. There shall be taken into account, together with the context:

- **a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;**
- **b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;**
- **c. any relevant rules of international law applicable in the relations between the parties.**

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32.
Supplementary means of interpretation.

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

a. leaves the meaning ambiguous or obscure; or
b. leads to a result which is manifestly absurd or unreasonable.

Article 33.
Interpretation of treaties authenticated in two or more languages.

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

As can be seen from these articles on treaty interpretation, the WTO Agreement is to be interpreted according to the ordinary meaning of the words in the relevant provision, viewed in their context and in the light of the object and purpose of the agreement. The ordinary meaning of a term in a provision is to be discerned on the basis of the plain text. The definitions given to this term in a dictionary can be of assistance in that purpose. "Context" refers to the kinds of conclusions that can be drawn on the basis of, for example, the structure, content or terminology in other provisions belonging to the same agreement, particularly the ones preceding and following the rule subject to interpretation. The "object and purpose" refers to the explicit or implicit objective of the rule in question or the agreement as a whole.

In practice, panels and the Appellate Body seem to rely more on the ordinary meaning and on the context than on the object and purpose of the provisions to be interpreted. The negotiating history of the agreement is merely a subsidiary tool of interpretation (Article 32 of the Vienna Convention). This tool is to be used only as confirmation of the interpretation according to the ordinary meaning, context and object and purpose or if that interpretative result is ambiguous, obscure, manifestly absurd or unreasonable. One of the corollaries of the rules on interpretation is that meaning and effect must be given to all terms of an agreement, rather than reducing whole parts of an agreement to redundancy or inutility[2] Conversely, the process of interpretation does not permit reading words

into an agreement that are not there[3]. With respect to Article 33 of the Vienna Convention, the WTO Agreement is authentic in English, French and Spanish.

1.3 Functions, objectives and key features of the dispute settlement system.
"Mutually Agreed Solutions" as "Preferred Solution" ……..

Although the dispute settlement system is intended to uphold the rights of aggrieved Members and to clarify the scope of the rights and obligations, which gradually achieves higher levels of security and predictability, the primary objective of the system is not to make rulings or to develop jurisprudence. Rather, like other judicial systems, the priority is to settle disputes, preferably through a mutually agreed solution that is consistent with the WTO Agreement (Article 3.7 of the DSU). Adjudication is to be used only when the parties cannot work out a mutually agreed solution. By requiring formal consultations as the first stage of any dispute, the DSU provides a framework in which the parties to a dispute must always at least attempt to negotiate a settlement. Even when the case has progressed to the stage of adjudication, a bilateral settlement always remains possible, and the parties are always encouraged to make efforts in that direction (Articles 3.7 and 11 of the DSU).

Prompt settlement of disputes …….

The DSU emphasizes that prompt settlement of disputes is essential if the (WTO) is to function effectively and the balance of rights and obligations between the Members is to be maintained (Article 3.3 of the DSU). It is well known that, to be achieved, justice must not only provide an equitable outcome but also be swift. Accordingly, the DSU sets out in considerable detail the procedures and corresponding deadlines to be followed in resolving disputes. The detailed procedures are designed to achieve efficiency, including the right of a complainant to move forward with a complaint even in the absence of agreement by the respondent (Articles 4.3 and 6.1 of the DSU). If a case is adjudicated, it should normally take no more than one year for a panel ruling and no more than 16 months if the case is appealed (Article 20 of the DSU). If the complainant deems the case urgent, consideration of the case should take even less time (Articles 4.9 and 12.8 of the DSU).

These time-frames might still appear long, considering that time for implementation will have to be added after the ruling. Also, for the entire duration of the dispute, the complainant may still suffer economic harm from the challenged measure; and even after prevailing in dispute settlement, the complainant will receive no compensation for the harm suffered before the time by which the respondent must implement the ruling.

However, one must take into account that disputes in the WTO are usually very complex in both factual and legal terms. Parties generally submit a considerable amount of data and documentation relating to the challenged measure, and they also put forward very detailed legal arguments. The parties need time to prepare these factual and legal arguments and to respond to the arguments put forward by the opponent. The panel (and the Appellate Body) assigned to deal with the matter needs to consider all the evidence and arguments, possibly hear experts, and provide detailed reasoning in support of its conclusions. Considering all these aspects, the dispute settlement system of the WTO functions relatively fast and, in any event, much faster than many domestic judicial systems or other international systems of adjudication.

Prohibition against unilateral determinations ……..

WTO Members have agreed to use the multilateral system for settling their WTO trade disputes rather than resorting to unilateral action (Article 23 of the DSU). That means abiding by the agreed procedures and respecting the rulings once they are issued — and not taking the law into their own hands.

If Members were to act unilaterally, this would have obvious disadvantages that are well known from the history of the multilateral trading system. Imagine that one Member accuses another Member of breaking WTO rules. As a unilateral response, the accusing Member could decide to take a countermeasure, i.e. to infringe WTO obligations with regard to the other Member (by erecting trade barriers). Under traditional international law, that Member could argue that it has acted lawfully because its own violation is justified as a countermeasure in response to the other Member's violation that had occurred first. If, however, the accused Member disagrees on whether its measure truly infringes WTO obligations, it will not accept the argument of a justified countermeasure. On the contrary, it may assert that the countermeasure is illegal and, on that basis, it may feel justified in taking a countermeasure against the first countermeasure. The original complainant, based on its legal view on the matter, is likely to disagree and to consider that second countermeasure illegal. In response, it may adopt a further countermeasure. This shows that, if the views differ, unilateral actions are not able to settle disputes harmoniously. Things may spiral out of control and, unless one of the parties backs down, there is a risk of escalation of mutual trade restrictions, which may result in a "trade war".

To prevent such downward spirals, the DSU mandates the use of a multilateral system of dispute settlement to which WTO Members must have recourse when they seek redress against another Member under the WTO Agreement (Article 23.1 of the DSU). This applies to situations in which a Member believes that another Member violates the WTO Agreement or otherwise nullifies or impairs benefits under the WTO Agreements or impedes the attainment of an objective of one of the agreements.[1]

In such cases, a Member cannot take action based on unilateral determinations that any of these situations exist, but may only act after recourse to dispute settlement under the rules and procedures of the DSU. Whatever actions the complaining Member takes, it may only take them based on the findings of an adopted panel or Appellate Body report or arbitration award (Article 23.2(a) of the DSU). The Member concerned must also respect the procedures foreseen in the DSU for the determination of the time for implementation and impose countermeasures only on the basis of an authorization by the DSB (Article 23.2(b) and (c) of the DSU). This excludes unilateral actions such as those described above.

Exclusive jurisdiction ……..

By mandating recourse to the multilateral system of the WTO for the settlement of disputes, Article 23 of the DSU not only excludes unilateral action, it also precludes the use of other fora for the resolution of a WTO-related dispute.

Compulsory nature …….

The dispute settlement system is compulsory. All WTO Members are subject to it, as they have all signed and ratified the WTO Agreement as a single undertaking[2], of which the DSU is a part. The DSU subjects all WTO Members to the dispute settlement system for all disputes arising under the WTO Agreement. Therefore, unlike other systems of international dispute resolution, there is no need for the parties to a dispute to accept the jurisdiction of the WTO dispute settlement system in a separate declaration or agreement. This consent to accept the jurisdiction of the WTO dispute settlement system is already contained in a Member's accession to the WTO. As a result, every Member enjoys assured access to the dispute settlement system and no responding Member may escape that jurisdiction.

1.4 Participants in the dispute settlement system.

Parties and third parties …….

The only participants in the dispute settlement system are the Member governments of the WTO), which can take part either as parties or as third parties. The WTO Secretariat, WTO observer countries, other international organizations, and regional or local governments are not entitled to initiate dispute settlement proceedings in the WTO.

The DSU sometimes refers to the Member bringing the dispute as the "complaining party" or the "complainant" (this guide mostly uses the term "complainant"). No equivalent short term is used for the "party to whom the request for consultations is addressed". The DSU sometimes also speaks of "Member concerned". In practice, the terms "respondent" or "defendant" are commonly used; this guide mostly uses the term "respondent".

No non-governmental actors ……..

Since only WTO Member governments can bring disputes, it follows that private individuals or companies do not have direct access to the dispute settlement system, even if they may often be the ones (as exporters or importers) most directly and adversely affected by the measures allegedly violating the WTO Agreement. The same is true of other non-governmental organizations with a general interest in a matter before the dispute settlement system (which are often referred to as NGOs). They, too, cannot initiate WTO dispute settlement proceedings.

Of course, these organizations can, and often do, exert influence or even pressure on the government of a WTO Member with respect to the triggering of a dispute. Indeed, several WTO Members have formally adopted internal legislation under which private parties can petition their governments to bring a WTO dispute.[1]

There are divergent views among Members on whether non-governmental organizations may play a role in WTO dispute settlement proceedings, for example, by filing amicus curiae submissions with WTO dispute settlement bodies. According to WTO jurisprudence, panels and the Appellate Body have the discretion to accept or reject these submissions, but are not obliged to consider them.

1.5 Substantive scope of the dispute settlement system.

The "covered agreements" ……

The (WTO) dispute settlement system applies to all disputes brought under the WTO Agreements listed in Appendix 1 of the DSU (Article 1.1 of the DSU). In the DSU, these agreements are referred to as the "covered agreements". The DSU itself and the WTO Agreement (in the sense of Articles I to XVI) are also listed as covered agreements. In many cases brought to the dispute settlement system, the complainant invokes provisions belonging to more than one covered agreement.

The covered agreements also include the so-called Plurilateral Trade Agreements contained in Annex 4 to the WTO Agreement (Appendix 1 of the DSU), which are called "plurilateral" as opposed to "multilateral" because not all WTO Members have signed them. However, the applicability of the DSU to those Plurilateral Trade Agreements is subject to the adoption of a decision by the parties to each of these agreements setting out the terms for the application of the DSU to the individual agreement, including any special and additional rules or procedures (Appendix 1 of the DSU). The Committee on Government Procurement has taken such a decision, but not the Committee on Trade in Civil Aircraft for the Agreement on Trade in Civil Aircraft. Two other plurilateral agreements, the International Dairy Agreement and the International Bovine Meat Agreement, are no longer in force. A single set of rules and procedures ……..

By applying to all these covered agreements, the DSU provides for a coherent and integrated dispute settlement system. It puts an end to the former "GATT à la carte", where each agreement not only had a different set of signatories but also separate dispute settlement rules.[1] Subject to certain exceptions, the DSU is applicable in a uniform manner to disputes under all the WTO Agreements. In some instances, there are so-called "special and additional rules and procedures" on dispute settlement contained in the covered agreements (Article 1.2 and Appendix 2 of the DSU). These are specific rules and procedures "designed to deal with the particularities of disputes under a specific covered agreement". They take precedence over the rules in the DSU to the extent that there is a difference between the rules and procedures of the DSU and the special and additional rules and procedures (Article 1.2 of the DSU). Such a "difference" or conflict between the DSU and the special rules exists only "where the provisions of the DSU and the special or additional rules and procedures of a covered agreement cannot be read as complementing each other" because they are mutually inconsistent such that adherence to the one provision would lead to a violation of the other provision.[2] Only in that case and to that extent, do the special additional provisions prevail and do the DSU rules not apply.

1.6 Developing country Members and the dispute settlement system.

The DSU also addresses the particular status of developing country Members of the (WTO), although the approach taken differs from that of the other covered agreements. Unlike those agreements, which set out the Members' substantive trade obligations, the DSU chiefly specifies the procedures under which such substantive obligations can be enforced. Accordingly, in the dispute settlement system, special and differential treatment[1] does not take the form of reducing obligations, providing enhanced substantive rights or granting transition periods. Rather, it takes a procedural form, for instance, by making available to developing country Members additional or privileged procedures, or longer or accelerated deadlines. These rules of special and differential treatment will be mentioned in subsequent chapters in the relevant procedural context in which they apply. The rules of special and

differential treatment and other aspects of the developing countries' role in the dispute settlement system are also the subject of a separate chapter.[2]

Chapter 2 -- Historic development of the WTO dispute settlement system.

The (WTO) dispute settlement system is often praised as one of the most important innovations of the Uruguay Round. This should not, however, be misunderstood to mean that the WTO dispute settlement system was a total innovation and that the previous multilateral trading system based on GATT 1947 did not have a dispute settlement system.

On the contrary, there was a dispute settlement system under GATT 1947 that evolved quite remarkably over nearly 50 years on the basis of Articles XXII and XXIII of GATT 1947. Several of the principles and practices that evolved in the GATT dispute settlement system were, over the years, codified in decisions and understandings of the contracting parties to GATT 1947. The current WTO system builds on, and adheres to, the principles for the management of disputes applied under Articles XXII and XXIII of GATT 1947 (Article 3.1 of the DSU). Of course, the Uruguay Round brought important modifications and elaborations to the previous system, which will be mentioned later.[1] This chapter provides a brief overview of the historic roots of the current dispute settlement system.

2.1 The system under GATT 1947 and its evolution over the years.

Articles XXII and XXIII and emerging practices ……

The rudimentary rules in Article XXIII:2 of GATT 1947 provided that the contracting parties themselves, acting jointly, had to deal with any dispute between individual contracting parties. Accordingly, disputes in the very early years of GATT 1947 were decided by rulings of the Chairman of the GATT Council. Later, they were referred to working parties composed of representatives from all interested contracting parties, including the parties to the dispute. These working parties adopted their reports by consensus decisions. They were soon replaced by panels made up of three or five independent experts who were unrelated to the parties of the dispute. These panels wrote independent reports with recommendations and rulings for resolving the dispute, and referred them to the GATT Council. Only upon approval by the GATT Council did these reports become legally binding on the parties to the dispute. The GATT panels thus built up a body of jurisprudence, which remains important today, and followed an increasingly rules-based approach and juridical style of reasoning in their reports.
The contracting parties to GATT 1947 progressively codified and sometimes also modified the emerging procedural dispute settlement practices. The most important pre-Uruguay Round decisions and understandings were:

- **The Decision of 5 April 1966 on Procedures under Article XXIII;**
- **The Understanding on Notification, Consultation, Dispute Settlement and Surveillance, adopted on 28 November 1979[2];**
- **The Decision on Dispute Settlement, contained in the Ministerial Declaration of 29 November 1982[3];**
- **The Decision on Dispute Settlement of 30 November 1984.**

Weaknesses of the GATT dispute settlement system ……..

Some key principles, however, remained unchanged up to the Uruguay Round, the most important being the rule of positive consensus that existed under GATT 1947. For example, there needed to be a positive consensus in the GATT Council in order to refer a dispute to a panel. Positive consensus meant that there had to be no objection from any contracting party to the decision. Importantly, the parties to the dispute were not excluded from participation in this decision-making process. In other words, the respondent could block the establishment of a panel. Moreover, the adoption of the panel report also required a positive consensus, and so did the authorization of countermeasures against a non-implementing respondent. Such actions could also be blocked by the respondent.

One might think that such a system could not possibly have worked. Why would a respondent not use its right to block the establishment of a panel if it thought that it might lose the case? Why would the losing party not block the adoption of the panel report? How could a party refrain from using its veto against the authorization of countermeasures, from which it would suffer economically? If domestic judicial systems were to operate on the basis of such a consensus rule, they would probably fail in most instances.

Quite surprisingly, this was generally not the experience of the dispute settlement system of GATT 1947. Individual respondent contracting parties mostly refrained from blocking consensus decisions and allowed disputes in which they were involved to proceed, even if this was to their short-term detriment. They did so because they had a long-term systemic interest and knew that excessive use of the veto right would result in a response in kind by the others. Accordingly, panels were established and their reports frequently adopted, albeit often with delays (even though the authorization of countermeasures was only granted once).

On the basis of empirical research, it has been concluded that the GATT 1947 dispute settlement system brought about solutions satisfying the parties in a large majority of the cases. However, it must be noted that, by their nature, such statistics can only cover complaints that were actually brought. Certainly, there were a significant number of disputes that were never brought before the GATT because the complainant suspected that the respondent would exercise its veto. Thus, the risk of a veto also weakened the GATT dispute settlement system. In addition, such vetoes actually occurred, especially in economically important or politically sensitive areas such as anti-dumping. Finally, there was a deterioration of the system in the 1980s as contracting parties increasingly blocked the establishment of panels and the adoption of panel reports.

Even when panel reports were adopted, the risk of one party blocking adoption must often have influenced the panels' rulings. The three panelists knew that their report had also to be accepted by the losing party in order to be adopted. Accordingly, there was an incentive to rule not solely on the basis of the legal merits of a complaint, but to aim for a somewhat "diplomatic" solution by crafting a compromise that would be acceptable to both sides.

Hence, the structural weaknesses of the old GATT dispute settlement system were significant even though many disputes were ultimately resolved. As noted in the late 1980s, when the Uruguay Round negotiations were ongoing, the situation deteriorated, especially in politically sensitive areas or because some contracting parties attempted to achieve trade-offs between ongoing disputes and matters being negotiated. This resulted in a decreasing confidence by the contracting parties in the

ability of the GATT dispute settlement system to resolve the difficult cases. In turn, this also led to more unilateral action by individual contracting parties, who, instead of invoking the GATT dispute settlement system, would take direct action against other parties in order to enforce their rights.[5]

Dispute settlement under the Tokyo Round "codes" ……

Several of the plurilateral agreements emerging from the Tokyo Round of Multilateral Trade Negotiations, the so-called "Tokyo Round Codes", for example the one on Anti-Dumping, contained code-specific dispute settlement procedures. Like the codes as a whole, these specific dispute settlement procedures were applicable only to the signatories of the codes, and only with regard to the specific subject matter. If the multilateral trading system before the establishment of the WTO was often referred to as a "GATT à la carte", this also applied to dispute settlement. In some instances, where rules pertaining to a specific subject-matter existed both in GATT 1947 and in one of the Tokyo Round Codes, a complainant also had some leeway for "forum-shopping" and "forum-duplication", i.e. choosing the agreement and the dispute settlement mechanism that promised to be the most beneficial to its interests, or launching two separate disputes under different agreements on the same matter.

In terms of how satisfactorily the dispute settlement system under these codes functioned, the record was less favourable than it was for GATT 1947, i.e. consensus was blocked quite frequently.

The Uruguay Round and the Decision of 1989 ……..

As the inherent problems in the GATT dispute settlement system led to increasing problems in the 1980s, many contracting parties to GATT 1947, both developing and developed countries, felt that the system needed improving and strengthening. Negotiations on dispute settlement were accordingly included and given high priority on the agenda of the Uruguay Round negotiations.

By 1989, midway through the Uruguay Round negotiations, the contracting parties were ready to implement some preliminary results of the negotiations ("early harvest") on certain issues and accordingly adopted the Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures.[6] The decision was to apply on a trial basis until the end of the Uruguay Round and already contained many of the rules later embodied in the DSU, such as a right to a panel and strict time-frames for panel proceedings. However, there was no agreement yet on the important issue of the procedure to be used for the adoption of panel reports. Nor was appellate review foreseen at that stage.

Articles XXII and XXIII and emerging practices ……

The rudimentary rules in Article XXIII:2 of GATT 1947 provided that the contracting parties themselves, acting jointly, had to deal with any dispute between individual contracting parties. Accordingly, disputes in the very early years of GATT 1947 were decided by rulings of the Chairman of the GATT Council. Later, they were referred to working parties composed of representatives from all interested contracting parties, including the parties to the dispute. These working parties adopted their reports by consensus decisions. They were soon replaced by panels made up of three or five independent experts who were unrelated to the parties of the dispute. These panels wrote independent reports with recommendations and rulings for resolving the dispute, and referred them to the GATT Council. Only upon approval by the GATT Council did these reports become legally binding on the

parties to the dispute. The GATT panels thus built up a body of jurisprudence, which remains important today, and followed an increasingly rules-based approach and juridical style of reasoning in their reports.

The contracting parties to GATT 1947 progressively codified and sometimes also modified the emerging procedural dispute settlement practices. The most important pre-Uruguay Round decisions and understandings were:

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Weaknesses of the GATT dispute settlement system ……..

Some key principles, however, remained unchanged up to the Uruguay Round, the most important being the rule of positive consensus that existed under GATT 1947. For example, there needed to be a positive consensus in the GATT Council in order to refer a dispute to a panel. Positive consensus meant that there had to be no objection from any contracting party to the decision. Importantly, the parties to the dispute were not excluded from participation in this decision-making process. In other words, the respondent could block the establishment of a panel. Moreover, the adoption of the panel report also required a positive consensus, and so did the authorization of countermeasures against a non-implementing respondent. Such actions could also be blocked by the respondent.

One might think that such a system could not possibly have worked. Why would a respondent not use its right to block the establishment of a panel if it thought that it might lose the case? Why would the losing party not block the adoption of the panel report? How could a party refrain from using its veto against the authorization of countermeasures, from which it would suffer economically? If domestic judicial systems were to operate on the basis of such a consensus rule, they would probably fail in most instances.

Quite surprisingly, this was generally not the experience of the dispute settlement system of GATT 1947. Individual respondent contracting parties mostly refrained from blocking consensus decisions and allowed disputes in which they were involved to proceed, even if this was to their short-term detriment. They did so because they had a long-term systemic interest and knew that excessive use of the veto right would result in a response in kind by the others. Accordingly, panels were established and their reports frequently adopted, albeit often with delays (even though the authorization of countermeasures was only granted once).

On the basis of empirical research, it has been concluded that the GATT 1947 dispute settlement system brought about solutions satisfying the parties in a large majority of the cases. However, it must be noted that, by their nature, such statistics can only cover complaints that were actually brought. Certainly, there were a significant number of disputes that were never brought before the GATT because the complainant suspected that the respondent would exercise its veto. Thus, the risk of a veto also weakened the GATT dispute settlement system. In addition, such vetoes actually occurred, especially in economically important or politically sensitive areas such as anti-dumping. Finally, there

was a deterioration of the system in the 1980s as contracting parties increasingly blocked the establishment of panels and the adoption of panel reports.

Even when panel reports were adopted, the risk of one party blocking adoption must often have influenced the panels' rulings. The three panelists knew that their report had also to be accepted by the losing party in order to be adopted. Accordingly, there was an incentive to rule not solely on the basis of the legal merits of a complaint, but to aim for a somewhat "diplomatic" solution by crafting a compromise that would be acceptable to both sides.

Hence, the structural weaknesses of the old GATT dispute settlement system were significant even though many disputes were ultimately resolved. As noted in the late 1980s, when the Uruguay Round negotiations were ongoing, the situation deteriorated, especially in politically sensitive areas or because some contracting parties attempted to achieve trade-offs between ongoing disputes and matters being negotiated. This resulted in a decreasing confidence by the contracting parties in the ability of the GATT dispute settlement system to resolve the difficult cases. In turn, this also led to more unilateral action by individual contracting parties, who, instead of invoking the GATT dispute settlement system, would take direct action against other parties in order to enforce their rights.[5]

Dispute settlement under the Tokyo Round "codes" …….

Several of the plurilateral agreements emerging from the Tokyo Round of Multilateral Trade Negotiations, the so-called "Tokyo Round Codes", for example the one on Anti-Dumping, contained code-specific dispute settlement procedures. Like the codes as a whole, these specific dispute settlement procedures were applicable only to the signatories of the codes, and only with regard to the specific subject matter. If the multilateral trading system before the establishment of the WTO was often referred to as a "GATT à la carte", this also applied to dispute settlement. In some instances, where rules pertaining to a specific subject-matter existed both in GATT 1947 and in one of the Tokyo Round Codes, a complainant also had some leeway for "forum-shopping" and "forum-duplication", i.e. choosing the agreement and the dispute settlement mechanism that promised to be the most beneficial to its interests, or launching two separate disputes under different agreements on the same matter.

In terms of how satisfactorily the dispute settlement system under these codes functioned, the record was less favourable than it was for GATT 1947, i.e. consensus was blocked quite frequently.

The Uruguay Round and the Decision of 1989 …….

As the inherent problems in the GATT dispute settlement system led to increasing problems in the 1980s, many contracting parties to GATT 1947, both developing and developed countries, felt that the system needed improving and strengthening. Negotiations on dispute settlement were accordingly included and given high priority on the agenda of the Uruguay Round negotiations.

By 1989, midway through the Uruguay Round negotiations, the contracting parties were ready to implement some preliminary results of the negotiations ("early harvest") on certain issues and accordingly adopted the Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures.[6] The decision was to apply on a trial basis until the end of the Uruguay Round and already contained many of the rules later embodied in the DSU, such as a right to a panel and strict time-frames for panel proceedings. However, there was no agreement yet on the important issue

of the procedure to be used for the adoption of panel reports. Nor was appellate review foreseen at that stage.

As part of the results of the Uruguay Round, the DSU introduced a significantly strengthened dispute settlement system. It provided more detailed procedures for the various stages of a dispute, including specific time-frames. As a result, the DSU contains many deadlines, so as to ensure prompt settlement of disputes. The new dispute settlement system is also an integrated framework that applies to all covered agreements with only minor variations.[1]

Arguably, its most important innovation is that the DSU eliminated the right of individual parties, typically the one whose measure is being challenged, to block the establishment of panels or the adoption of a report. Now, the DSB automatically establishes panels and adopts panel and Appellate Body reports unless there is a consensus not to do so. This "negative" consensus rule contrasts sharply with the practice under the GATT 1947 and also applies, in addition to the establishment of panels and the adoption of panel and Appellate Body reports, to the authorization of countermeasures against a party which fails to implement a ruling.[2]

Other important new features of the (WTO) dispute settlement system are the appellate review of panel reports and a formal surveillance of implementation following the adoption of panel (and Appellate Body) reports.

Chapter 3 -- WTO Bodies involved in the dispute settlement process.

The operation of the (WTO) dispute settlement process involves the parties and third parties to a case, the DSB panels, the Appellate Body, the WTO Secretariat, arbitrators, independent experts and several specialized institutions. This chapter gives an introduction to the WTO bodies involved in the dispute settlement system. The involvement of the parties and third parties, the primary participants in a dispute settlement proceeding, has already been outlined here. The precise tasks and roles of each of the actors involved in the dispute settlement process will become clear in the later chapter on the stages of the dispute settlement process.

Among the WTO bodies involved in dispute settlement, one can distinguish between a political institution, the DSB, and independent, quasi-judicial institutions such as panels, the Appellate Body and arbitrators.

3.1 The Dispute Settlement Body (DSB).

Functions and composition ……

The General Council discharges its responsibilities under the DSU through the DSB (Article IV:3 of the WTO Agreement). Like the General Council, the DSB is composed of representatives of all WTO Members. These are governmental representatives, in most cases diplomatic delegates who reside in Geneva (where the WTO is based) and who belong to either the trade or the foreign affairs ministry of the WTO Member they represent. As civil servants, they receive instructions from their capitals on the positions to take and the statements to make in the DSB. As such, the DSB is a political body.

The DSB is responsible for administering the DSU, i.e. for overseeing the entire dispute settlement process.

The DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations and authorize the suspension of obligations under the covered agreements (Article 2.1 of the DSU). A later chapter on the stages of the dispute settlement procedure will explain exactly what all these actions mean. In less technical terms, the DSB is responsible for the referral of a dispute to adjudication (establishing a panel); for making the adjudicative decision binding (adopting the reports); generally, for supervising the implementation of the ruling; and for authorizing "retaliation" when a Member does not comply with the ruling.

The DSB meets as often as is necessary to adhere to the time-frames provided for in the DSU (Article 2.3 of the DSU). In practice, the DSB usually has one regular meeting per month. When a Member so requests, the Director-General convenes additional special meetings. The staff of the WTO Secretariat provides administrative support for the DSB (Article 27.1 of the DSU).

Decision-making in the DSB …….

The general rule is for the DSB to take decisions by consensus (Article 2.4 of the DSU). Footnote 1 to Article 2.4 of the DSU defines consensus as being achieved if no WTO Member, present at the meeting when the decision is taken, formally objects to the proposed decision. This means that the chairperson does not actively ask every delegation whether it supports the proposed decision, nor is there a vote. On the contrary, the chairperson merely asks, for example, whether the decision can be adopted and if no one raises their voice in opposition, the chairperson will announce that the decision has been taken or adopted. In other words, a delegation wishing to block a decision is obliged to be present and alert at the meeting, and when the moment comes, it must raise its flag and voice opposition. Any Member that does so, even alone, is able to prevent the decision.

However, when the DSB establishes panels, when it adopts panel and Appellate Body reports and when it authorizes retaliation, the DSB must approve the decision unless there is a consensus against it (Articles 6.1, 16.4, 17.14 and 22.6 of the DSU). This special decision-making procedure is commonly referred to as "negative" or "reverse" consensus. At the three mentioned important stages of the dispute settlement process (establishment, adoption and retaliation), the DSB must automatically decide to take the action ahead, unless there is a consensus not to do so. This means that one sole Member can always prevent this reverse consensus, i.e. it can avoid the blocking of the decision (being taken). To do so that Member merely needs to insist on the decision to be approved.

No Member (including the affected or interested parties) is excluded from participation in the decision-making process. This means that the Member requesting the establishment of a panel, the adoption of the report or the authorization of the suspension of concessions can ensure that its request is approved by merely placing it on the agenda of the DSB. In the case of the adoption of panel and Appellate Body reports, there is at least one party which, having prevailed in the dispute, has a strong interest in the adoption of the report(s). In other words, any Member intending to block the decision to adopt the report(s) has to persuade all other WTO Members (including the adversarial party in the case) to join its opposition or at least to stay passive. Therefore, a negative consensus is largely a theoretical possibility and, to date, has never occurred. For this reason, one speaks of the quasi-automaticity of these decisions in the DSB. This contrasts sharply with the situation that prevailed under GATT 1947 when panels could be established, their reports adopted and retaliation authorized only on the basis of a positive consensus. Unlike under GATT 1947, the DSU thus provides no opportunity for blockage by individual Members in decision-making on these important matters.

Negative consensus applies nowhere else in the WTO decision-making framework other than in the dispute settlement system.

When the DSB administers the dispute settlement provisions of a plurilateral trade agreement (of Annex 4 of the WTO Agreement), only Members that are parties to that agreement may participate in decisions or actions taken by the DSB with respect to disputes under these agreements (Article 2.1 of the DSU).

With respect to the more operational aspects of the DSB's work, the Rules of Procedure for Meetings of the DSB[1] provide that the Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council[2] apply, subject to a few special rules on the chairperson and except as otherwise provided in the DSU. An important organizational aspect of these general rules is the requirement for Members to file items to be included on the agenda of an upcoming meeting no later than on the working day before the day on which the notice of the meeting is to be issued, which is at least ten calendar days before the meeting (Rule 3 of the Rules of Procedure). In practice, this means that items for the agenda must be made on the 11th day before the DSB meeting, and on the 12th or 13th day if the 11th day were to fall on a Saturday or Sunday.

Role of the chairperson ……

The DSB has its own chairperson, who is usually one of the Geneva-based ambassadors, i.e. a chief of mission of a Member's permanent representation to the WTO (Article IV:3 of the WTO Agreement). The chairperson is appointed by a consensus decision of the WTO Members. The chairperson of the DSB has mainly procedural functions, that is, passing information to the Members, chairing the meeting, calling up and introducing the items on the agenda, giving the floor to delegations wishing to speak, proposing and, if taken, announcing the requested decision. The chairperson of the DSB is also the addressee of the Members' communications to the DSB.

In addition, the chairperson has several responsibilities in specific situations. For instance, the chairperson determines, upon request by a party and in consultation with the parties to the dispute, the rules and procedures in disputes involving several covered agreements with conflicting "special or additional rules and procedures" if the parties cannot agree on the procedure within 20 days (Article 1.2 of the DSU). The chairperson can also be authorized by the DSB to draw up special terms of reference pursuant to Article 7.3 of the DSU. The DSB chairperson is further entitled to extend, after consultation with the parties, the time-period for consultations involving a measure taken by a developing country Member, if the parties cannot agree that the consultations have concluded (Article 12.10 of the DSU). In dispute settlement cases involving a least-developed country Member, the least-developed country can request the DSB chairperson to offer his/her good offices, conciliation and mediation before the case goes to a panel (Article 24.2 of the DSU). Lastly, the DSB chairperson is to be consulted before the Director-General determines the composition of the panel under Article 8.7 of the DSU, and before the Appellate Body adopts or amends its Working Procedures (Article 17.9 of the DSU).

3.2 The Director-General and the WTO Secretariat.

The Director-General of the (WTO) may, acting in an ex officio capacity, offer his/her good offices, conciliation or mediation with a view to assisting Members to settle a dispute (Article 5.6 of the DSU). In a dispute settlement procedure involving a least-developed country Member, when a satisfactory solution has not been found during consultations, the Director-General will, upon request by the

least-developed country Member, offer his or her good offices, conciliation or mediation in order to help the parties resolve the dispute, before a request for a panel is made (Article 24.2 of the DSU). The Director-General convenes the meetings of the DSB and appoints panel members upon the request of either party, and in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, where the parties cannot agree on the composition within 20 days (Article 8.7 of the DSU). The Director-General also appoints the arbitrator(s) for the determination of the reasonable period of time for implementation, if the parties cannot agree on the period of time and on the arbitrator (footnote 12 to Article 21.3(c) of the DSU), or for the review of the proposed suspension of obligations in the event of non-implementation (Article 22.6 of the DSU). The appointment of an arbitrator under Article 22 by the Director-General is an alternative to the original panelists undertaking the task, if they are unavailable.

The staff of the WTO Secretariat, which reports to the Director-General, assists Members in respect of dispute settlement at their request (Article 27.2 of the DSU), conducts special training courses (Article 27.3 of the DSU) and provides additional legal advice and assistance to developing country Members in matters relating to dispute settlement within the parameters of impartiality called for by Article 27.2 of the DSU. The Secretariat also assists parties in composing panels by proposing nominations for potential panelists to hear the dispute (Article 8.6 of the DSU), assists panels once they are composed (Article 27.1 of the DSU), and provides administrative support for the DSB.

3.3 Panels.

Functions and composition of panels ……

Panels are the quasi-judicial bodies, in a way tribunals, in charge of adjudicating disputes between Members in the first instance. They are normally composed of three, and exceptionally five, experts selected on an ad hoc basis.[1] This means that there is no permanent panel at the (WTO); rather, a different panel is composed for each dispute. Anyone who is well-qualified and independent (Articles 8.1 and 8.2 of the DSU) can serve as panelist. Article 8.1 of the DSU mentions as examples persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or who have worked in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member. The WTO Secretariat maintains an indicative list of names of governmental and non-governmental persons, from which panelists may be drawn (Article 8.4 of the DSU). WTO Members regularly propose names for inclusion in that list, and, in practice, the DSB always approves their inclusion without debate. It is not necessary to be on the list in order to be proposed as a potential panel member in a specific dispute. Although some individuals have served on more than one panel, most serve only on one panel. There is thus no institutional continuity of personnel between the different ad hoc panels. Whoever is appointed as a panelist serves independently and in an individual capacity, and not as a government representative or as a representative of any organization (Article 8.9 of the DSU).

The panel composed for a specific dispute must review the factual and legal aspects of the case and submit a report to the DSB in which it expresses its conclusions as to whether the claims of the complainant are well founded and the measures or actions being challenged are WTO-inconsistent. If the panel finds that the claims are indeed well founded and that there have been breaches by a Member of WTO obligations, it makes a recommendation for implementation by the respondent (Articles 11 and 19 of the DSU).

Administrative and legal support to panels ……

The WTO Secretariat is responsible for the administrative aspects of the dispute settlement procedures, as well as for assisting panels on the legal and procedural aspects of the dispute at issue (Article 27.1 of the DSU). This means, on the one hand, dealing with the panel's logistical arrangements, i.e. organizing the panelists' travel to Geneva where panel meetings take place, preparing the letters inviting the parties to the meetings with the panels, receiving the submissions and forwarding them to the panelists etc. On the other hand, assisting panels also means providing them with legal support by advising on the legal issues arising in a dispute, including the jurisprudence of past panels and the Appellate Body. Because panels are not permanent bodies, the Secretariat serves as the institutional memory to provide some continuity and consistency between panels, which is necessary to achieve the DSU's objective of providing security and predictability to the multilateral trading system (Article 3.2 of the DSU). The Secretariat staff assisting a panel usually consists of at least one secretary and one legal officer. Often, one of the two belongs to the division of the Secretariat responsible for the covered agreement invoked[2], and the other to the Legal Affairs Division. The staff of the Rules Division assists panels dealing with disputes on trade remedies (anti-dumping and subsidies).

3.4 Appellate Body.

Tasks and background ……

Unlike panels, the Appellate Body is a permanent body of seven members entrusted with the task of reviewing the legal aspects of the reports issued by panels. The Appellate Body is thus the second and final stage in the adjudicatory part of the dispute settlement system. As it did not exist in the old dispute settlement system under GATT 1947, the addition of this second adjudicatory stage was one of the major innovations of the Uruguay Round of Multilateral Trade Negotiations.

One important reason for the creation of the Appellate Body is the more automatic nature of the adoption of panel reports since the inception of the DSU.[1] In the current dispute settlement system, individual Members of the (WTO) are no longer able to prevent the adoption of panel reports, unless they have at least the tacit approval of all the other Members represented in the DSB The resulting virtual automatic nature of the adoption of panel reports not only took away the previous possibility that the "losing" party could block the adoption of the report, it also took away the possibility for parties or other Members to reject panel reports due to a substantive disagreement with the panel's legal analysis. Wherever one single Member, typically the party "winning" the dispute, is primarily guided by its intention to win the dispute, such rejection is impossible even if the panel report is legally flawed. Under the old dispute settlement system of GATT 1947, by contrast, some panel reports were not adopted because the legal interpretation of a particular GATT provision was unacceptable to the contracting parties from a substantive legal perspective. While this is no longer possible, the appellate review carried out by the Appellate Body now has the function of correcting possible legal errors committed by panels. In doing so, the Appellate Body also provides consistency of decisions, which is in line with the central goal of the dispute settlement system to provide security and predictability to the multilateral trading system (Article 3.2 of the DSU).

If a party files an appeal against a panel report, the Appellate Body reviews the challenged legal issues and may uphold, reverse or modify the panel's findings (Article 17.13 of the DSU).

Composition and structure of the Appellate Body ……

The DSB established the Appellate Body in 1995[2], after which the seven first Appellate Body members were appointed. The DSB appoints the members by consensus (Article 2.4 of the DSU), for a four-year term and can reappoint a person once (Article 17.2 of the DSU). An Appellate Body member can, therefore, serve a maximum of eight years. On average, every two years a part of the Appellate Body membership changes.

Appellate Body members must be persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally, and they must not be affiliated with any government (Article 17.3 of the DSU). Most Appellate Body members have so far been university professors, practising lawyers, past government officials or senior judges. Being an Appellate Body member is theoretically only a part-time occupation. However, the workload and, conversely, the ability to pursue substantial other professional activities, depends on the number of appeals being filed, given that Appellate Body members must be available at all times and on short notice (Article 17.3 of the DSU).

The seven Appellate Body members must be broadly representative of the membership of the WTO (Article 17.3 of the DSU), although they do not act as representatives of their own countries but rather they represent the WTO membership as a whole. The first seven members were citizens of Egypt, Japan, Germany, New Zealand, the Philippines, the United States and Uruguay. The current seven members are:

- **Professor Georges Abi-Saab, Egypt, appointed in 2000;**
- **Mr James Bacchus, United States, appointed in 1995[3];**
- **Professor Luiz Olavo Baptista, Brazil, appointed in 2001;**
- **Mr A.V. Ganesan, India, appointed in 2000;**
- **Mr John Lockhart, Australia, appointed in 2001;**
- **Professor Giorgio Sacerdoti, Italy, appointed in 2001;**
- **Professor Yasuhei Taniguchi, Japan, appointed in 2000.**

Either three or four Appellate Body members have always been citizens of a developing country Member. According to the Working Procedures for Appellate Review, the seven Appellate Body members elect one of their number as Chairman who serves a term of one or maximum two years (paragraph 5 of the Working Procedures). The current Chairman is James Bacchus who has held this position since 2001. The Chairman is responsible for the overall direction of the Appellate Body business, especially with regard to its internal functioning (paragraph 3 of the Working Procedures).

Appellate Body Secretariat ……..

The Appellate Body Secretariat provides legal assistance and administrative support to the Appellate Body (Article 17.7 of the DSU). To ensure the independence of the Appellate Body, this Secretariat is only linked to the WTO Secretariat administratively, but is otherwise separate. The Appellate Body Secretariat is housed together with the WTO Secretariat at the WTO headquarters in Geneva, where both the panels and the Appellate Body hold their meetings.

3.5 Arbitrators.

In addition to panels and the Appellate Body, arbitrators, either as individuals or as groups, can be called to adjudicate certain questions at several stages of the dispute settlement process. Arbitration is available as an alternative to dispute resolution by panels and the Appellate Body (Article 25 of the DSU), although it is a possibility that has so far very rarely been used.[1] Arbitration results are not appealable but can be enforced through the DSU (Articles 21 and 22 of the DSU).

Much more frequent are two other forms of arbitration foreseen in the DSU for specific situations and questions in the process of implementation, i.e. after the DSB has adopted a panel (and, if applicable, an Appellate Body) report, and the "losing" party is bound to implement the DSB rulings and recommendations. The first such situation, which an arbitrator may be called to decide on, is the establishment of the "reasonable period of time" granted to the respondent for implementation (Article 21.3(c) of the DSU). The second is where a party subject to retaliation may also request arbitration if it objects to the level or the nature of the suspension of obligations proposed (Article 22.6 of the DSU). These two forms of arbitration are thus limited to clarifying very specific questions in the process of implementation and they result in decisions that are binding for the parties.

3.6 Experts.

Disputes often involve complex factual questions of a technical or scientific nature, for instance when the existence or degree of a health risk related to a certain product is the subject of contention between the parties. Because panelists are experts in international trade but not necessarily in those scientific fields, the DSU gives panels the right to seek information and technical advice from experts. They may seek information from any relevant source, but before seeking information from any individual or body within the jurisdiction of a Member, the panel must inform that Member (Article 13.1 of the DSU). In addition to the general rule of Article 13 of the DSU, the following provisions in the covered agreements explicitly authorize or require panels to seek the opinions of experts when they deal with questions falling under these agreements:

- **Article 11.2 of the Agreement on Sanitary and Phytosanitary Measures;**
- **Articles 14.2, 14.3 and Annex 2 of the Agreement on Technical Barriers to Trade;**
- **Articles 19.3, 19.4 and Annex 2 of the Agreement on Implementation of Article VII of GATT 1994;**
- **Articles 4.5 and 24.3 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).**

Where a panel considers it necessary to consult experts in order to discharge its duty to make an objective assessment of the facts, it may consult either individual experts or appoint an expert review group to prepare an advisory report (Article 13.2 of the DSU).

Rules for the establishment of expert review groups and their procedures are contained in (Appendix 4 to the DSU). Expert review groups perform their duties under the panel's authority and report to the panel. The panel determines their terms of reference and detailed working procedures. The final reports of expert review groups are issued to the parties to the dispute when submitted to the panel. Expert review groups only have an advisory role. The ultimate decision on the legal questions and the establishment of the facts on the basis of the expert opinions remains the domain of the panel.

Participation in expert review groups is restricted to persons of professional standing and experience in the field in question. Citizens of parties to the dispute cannot serve on an expert review group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot otherwise be fulfilled. Government officials of parties to the dispute may not serve on an expert review group. Members of expert review groups serve in their individual capacity and not as government representatives, nor as representatives of any organization. Governments or organizations must not give them instructions with regard to matters before an expert review group.

Where panels have so far resorted to experts, they did not establish expert review groups, but consulted experts on an individual basis. They have selected them in consultation with the parties, given them a list of questions to which each expert individually responded in writing, and convened a special meeting with the experts at which these and other questions were discussed with the panelists and the parties. The panel report usually reflected both the written responses of the experts to the panel's questions as well as a transcript of the discussions at the meeting with the panel.

3.7 Rules of Conduct.

Under the DSU, the "players" in a dispute settlement process are subject to certain rules designed to ensure due process and unbiased decisions. Persons called to participate in the dispute settlement process as panelists, Appellate Body members or arbitrators must carry out their tasks in an impartial and independent manner. There must not be any ex parte communications (the panel is not entitled to communicate with individual parties except in the presence of the other party or parties) between the parties and the panel or Appellate Body members concerning matters under their consideration (Article 18.1 of the DSU).

More specifically, the DSB has adopted Rules of Conduct for the DSU[1], which aim at guaranteeing the integrity, impartiality and confidentiality of the dispute settlement system. These Rules of Conduct are applicable to all "covered persons" which include panel members, Appellate Body members, experts assisting panels, arbitrators, members of the Textile Monitoring Body, and (WTO) Secretariat and Appellate Body Secretariat staff.

Under the Rules of Conduct, "covered persons" are required to be independent and impartial, to avoid direct or indirect conflicts of interest, and to respect the confidentiality of dispute settlement proceedings. In particular, any covered person is required to disclose the existence or development of any interest, relationship or matter that he or she could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to that person's independence or impartiality. Such disclosure has to include information on financial, professional and other active interests as well as considered statements of public opinion and employment or family interests.

A violation of any of these requirements by a covered person gives the parties to the dispute a right to challenge the participation of that person in the dispute settlement proceeding and to request the exclusion of that person from any further participation in the process. In the case of Secretariat staff, the challenge is addressed to the Director-General.

Chapter 4 -- Legal basis for a dispute.

This chapter will explain the conditions under which Members of the (WTO) can invoke the provisions of the dispute settlement system; that is, what constitutes a valid basis for a complaint by one Member against another Member.

4.1 Legal provisions in the multilateral trade agreements and the DSU.

DSU — Reference to the "covered agreements" ……

Article 1.1 of the DSU stipulates that its rules and procedures apply to "disputes brought pursuant to the consultation and dispute settlement provisions of the ... 'covered agreements'". The basis or cause of action for a WTO dispute must, therefore, be found in the "covered agreements" listed in Appendix 1 to the DSU, namely, in the provisions on "consultation and dispute settlement" contained in those WTO Agreements. In other words, it is not the DSU, but rather the WTO Agreements that contain the substantive rights and obligations of WTO Members, which determine the possible grounds for a dispute.

Dispute settlement provisions in the covered agreements ……

These provisions on "consultation and dispute settlement" are:

- **Articles XXII and XXIII of GATT 1994;**
- **Article 19 of the Agreement on Agriculture;**
- **Article 11 of the Agreement on the Application of Sanitary and Phytosanitary Measures;**
- **Article 8.10 of the Agreement on Textiles and Clothing;**
- **Article 14 of the Agreement on Technical Barriers to Trade;**
- **Article 8 of the Agreement on Trade-Related Investment Measures;**
- **Article 17 of the Agreement on Implementation of Article VI of GATT 1994[1];**
- **Article 19 of the Agreement on Implementation of Article VII of GATT 1994[2];**
- **Articles 7 and 8 of the Agreement on Preshipment Inspection;**
- **Articles 7 and 8 of the Agreement on Rules of Origin;**
- **Article 6 of the Agreement on Import Licensing Procedures;**
- **Articles 4 and 30 of the Agreement on Subsidies and Countervailing Measures;**
- **Article 14 of the Agreement on Safeguards;**
- **Articles XXII and XXIII of the General Agreement on Trade in Services;**
- **Article 64 of the Agreement on Trade-Related Aspects of Intellectual Property Rights.**

Many of these provisions simply refer to Articles XXII and XXIII of GATT 1994[3], or have been drafted using Articles XXII and XXIII as a model. Article XXIII deserves being considered first and given special attention. Obviously, a dispute can be, and often is, brought under more than one covered agreement. In such a case, the question of the proper legal basis has to be assessed separately for the claims made under different agreements.

4.2 Types of complaints and required allegations in GATT 1994.

The GATT 1994 contains "consultation and dispute settlement provisions" in both Articles XXII and XXIII. However, it is Article XXIII:1(a) to (c) which sets out the specific circumstances in which a

(WTO) Member is entitled to a remedy. Article XXIII:2 originally specified the form that this remedy could take, but the consequences of a successful recourse to the dispute settlement system nowadays are set out in more detail in the DSU. Article XXIII of GATT 1994 therefore retains its significance chiefly for specifying in paragraph 1 the conditions under which a Member can invoke the dispute settlement system. Article XXIII:1 of GATT 1994 states:

"Nullification or Impairment

> **1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of**
>
> **a. the failure of another contracting party to carry out its obligations under this Agreement, or**
> **b. the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or**
> **c. the existence of any other situation,**
>
> **the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it."**

The different types of complaints under Article XXIII:1 of GATT 1994 ……

In subparagraphs (a), (b) and (c), Article XXIII:1 provides for three alternative options (i.e. (a) "or" (b) "or" (c)) on which a complainant may rely. However, Article XXIII:1 starts with an introductory clause containing the condition that a Member "consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded". This must be the result of one of the scenarios specified in subparagraphs (a), (b) and (c).

The first, and by far, the most common complaint is the so-called "violation complaint" pursuant to Article XXIII:1(a) of GATT 1994. This complaint requires "nullification or impairment of a benefit" as a result of the "the failure of another [Member] to carry out its obligations" under GATT 1994. This "failure to carry out obligations" is just a different way of referring to a legal inconsistency with, or violation of, the GATT 1994. There also needs to be "nullification or impairment" as a result of the alleged legal inconsistency.

The second type of complaint is the so-called "non-violation complaint" pursuant to Article XXIII:1(b) of GATT 1994. A non-violation complaint may be used to challenge any measure applied by another Member, even if it does not conflict with GATT 1994, provided that it results in "nullification or impairment of a benefit". There have been a few such complaints both under GATT 1947 and in the WTO.

The third type of complaint is the so-called "situation complaint" pursuant to Article XXIII:1(c) of GATT 1994. Literally understood, it could cover any situation whatsoever, as long as it results in "nullification or impairment". However, although a few such situation complaints have been raised

under the old GATT, none of them has ever resulted in a panel report. In the WTO, Article XXIII:1(c) of GATT 1994 has not so far been invoked by any complainant.

Given the admissibility of "non-violation" and "situation complaints", the scope of the WTO dispute settlement system is broader than that of other international dispute settlement systems which are confined to adjudicating only violations of agreements. Simultaneously, the WTO dispute settlement system is narrower than those other systems, in the sense that a violation must also result in nullification or impairment (or possibly the impeded attainment of an objective). This particularity of the system for settlement of international trade disputes reflects the intention to maintain the negotiated balance of concessions and benefits between the WTO Members. It was GATT practice and it is now WTO law that a violation of a WTO provision triggers a rebuttal presumption of nullification or impairment of trade benefits (Article 3.8 of the DSU).

In summary, the WTO dispute settlement system provides for three kinds of complaints: (a) "violation complaints", (b) "non-violation complaints" and (c) "situation complaints". Violation complaints are by far the most frequent. Only a few cases have been brought on the basis of an allegation of non-violation nullification or impairment of trade benefits. No "situation complaint" has ever resulted in a panel or Appellate Body report based on Article XXIII:1(c) of GATT 1994.

Violation complaint ……..

As outlined above, a violation complaint will succeed when the respondent fails to carry out its obligations under GATT 1994 or the other covered agreements, and this results directly or indirectly in nullification or impairment of a benefit accruing to the complainant under these agreements. If it can be established before a Panel and the Appellate Body that these two conditions are satisfied, the complainant will "win" the dispute.

In practice, the first of these two conditions, the violation, plays a much more important role than the second condition, nullification or impairment of a benefit. This is due to the fact that nullification or impairment is "presumed" to exist whenever a violation has been established. This presumption evolved in GATT jurisprudence[1] and is today codified in Article 3.8 of the DSU. Article 3.8 is concerned only with violation complaints ("where there is an infringement"). The presumption set out in this article relates to nullification or impairment once it has been established that there is a breach of an obligation. The presumption does not address the question whether there is such a violation, and it should not be confused with this question.[2]

The effect of the legal presumption is that of a reversal of the burden of proof. The concept of a legal presumption and the language in the last sentence of Article 3.8 of the DSU imply that the presumption set out by Article 3.8 of the DSU can be rebutted. However, there has been no single case of a successful rebuttal in the history of GATT and the WTO to date. GATT panels rejected all attempts to demonstrate that there was no actual trade impact.[3] For instance, the fact that an import quota had not been fully utilized was insufficient for proving the absence of nullification or impairment of benefits because quotas give rise to increased transaction costs and uncertainties that could affect investment plans.[4] In another case, a panel rejected the claim that the GATT-inconsistent measure caused no or insignificant trade effects arguing that the national treatment requirement in GATT 1947 did not protect expectations on export volumes, but expectations on the competitive relationship between imported and domestic products.[5] The Appellate Body has endorsed this reasoning.[6] One GATT panel went as far as to observe that the presumption had, in practice, operated as an irrefutable presumption.[7]

In the practice of the WTO dispute settlement system, panels typically cite Article 3.8 of the DSU (other than disputes brought under the GATS) once they have concluded that the defendant has violated a rule of a covered agreement. Unless the defendant (exceptionally) makes an attempt to rebut the presumption, panels dedicate no more than a brief paragraph at the end of their reports to the issue of nullification or impairment. It should be noted that the types of complaints brought under the GATS are slightly different.

4.2 Types of complaints and required allegations in GATT 1994.

Non-violation complaint …….

One might wonder about the legitimacy of the non-violation complaint, given that the WTO Agreement contains all the rights and obligations on which the Members agreed in their negotiations. Why should there be a remedy against actions that are not inconsistent with these rights and obligations, in other words, measures that the WTO Agreement does not preclude?

The reason is that an international trade agreement such as the WTO Agreement can never be a complete set of rules without gaps. As a result, it is possible for WTO Members to take measures that comply with the letter of the agreement, but nevertheless frustrate one of its objectives or undermine trade commitments contained in the agreement. More technically speaking, the benefit a Member legitimately expects from another Member's commitment under the WTO Agreement can be frustrated both by measures proscribed in the WTO Agreement and by measures consistent with it. If one Member frustrates another Member's benefit by taking a measure otherwise consistent with the WTO Agreement, this impairs the balance between the mutual trade commitments of the two Members. The non-violation complaint provides for a means to redress this imbalance.

A GATT panel has described the purpose of the unusual remedy of the non-violation complaint as encouraging contracting parties to make tariff concessions. When the value of a tariff concession has been impaired by a contracting party giving that concession as a result of the application of a GATT-consistent measure, the contracting party receiving such concession — whose expectation of improved competitive opportunities is frustrated by that measure — must be given a right of redress.[1]

It would be wrong to believe that the non-violation complaint has a wide scope of application and is suitable to address all sorts of measures otherwise consistent with GATT 1994 and the other covered agreements. Panels and the Appellate Body have stated that the remedy in Article XXIII:1(b) "should be approached with caution and should remain an exceptional remedy".[2] One panel has added: "The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules." [3]

Article 26.1 of the DSU specifically addresses non-violation complaints in the sense of Article XXIII:1(b) of GATT 1994 and requires the complainant to "present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement." No presumption applies in non-violation cases as regards nullification or impairment. The text of Article XXIII:1(b), combined with the concept of nullification or impairment of a benefit[4] gives rise to three conditions whose existence a complainant must establish, in order to be successful with a non-violation complaint. These three conditions are: (1) the application of a measure by a Member of the WTO; (2) the existence of a benefit accruing under the applicable agreement; and (3) the nullification or impairment of a benefit as a result of the application of the measure.[5]

The first condition means that the measure applied is attributable to the government of the respondent Member. Purely private conduct, taken by itself, would not satisfy this condition. If a government simply tolerates private restrictive conduct, this also could not be challenged with the non-violation complaint. A different situation is that where the government actively supports or encourages such private actions.[6] With respect to the second condition, complainants have in the past been able to rely on the legitimate expectation of improved market access opportunities resulting from the relevant tariff concessions. As to the third condition, this benefit is nullified or impaired when the measure in question has the effect of upsetting the competitive relationship between imported and domestic goods and the complainant was not able to reasonably anticipate the application of the measure when it was negotiating the concession.

There have been 14 cases in which a non-violation claim under Article XXIII:1(b) of GATT 1947 has been considered by working parties and panels. In six of these cases, the claim under Article XXIII:1(b) was successful[7] and, on three of these occasions, the report was adopted by the GATT Council.

Situation complaint ……..

The negotiating history indicates that Article XXIII:1(c) of GATT 1947, the so-called "situation complaint", was intended to play a role in situations of macroeconomic emergency (e.g. general depressions, high unemployment, collapse of the price of a commodity, balance-of-payment difficulties). Under GATT 1947 practice, contracting parties relied on Article XXIII:1(c) in a few cases in order to complain about withdrawn concessions, failed re-negotiations of tariff concessions and non-realized expectations on trade flows. However, none of these complaints ever resulted in a panel ruling based on Article XXIII:1(c).[8] Therefore neither GATT nor WTO jurisprudence provides guidance as to the criteria for a legitimate situation complaint.

From the plain text of Article XXIII:1(c), one can deduce that there needs to be a situation other than those mentioned in subparagraphs (a) and (b) of Article XXIII:1 and nullification or impairment of a benefit (or the impeded attainment of an objective of GATT 1994). Article 26.2(a) of the DSU provides that the complaining party must "present a detailed justification in support of any argument" with respect to the situation complaint.

Article 26.2 of the DSU also provides that the rules and procedures of the DSU apply only to situation complaints up to the circulation of the panel report. Regarding the adoption of a panel report and the surveillance and implementation of recommendations and rulings in these cases, the old dispute settlement rules and procedures contained in the Decision of 12 April 1989[9] continue to apply. This means that there is no reverse consensus rule applying to the adoption of the panel report and the authorization of the suspension of obligations in the event of non-implementation of rulings with respect to situation complaints. In other words, any Member could block these decisions in the DSB by preventing a positive consensus.[10] So far, this provision has never been invoked by any Member.

Synthesis for practical purposes ……..

In summary, it can be said that there are two types of complaints which play a practical role in the WTO dispute settlement process. These are the violation complaint and, far less frequently, the non-violation complaint, as described above. It is possible for one case to simultaneously involve both these types of complaints, for instance when raised in the alternative ("if the Panel finds that there is no

violation, the complainant submits that it would have to find that there is non-violation nullification or impairment").[11]

4.3 Types of dispute in the other multilateral agreements on trade in goods.

As stated above, most of the multilateral agreements on trade in goods (which are contained in Annex 1A of the WTO Agreement) other than GATT 1994 include an express reference to Articles XXII and XXIII of GATT or paraphrase the criteria contained therein. In those cases, the requirements and options for a complaint are the same as discussed above. Minor adaptations are of course necessary because, for instance, the failure to carry out an obligation under the agreement then refers to the respective agreement, not to GATT 1994. Similarly, the benefit must be one accruing under that agreement. Accordingly, the following section will only highlight the instances in which there are departures from what was explained in the context of GATT 1994.

The SCM Agreement also refers to Articles XXII and XXIII of GATT 1994 (Article 30). However, in Article 4, it specifically provides otherwise in relation to the prohibited subsidies as defined in Article 3 (export subsidies and import substitution subsidies) by not requiring any claim of nullification or impairment of a benefit. As a consequence, Article 3.8 of the DSU is not applicable.[1]

4.4 Types of dispute in the GATS.

The dispute settlement provisions of the GATS (which is contained in Annex 1B of the WTO Agreement) are contained in Articles XXII and XXIII of that Agreement. The GATS only provides for two types of complaints, the violation complaint and the non-violation complaint.[1] There is no situation complaint and the GATT 1994 clause referring to the scenario that "the attainment of any objective of the Agreement is being impeded" also does not exist.

As regards the violation complaint, Article XXIII:1 of the GATS provides that a WTO Member that considers that another Member has failed to carry out its obligations under the GATS may have recourse to the DSU. The GATS thus abandoned the notion of nullification or impairment as a requirement in addition to the failure to carry out obligations. Consequently, Article 3.8 of the DSU is of no relevance to complaints brought under the GATS.

The non-violation complaint of GATS resembles that of GATT 1994 because a Member can allege nullification or impairment of a benefit it could reasonably expect to accrue to it under a specific commitment of another Member in the absence of a conflict with the provisions of GATS (Article XXIII:3).

4.5 Types of dispute in the TRIPS Agreement.

In Article 64.1, the TRIPS Agreement (which is contained in Annex 1C of the WTO Agreement) contains a reference to Articles XXII and XXIII of GATT 1994. On that basis, one would say that all the above as explained in the context of GATT 1994 also applies to disputes under the TRIPS Agreement. In other words, there are three different types of complaints that could be brought under the TRIPS Agreement. However, Article 64.2 of the TRIPS Agreement excluded non-violation and situation complaints for the first five years from the entry into force of the WTO Agreement. Article 64.3 mandated the Council for TRIPS to examine the scope and modalities for non-violation and situation complaints during the five-year moratorium and to submit recommendations to the Ministerial Conference for approval by consensus.

The five-year deadline of Article 64.2 expired on 31 December 1999, but the TRIPS Council has not so far submitted recommendations to the Ministerial Conference, nor has the Ministerial Conference approved any recommendations in that regard. This has resulted in a controversy among Members over whether, in the absence of an approved recommendation on scope and modalities, complaints of the type set out in Article XXIII:1(b) and 1(c) of GATT 1994 are possible since the expiry of the Article 64.2 moratorium. Despite this controversy, no non-violation and situation complaints were brought by Members under the TRIPS Agreement.

At their fourth ministerial session in 2001, ministers of the WTO Members renewed the moratorium contained in Article 64.2 and directed the TRIPS Council to continue its examination of the scope and modalities for non-violation and situation complaints and to make recommendations to the fifth session of the Ministerial Conference that took place in September 2003.[1] However, the fifth session was concluded without any action on this matter.

4.6 Disputes on Articles I to XVI of the WTO Agreement and the DSU.

Articles I to XVI of the WTO Agreement and the DSU do not contain specific provisions concerning consultations and dispute settlement to deal with matters arising under the WTO Agreement itself (in the sense of Articles I to XVI) or the DSU itself. However, these two Agreements do fall within the category of "covered agreements", as they are listed in Appendix 1 to the DSU. The second sentence of Article 1.1 of the DSU also provides specifically that the dispute settlement system applies to disputes under the WTO Agreement (in the sense of Articles I to XVI) and the DSU.

To date, there have been two cases in which a complainant has claimed a breach by a Member of a provision of the DSU, namely Article 23.1.[1] Moreover, one provision of the WTO Agreement (in the sense of Articles I to XVI), namely Article XVI:4, is a frequent basis for violation complaints.

Chapter 5 -- Possible Object of a Complaint — Jurisdiction of Panels and the Appellate Body.

The previous chapter explored what constitutes a valid basis for a complaint in the (WTO) dispute settlement system and explained the different types of complaints available under the covered agreements. The present chapter addresses the jurisdiction of WTO panels and the Appellate Body by exploring the question of the object of the complaint. To put it more simply: against what can the complaint be directed? For example, in a violation complaint, what types of action by a Member are covered by a commitment in a covered agreement? Can only acts of administrative authorities be challenged or also legislative acts? Can the complainant invoke the dispute settlement system only against legally binding acts of Members or also against non-binding acts taken by the Members' authorities? Can the challenge only be directed against governmental conduct or also against behaviour of private individuals? Can it be directed only against positive action or also against omissions, i.e. the failure to act?

Answers to these questions are important because they serve to delineate the jurisdiction of WTO panels and the Appellate Body.

5.1 Article 1.1 of the DSU.

One could give a simple and formalistic answer to the question of jurisdiction: the WTO dispute settlement system has jurisdiction over any dispute between WTO Members arising under any of the covered agreements (Article 1.1 of the DSU). How the object of a dispute is viewed in legal terms

depends on the content of the agreements (i.e. on the type of complaint possible under the agreement in question, combined with the substantive provision in question). For example, a violation complaint under Article X, Y or Z of GATT 1994 can be directed against anything that might violate those provisions. In such a case, a panel would probably not spend any time deciding whether the complainant is challenging a proper measure, but rather would simply assess whether what is alleged to violate the invoked article actually does so. There is no doubt that the panel would have jurisdiction to answer that question.

At the same time, it is possible conceptually to categorize the possible objects of a complaint on the basis of the common structure of the provisions of the covered agreements. Such categorization follows below.

5.2 Action and inaction; binding and non-binding acts of Members.

If a complaint is based on a provision that prohibits certain actions (e.g. Article XI of GATT 1994 which prohibits, among other things, export restrictions), only positive action (e.g. a law, regulation or decision impeding the exportation of goods to other (WTO) Members or other forms of measures imposing restrictions) can violate such a provision. Inaction as such (the failure to adopt such a law, regulation or decision) could not breach this obligation.[1] The positive action in question could be a formal regulation, but also an informal instruction issued by the government, if, as in the Article XI example above, it effectively restricts exports.

The situation is different under WTO Agreement provisions that do not prohibit certain behaviour, but rather require positive action. The TRIPS Agreement, for example, obliges Members in Article 25.1 to provide for the protection of new or original independently created industrial designs. In Article 26, it defines what this protection has to include. This is a typical obligation to take positive action by passing and applying a law granting this protection. Accordingly, inaction or an omission will be at the heart of a violation complaint which can be brought in a situation where a Member has either done nothing, i.e. not passed any laws, or where the laws passed and applied for some reason do not meet the required standards.

Obligations to take positive action are prominent within the TRIPS Agreement, but also exist in other covered agreements. Notification and transparency requirements (e.g. Article 12.2 of the Agreement on Safeguards or Article X:1 of GATT 1994) or consultation requirements (Article 12.3 of the Agreement on Safeguards) are other examples. What can become the object of a violation complaint, therefore, essentially depends on the obligations underlying the claim. Whatever activity can violate these obligations of the Members can also be challenged by a complainant.

Article 6.2 of the DSU, which obliges the complainant to identify in its request for the establishment of a panel the specific "measures" at issue, should not be understood to impose the requirement that a complaint can only be brought against a "measure" in the sense of a positive act, which would exclude inaction. The Appellate Body has dealt with the term "measure" in Article 6.2 of the DSU and stated, with reference to previous GATT and WTO jurisprudence, that a "measure" may be any act of a Member, whether or not legally binding, including a government's non-binding administrative guidance and also an omission or a failure to act on the part of a Member.[3] This must be so because Article 6.2 of the DSU applies to all complaints and, as pointed out above with the example of Article 25 of the TRIPS Agreement, complaints are also possible against the failure of a Member to take action where the WTO provision in question requires positive action.

5.3 Only governmental measures of Members?

As a general rule, only government measures can be the object of (WTO) complaints.

Concerning violation complaints, it is recalled that the WTO Agreement is an international agreement binding the WTO Members under public international law. The obligations contained in the WTO Agreement, as such, therefore bind only the signatory States and separate customs territories. It follows that non-governmental, private actors cannot infringe these obligations. However, there can be instances in which certain private behaviour has strong ties to some governmental action. Whether this permits the attribution of the private behaviour to the Member in question, and therefore is actionable under the WTO, will obviously depend on the particularities of each case.[1]

As regards the non-violation complaint, Article XXIII:1(b) of GATT 1994 requires the application of a measure by another Member. A purely private activity without government involvement would therefore not satisfy that requirement.[2] However, in practice, things are not always so clear-cut, and there have been several trade disputes involving private actions having some governmental connection or endorsement. On the basis of the panel reports in such disputes, the panel in Japan — Film defined "sufficient government involvement" as the decisive criterion as to whether a private action may be deemed to be a governmental "measure".

Finally, a situation complaint could arguably apply to situations in which private parties have taken some action against which the Member did not act but this has never been tested in either the GATT or WTO dispute settlement systems.

5.4 Measures taken by regional or local subdivisions of a Member.

Under traditional public international law, subjects of international law, typically States, are responsible for the activities of all branches of government within their system of governance, and also for all regional levels or other subdivisions of government. This principle also applies in (WTO) law, except where the covered agreements expressly deal with this question and exclude acts taken by regional or local governments from the coverage of certain obligations. Article 22 of the DSU specifically confirms that the dispute settlement system can be invoked in respect of measures taken by regional or local governments or authorities within the territory of a Member. There are particular rules, however, applying in the implementation phase. Where a measure taken by a regional or local authority is inconsistent with a provision of a covered agreement, the Member must take such reasonable measures as may be available to it to ensure observance (Article 22.9 of the DSU, Article XXIV:12 of GATT 1994 and Article I:3(a) of the GATS).[1] Article 14 of the TBT Agreement attributes to Members acts of non-governmental organizations regulated by the Agreement.[2]

5.5 The possibility of challenging laws "as such."

WTO complaints are often directed against specific administrative measures taken by authorities of a Member pursuant to domestic laws, for example, anti-dumping duties imposed by an anti-dumping authority following an investigation of certain imports. However, the underlying law itself may also violate a (WTO) legal obligation or otherwise nullify or impair benefits under the covered agreements. Article XVI:4 of the WTO Agreement makes clear that Members must ensure the conformity of their laws, regulations and administrative procedures with their obligations under the

WTO Agreement, including its Annexes. Accordingly, Members frequently invoke the dispute settlement system against a law as such, independently of, or without waiting for, the application of that law. For example, claims about taxes which discriminate against imports and contravene Article III:2 of GATT 1994 are typically directed at the tax legislation and not at the tax imposed on a specific shipment of goods at a specific time in the recent past. Successfully challenging the law as such gives the advantage that the respondent's implementation, ideally the withdrawal or modification of the inconsistent measure (Article 3.7 of the DSU), would equally address the law as such and not be limited to an isolated case of application of such law.

Discretionary and mandatory legislation ……

There is an important distinction in WTO law between challenging a law as such and challenging the application of that law. Under GATT 1947, panels had already developed the concept that, when legislation as such is the object of a complaint, mandatory and discretionary legislation must be distinguished from each other. The Appellate Body has endorsed this distinction.[1] Only legislation that mandates a violation of WTO obligations can be found as such to be inconsistent with those obligations. By contrast, legislation that merely gives discretion to the executive authority of a Member to act inconsistently with the WTO Agreement cannot be challenged as such. In such a case, only the actual application of such legislation in a manner that is inconsistent with the WTO Agreement is subject to challenge. Thus, where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations under the WTO Agreement in good faith.[2] According to this approach, the test is whether or not the legislation in question allows the administrative authorities to abide by that Member's WTO obligations.

Nonetheless, one panel took issue with this distinction as a principle applying to all WTO obligations. This panel insisted that it depends on the precise WTO provision in question and whether the provision precludes only mandatory laws or also discretionary ones.[3] The Appellate Body recently stated that it is "not ... precluding the possibility that a Member could violate its WTO obligations by enacting legislation granting discretion to its authorities to act in violation of its WTO obligation."

Legislation not yet in force …….

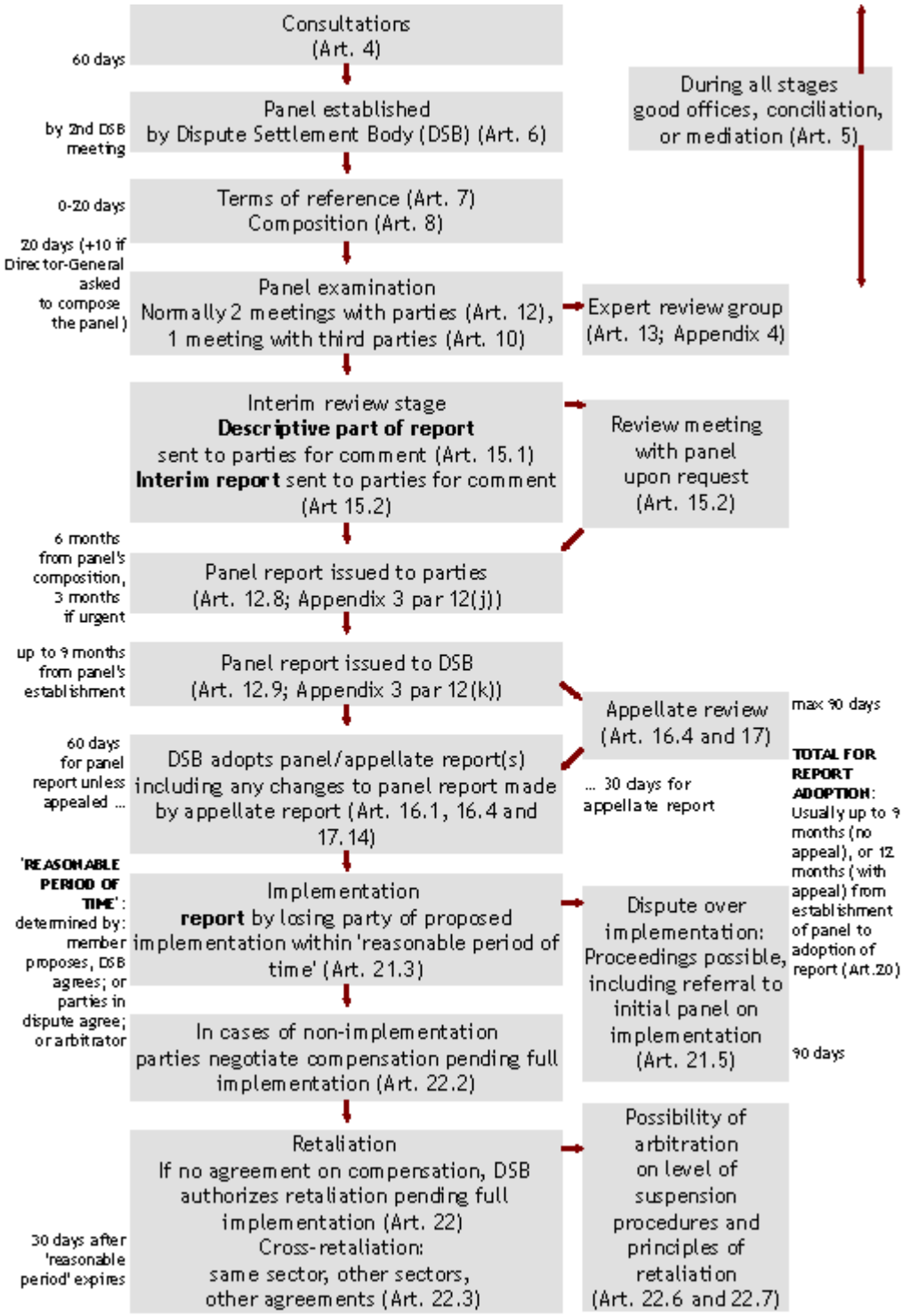
There are times when a piece of domestic legislation has already been adopted, but has not yet entered into force. In other words, the law has been adopted in its final form, but with the stipulation that it will be effective only from a future date. Can such laws be challenged in the WTO dispute settlement system before they enter into force, given that the legislative authorities have completed their work of crafting the law and the entry into effect is only a matter of time and thus automatic? Or is it premature to challenge such a law, given that it has no legal effect until the date of entry into force, which would exclude any violation of WTO law and might also prevent nullification or impairment of any benefit for the time being?

Several dispute settlement panels have dealt with this type of question and have found that the challenge was not premature in these specific instances because the entry into force was automatic at a future date and did not depend on further legislative action. Even though the legal effect of such a measure will only occur in the future, the measure already had an impact on the market participants engaging in international trade prior to its coming into force because these market participants typically plan their transactions ahead of time.[5]

Chapter 6 -- The process — Stages in a typical WTO dispute settlement case.

This chapter explains all the various stages through which a dispute can pass in the (WTO) dispute settlement system. There are two main ways to settle a dispute once a complaint has been filed in the WTO: (i) the parties find a mutually agreed solution, particularly during the phase of bilateral consultations; and (ii) through adjudication, including the subsequent implementation of the panel and Appellate Body reports, which are binding upon the parties once adopted by the DSB. There are three main stages to the WTO dispute settlement process: (i) consultations between the parties; (ii) adjudication by panels and, if applicable, by the Appellate Body; and (iii) the implementation of the ruling, which includes the possibility of countermeasures in the event of failure by the losing party to implement the ruling.

6.1 Flow chart of the Dispute Settlement Process.



6.2 Consultations.

Objective of consultations ……..

The preferred objective of the DSU is for the Members concerned to settle the dispute between themselves in a manner that is consistent with the WTO Agreement (Article 3.7 of the DSU).

Accordingly, bilateral consultations between the parties are the first stage of formal dispute settlement (Article 4 of the DSU). They give the parties an opportunity to discuss the matter and to find a satisfactory solution without resorting to litigation (Article 4.5 of the DSU). Only after such mandatory consultations have failed to produce a satisfactory solution within 60 days may the complainant request adjudication by a panel (Article 4.7 of the DSU).[1] Even when consultations have failed to resolve the dispute, it always remains possible for the parties to find a mutually agreed solution at any later stage of the proceedings.[2]

A majority of disputes so far in the (WTO) have not proceeded beyond consultations, either because a satisfactory settlement was found, or because the complainant decided for other reasons not to pursue the matter further. This shows that consultations are often an effective means of dispute resolution in the WTO and that the instruments of adjudication and enforcement in the dispute settlement system are by no means always necessary.

Together with good offices, conciliation and mediation[3], consultations are the key non-judicial/diplomatic feature of the dispute settlement system of the WTO. Consultations also allow the parties to clarify the facts of the matter and the claims of the complainant, possibly dispelling misunderstandings as to the actual nature of the measure at issue. In this sense, consultations serve either to lay the foundation for a settlement or for further proceedings under the DSU.

Legal basis and requirements for a request for consultations ……

The request for consultations formally initiates a dispute in the WTO and triggers the application of the DSU. Very often, informal discussions on the matter between capital-based officials or between the Geneva delegations of the Members involved precede the formal WTO consultations. However, even where prior consultations occurred, it remains necessary for the complainant to go through the consultation procedure set forth in the DSU as a prerequisite for further proceedings in the WTO.

The complaining Member addresses the request for consultations to the responding Member, but must also notify the request to the DSB and to relevant Councils and Committees overseeing the agreement(s) in question (Article 4.4 of the DSU). Members only have to send one single text of their notification to the Secretariat, specifying the other relevant Councils or Committees. The Secretariat then distributes it to the specified relevant bodies.[4] The request for consultations informs the entire Membership of the WTO and the public at large of the initiation of a WTO dispute. The complainant has to make the request pursuant to one or more of the covered agreements (Articles 4.3 and 1.1 of the DSU), specifically under the respective provision on consultations of the covered agreement(s) in question. Consultations are thus subject to the provisions of Article 4 of the DSU and the respective individual WTO Agreement.

Under GATT 1994 and those covered agreements that refer to the consultations and dispute settlement provisions of GATT 1994, two legal bases are available for launching a dispute with a request for consultations, that is, either Articles XXII:1 or XXIII:1 of GATT 1994. Similarly, under GATS), consultations can be initiated under either Articles XXII:1 or XXIII:1.

For practical purposes, the main difference between these two legal bases relates to the ability of other WTO Members to join as third parties, which is possible only when consultations are held pursuant to Article XXII of GATT 1994, Article XXII:1 of GATS, or the corresponding provisions in other covered agreements (Article 4.11 of the DSU). Hence, the choice between Articles XXII:1 and XXIII:1 of GATT 1994 is a strategic one, depending on whether the complainant wants to make it

possible for other Members to participate. If the complainant invokes Article XXII:1, the admission of interested third parties depends on the respondent, who may or may not accept them. By choosing Article XXIII:1, the complainant is able to prevent the involvement in the consultations of third parties. This option may be attractive for a complainant who intends to work towards a mutually agreed solution with the respondent without interference from other Members.

A request for consultations must be submitted in writing and must give the reasons for the request. This includes identifying the measures at issue and indicating the legal basis for the complaint (Article 4.4 of the DSU). In practice, such requests for consultations are very brief; often they are no more than one or two pages long, yet they must be sufficiently precise. Because requests for consultations are always the first official WTO document emerging in a specific dispute and each dispute has its own WT/DS number, requests for consultations carry the document symbol WT/DS###/1 (except in the case of issues falling under the Agreement on Textiles and Clothing where different procedures apply).

Fruitfulness of action under the dispute settlement system ……..

Before initiating consultations, a Member is obliged to exercise its judgement as to whether action under the dispute settlement system would be fruitful, the aim of the dispute settlement mechanism being to secure a positive solution to the dispute (Article 3.7 of the DSU). By its express terms, Article 3.7 of the DSU entrusts the Members of the WTO with the self-regulating responsibility of exercising their own judgement in deciding whether they consider it would be fruitful to bring a case.

Procedure for consultations …….

The respondent (i.e. the Member to whom the request for consultations is addressed), is obliged to accord sympathetic consideration to, and afford adequate opportunity for, consultations (Article 4.2 of the DSU). Consultations typically take place in Geneva and are confidential (Article 4.6 of the DSU), which also means that the (WTO) Secretariat is not involved. The fact that they take place behind closed doors also means that their content remains undisclosed to any panel subsequently assigned the matter.

Unless otherwise agreed, the respondent must reply to the request within ten days and must enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request for consultations. If the respondent fails to meet any of these deadlines, the complainant may immediately proceed to the adjudicative stage of dispute settlement and request the establishment of a panel (Article 4.3 of the DSU). If the respondent engages in consultations, the complainant can proceed to the request for establishment of a panel at the earliest 60 days after the date of receipt of the request for consultations, provided that no satisfactory solution has emerged from the consultations. However, the consultation stage can also be concluded earlier if the parties jointly consider that consultations have failed to settle the dispute (Article 4.7 of the DSU). In practice, parties to a dispute often allow themselves significantly more time than the minimum of 60 days.

In cases of urgency, including those that concern perishable goods, Members must enter into consultations within a period of no more than ten days after the date of receipt of the request. If the consultations fail to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel (Article 4.8 of the DSU).
Third parties in consultations ……..

A WTO Member that is neither the complainant nor the respondent may be interested in the matters the parties to a dispute are discussing in their consultations. There are various reasons for such an interest: for example, that other Member may have a trade interest and so feels similarly aggrieved by the challenged measure; it may, on the contrary, benefit from that measure; or it may be concerned about the challenge because it maintains a measure similar to that of the respondent. The Member in question may also have an interest in being present at discussions on any mutually agreeable solution because such a solution may affect its interests.

Such other Member may request to join consultations if it has a substantial trade interest in the matter being discussed and if consultations were requested pursuant to Article XXII:1 of GATT1994, Article XXII:1 of GATS or the corresponding provisions of the other covered agreements. The request must be addressed to the consulting Members and the DSB within ten days after the date of the circulation of the original request for consultations.[1] The responding Member must also agree that the claim of substantial trade interest is well founded. If the respondent disagrees, there is no recourse through which the interested Member can impose its presence at the consultations, no matter how legitimate the invoked substantial trade interest may be. However, the interested Member can always request consultations directly with the respondent (Article 4.11 of the DSU), which would open a new, separate dispute settlement proceeding.

6.3 The panel stage.

If the consultations have failed to settle the dispute, the complaining party may request the establishment of a panel to adjudicate the dispute. As mentioned earlier, the complainant may do so any time 60 days after the date of receipt by the respondent of the request for consultations, but also earlier if the respondent either did not respect the deadlines for responding to the request for consultations or if the consulting parties jointly consider that consultations have failed to settle the dispute (Article 4.7 of the DSU). Where consultations do not yield a satisfactory result for the complainant, the procedure starting with the panel stage offers the complainant the possibility to uphold its rights or protect its benefits under the WTO Agreement. This procedure is equally important for the respondent as an opportunity to defend itself because it may disagree with the complainant on either the facts or the correct interpretation of obligations or benefits under the WTO Agreement. The adjudicative stage of dispute settlement is intended to resolve a legal dispute, and both parties must accept any rulings as binding (although they are always able to try to settle the dispute amicably at any time).

Establishment of a panel …….

The request for establishment of a panel initiates the phase of adjudication. A request for the establishment of a panel must be made in writing and is addressed to the Chairman of the DSB. This request becomes an official document in the dispute in question and is circulated to the entire (WTO) membership.[1] In order to be included in the agenda of a DSB meeting, the request for establishment of a panel must be filed at least 11 days in advance (Rule 3 of the Rules of Procedure). It must indicate whether consultations were held, identify the specific measures at issue, and provide a brief, but sufficiently clear, summary of the legal basis of the complaint (Article 6.2 of the DSU).

The content of the request for establishment of the panel is crucial. Under Article 7.1 of the DSU, such request determines the standard terms of reference for the panel's examination of the matter. In other words, the request for the establishment of a panel defines and limits the scope of the dispute and thereby the extent of the panel's jurisdiction. Only the measure or measures identified in the

request become the object of the panel's review and the panel will review the dispute only in the light of the provisions cited in the complainant's request. In addition to determining the panel's terms of reference, the request for establishment of the panel also has the function of informing the respondent and third parties of the basis for the complaint.[2]

It is thus important to draft the request for the establishment of a panel with sufficient precision so as to avoid having the respondent raise preliminary objections against individual claims or having the panel decline to rule on certain aspects of the complaint. Providing "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" means that the legal claims, but not the arguments, must all be specified sufficiently in the request for the establishment of a panel. If the initial request does not specify a certain claim, the request cannot subsequently be "cured" by a complaining party's argumentation in the written submissions or in oral statements to the panel.[3] The mere listing of the articles of the agreements allegedly breached may, in the particular circumstances of the case, be sufficient to satisfy the minimum requirements of Article 6.2 of the DSU[4], but this must be examined on a case-by-case basis.[5] In several cases of (preliminary) objections by the respondent, panels and the Appellate Body have asked whether the respondent's ability to defend itself was prejudiced by the alleged lack of clarity in the panel request.[6]

Panels have standard terms of reference, unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel (Article 7.1 of the DSU). If other than standard terms of reference are agreed upon, any Member may raise any point in that respect in the DSB (Article 7.3 of the DSU).

Establishing panels is one of the functions of the DSB and is one of the three situations in which the decision of the DSB does not require a consensus. In the first DSB meeting in which such a request is made, the responding Member can still block the panel's establishment, as was the case in the dispute settlement system under GATT 1947. At the second DSB meeting where the request is made, however, the panel will be established, unless the DSB decides by consensus not to establish the panel (i.e. the "negative" consensus rule applies (Article 6.1 of the DSU)). This second meeting usually takes place around one month later, but the complainant can also request a special meeting of the DSB within 15 days of the request, provided that at least ten days' advance notice of the meeting is given (footnote 5 to Article 6.1 of the DSU).

The rule of negative (or reverse) consensus means that the complainant ultimately has a guarantee that the requested panel will be established if it so wishes. The only possibility to prevent the establishment is a consensus in the DSB against establishment, but this will not happen as long as the complainant is unwilling to join in that consensus. In other words, as long as the complainant, even alone and against the opposition of all other WTO Members, insists on the establishment of the panel, it is impossible for the DSB to reach a consensus against establishment. Therefore[7], one speaks of a virtually automatic DSB decision to establish a panel.

Third parties before the panel ……..

The complaining and the responding Members are the parties to the disputes. Other Members have an opportunity to be heard by panels and to make written submissions as third parties, even if they have not participated in the consultations. In order to participate in the panel procedure, these Members must have a substantial interest in the matter before the panel and they must notify their interest to the DSB (Article 10.2 of the DSU).

In practice, the DSB applies a ten-day deadline from the establishment of the panel for Members to reserve their rights as third parties. At the meeting at which the panel is established, it is sufficient to do so orally. During the following ten days, the substantial interest and the desire of Members to participate as third parties must be notified to the DSB in writing through the WTO Secretariat.

There is a difference between "substantial trade interest" which is required for third parties in consultations and "substantial interest" before the panel. Most significant is the fact that it is possible to join consultations only with the respondent's acceptance (and in the case of non-acceptance, there is no recourse to enforce participation). On the other hand, any Member who invokes a systemic interest, in practice, is admitted to a panel procedure as a third party without any scrutiny whether the interest truly is "substantial".

Third parties receive the parties' first written submissions to the panel and present their views orally to the panel during the first substantive meeting (Article 10.3 of the DSU). Third parties have no rights beyond these although a panel can, and often does, extend the rights of participation of third parties in individual cases.

Composition of the panel …….

Even after a panel has been established by the DSB, it still must be composed because there are no permanent panels nor permanent panelists in the (WTO). Instead, panels must be composed ad hoc for each individual dispute, with the selection of three or five members, pursuant to procedures laid down in the DSU (Article 8 of the DSU).

Panels are composed of three persons unless the parties to the dispute agree, within ten days from the establishment of the panel, to a panel composed of five panelists (Article 8.5 of the DSU). The Secretariat proposes nominations for the panel to the parties to the dispute (Article 8.6 of the DSU). Potential candidates must meet certain requirements in terms of expertise and independence (Articles 8.1 and 8.2 of the DSU). The WTO Secretariat maintains an indicative list of names of governmental and non-governmental persons, from which panelists may be drawn (Article 8.4 of the DSU) although other names can be considered as well. WTO Members regularly propose names for inclusion in that list, and, in practice, the DSB almost always approves their inclusion without debate. As noted, it is not necessary to be on the indicative list in order to be proposed as a potential panel member in a specific dispute. Citizens of a party or a third party to a dispute may not serve as panelists without the agreement of the parties (Article 8.3 of the DSU). When a dispute is between a developing country Member and a developed country Member the panel must, upon request by the developing country Member, include at least one panelist from a developing country Member (Article 8.10 of the DSU). Traditionally, many panelists are trade delegates of WTO Members or capital-based trade officials, but former Secretariat officials, retired government officials and academics also regularly serve on panels. These individuals perform the task of a panelist on a part-time basis, in addition to their usual professional activity.

When the Secretariat proposes qualified individuals nominations as panelists, the parties must not oppose these nominations except for compelling reasons (Article 8.6 of the DSU). In practice, many Members make quite extensive use of this clause and oppose nominations very frequently. In such cases, there is no review regarding whether the reasons given are truly compelling. Rather, the Secretariat proposes other names. If, according to this method, there is no agreement between the parties on the composition of the panel within 20 days after the date of its establishment by the DSB, either party may request the Director-General of the WTO to determine the composition of the panel.

Within ten days after sending this request to the chairperson of the DSB, the Director-General appoints the panel members in consultation with the chairperson of the DSB and the chairperson of the relevant Council or Committee, after consulting with the parties (Article 8.7 of the DSU).[1] The availability of this procedure is important because it prevents a respondent from blocking the entire panel proceeding by delaying (forever) the composition of the panel, which is what sometimes happens in other systems of international dispute resolution. Of course, the parties are always free to devote more than 20 days attempting to agree on the composition of the panel as long as none of them requests the Director-General to intervene.

The selected panelists must fulfill their task in full independence and not as representatives of a government or other organization for which they might happen to work. Members are prohibited from giving panelists instructions or seeking to influence them with regard to matters before the panel (Article 8.9 of the DSU).

Special rules on composition ……

The Ministerial Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services, adopted in Marrakesh on 15 April 1994, and paragraph 4 of the GATS Annex on Financial Services expressly provide for the selection of panelists to ensure that panels have the relevant specific expertise in the sector that is the subject of the dispute.

Multiple complainants ……

Given that governmental measures regulating trade often affect trade with many WTO Members, there is frequently more than one other Member taking issue with a measure allegedly breaching WTO law or impairing benefits under the WTO Agreements. Past practice shows that Members have used various strategies available under the dispute settlement rules to protect their commercial interests:

- **The most passive strategy has been to hold back completely and hope that another Member raises the issue, proceeds through the entire dispute settlement process and ultimately secures the withdrawal of a measure if it has been found WTO-inconsistent. If this happens, all WTO Members benefit from that withdrawal.[2] Whether the Member which invoked the dispute settlement system benefits from that withdrawal to a greater extent than the passive Member(s) will largely depend on the respective trade flows in the products or services concerned.**
- **A more active strategy has been to participate as a third party in a dispute between two other Members involving a measure of interest. Compared to the passive option, being a third party offers the advantage of receiving information on the dispute, namely, the initial submissions, and of being heard by the panel and the parties. But the panel report does not include conclusions and recommendations with respect of third parties. A third party can always, however, switch to a more active role at a later stage and initiate a dispute settlement proceeding in its own.**
- **The most active strategy available would be that of being a complainant in one's own right by requesting consultations and a panel either in parallel to other complainants or jointly with other (co-)complainants. Both these variations exist in practice.**

Establishment and composition in the case of multiple complainants ……

In the case of multiple complainants, i.e. more than one Member requesting the establishment of a panel related to the same matter, Article 9.1 of the DSU applies and calls for the DSB, whenever feasible, to establish a single panel to examine these complaints taking into account the rights of all Members concerned.[3] For example, in US — Shrimp, the DSB decided to establish one single panel, despite a separate request made by India after the establishment of a panel at the joint request of Malaysia and Thailand and a separate request of Pakistan.[4] The "feasibility" of establishing a single panel obviously depends on factors such as the timing of the various disputes being more or less similar. If there is a long period of time between the different requests for establishment of a panel, establishing a single panel may be unfeasible, for instance if the panel that has been established first has already held its substantive meetings. When the time lag between the two disputes is less, establishing a single panel can be feasible if the parties, for instance, agree on a shorter time-period for consultations.

If it is not feasible to establish a single panel and more than one panel is established, the same persons should, if possible, serve as panelists on each of the separate panels and the timetables should be harmonized (Article 9.3 of the DSU). In EC — Hormones, for instance, the complaint of Canada (WT/DS48) and that of the United States (WT/DS26) were reviewed by two separate panels composed of the same individuals.

These two solutions serve to ensure that there is a consistent legal approach on the different complaints. With various panels composed of different panelists, who would work separately and not know each others' reasoning and decision (panel procedures are confidential until the circulation of the report), there is a risk that the different panel reports could depart one from another and even be contradictory.[5]

The panel procedure …….

Once established and composed, the panel now exists as a collegial body and can start its work. One of the first tasks for the panel is to draw up a calendar for the panel's work (Article 12.3 of the DSU). The procedure is primarily set out in Article 12 and Appendix 3 to the DSU, but offers a certain degree of flexibility. The panel can follow different procedures after consulting the parties (Article 12.1 of the DSU, paragraph 11 of Appendix 3). In practice, panels generally follow the working procedures of Appendix 3 to the DSU, but often adopt additional rules where the specific dispute so requires. This usually happens in consultations or in agreement with the parties during the panel's "organizational" meeting with the parties. If this is not possible, the panel takes a decision on the working schedule and notifies the parties. The calendar of work thus adopted on the basis of the suggested timetable in Appendix 3 to the DSU sets dates and deadlines for the key stages of the panel proceeding, (e.g. the dates by which submissions have to be filed, the oral hearings (called "first" or "second substantive meeting") take place, when the interim and the final panel report are to be issued, etc.).

Submissions and oral hearings ……..

In accordance with the panel's calendar, the substantive panel process may start with an exchange of submissions between the parties on any preliminary issue raised by the respondent. For example, a respondent may challenge the sufficiency or clarity of the request for the establishment of the panel.

In such cases, the panel may issue a preliminary ruling, but it can also reserve its ruling for the final panel report.[1]

When there are no such preliminary issues, the parties start by exchanging a first set of written submissions. The complainant normally is the first to file its submission, to which the respondent replies in its first submission (Article 12.6 of the DSU). The third parties usually file their submissions after the parties have filed theirs. The third parties, who are entitled to receive the parties' first written submissions (Article 10.3 of the DSU), often side with the positions taken by one of the parties. The DSU envisages that the Secretariat is to receive these submissions and transmit them to the other party or parties to the dispute (Article 12.6 of the DSU). In practice, however, these submissions are filed with the Secretariat DS Registry[2] only in the number requested for the panel, whereas the parties and third parties serve copies directly on the other parties and third parties, often through the letter boxes of their Geneva delegations in the (WTO) building.

The parties' written submissions are quite extensive documents sometimes of considerable length and often with elaborate annexes. They clarify the facts of the case and contain legal arguments, which often rely substantially on prior jurisprudence of panels and the Appellate Body. The complainant's submission usually attempts to establish that the claim of a violation or of non-violation nullification or impairment is substantiated. The respondent typically tries to refute the factual and legal allegations and arguments put forward by the complainant. In contrast to the parties' submissions, third party submissions are usually a lot shorter, often only a few pages long, and comment on the parties' factual and legal arguments.

All these submissions are kept confidential (Article 18.2 of the DSU and paragraph 3 of the Working Procedures in Appendix 3 to the DSU), but the panel report, which is ultimately circulated to all Members and made public, reflects and summarizes the factual and legal allegations and arguments of the parties before the panel (in the so-called descriptive part of the panel report). In addition, the parties are free to disclose their own submissions to the public (Article 18.2 of the DSU and paragraph 3 of the Working Procedures in Appendix 3 to the DSU). Several Members publish their submissions on their own websites, as soon as they are filed, after an oral hearing, or once the procedure is concluded.[3]

In drawing up their working procedures for a specific dispute, panels sometimes request the parties and third parties to submit executive summaries of their submissions. To some extent, these summaries are used in drafting the descriptive part of the panel report.

After the exchange of the first written submissions, the panel convenes a first oral hearing, called the first substantive (as opposed to "organizational") meeting. Like all meetings, this meeting takes place at the WTO headquarters in Geneva, and is similar to an oral hearing before a court, but the setting is more informal. Contrary to practice in many domestic judiciaries, this oral hearing is not public. Only the parties and third parties to the dispute, the panelists, the Secretariat staff supporting the panel, and the interpreters are entitled to attend this meeting.

At this meeting, which is recorded on tape, the parties present their views orally, mostly on the basis of a prepared statement also distributed in writing to the panel and the other parties (paragraph 9 of the Working Procedures in Appendix 3). After hearing the complainant(s) and the respondent, the panel accords the third parties an opportunity to present their views orally during a special session dedicated to the third parties' presentations (Article 10.2 of the DSU, paragraph 6 of the Working Procedures in Appendix 3). This means that, under the normal procedures, third parties are not

present prior to this special third party session, when the parties present their views orally, but only while all the third parties present their case. Accordingly, they all leave the room after all third parties have spoken (unless the panel adopts a different procedure).

After the oral statements, the parties (and third parties) are invited to respond to questions from the panel and from the other parties in order to clarify all the legal and factual issues (paragraph 8 of the Working Procedures in Appendix 3). These questions are usually distributed in written form, but discussed in the oral hearing to the extent that parties (and third parties) are ready to respond to them orally. After the conclusion of the first substantive meeting, the parties are usually requested, within a deadline of several days, to submit written answers to the panel's and the other parties' questions, irrespective of whether they have already been discussed orally.

Approximately four weeks after the first panel meeting, the parties simultaneously exchange written rebuttals, also called the second written submissions. In these submissions, which are not provided to the third parties, the parties respond to each other's first written submissions and oral statements made at the first substantive meeting. Thereafter, the panel holds a second substantive meeting with the parties (panels have the power to schedule a third (or more) meetings in a dispute). The parties once again orally present factual and legal arguments at this second oral hearing and respond to further questions from the panel and the other party, first orally, then in writing. Sometimes a Panel holds a third meeting, in particular when an expert hearing takes place.

In cases of multiple complaints on the same matter where a single panel is established, the written submissions of each of the complainants must be made available to the other complainants, and each complainant has the right to be present when any one of the other complainants presents its views to the panel (Article 9.2 of the DSU).

Deliberation of the panel and preparation of the panel report ……..

After the oral hearings are concluded, the panel goes into internal deliberations to review the matter and to reach conclusions as to the outcome of the dispute and the reasoning in support of such outcome. The panel is mandated to make an objective assessment of the relevant factual questions and legal issues in order to assess the conformity of the challenged measure with the covered agreement(s) invoked by the complainant (Article 11 of the DSU). Simply put, the panel examines the correctness of the complainant's claim that the respondent has acted inconsistently with its WTO obligations.[4] Thus, the panel's mandate is to apply existing WTO law, not to make law. Article 19.2 of the DSU emphasizes that panels and the Appellate Body must not add to or diminish the rights and obligations set forth in the covered agreements.

The panel's deliberations are confidential and its report is drafted in the absence of the parties (Article 14.1 and 14.2 of the DSU and paragraph 3 of the Working Procedures in Appendix 3 to the DSU). Article 18.1 of the DSU also prohibits any ex parte communications with the panel on the matter under consideration, which means that the panel is not entitled to communicate with individual parties except in the presence of the other party or parties.

The panel report is divided into two main parts: the so-called "descriptive part" and the "findings". The descriptive part is usually the longer part, and is typically composed of an introduction, the factual aspects, the claims of the parties (also sometimes called "Findings Requested"), and, most importantly, a summary of the factual and legal arguments of the parties and third parties.

The panel first issues a draft descriptive part to the parties for written comments (Article 15.1 of the DSU). In accordance with the proposed timetable in Appendix 3 to the DSU, parties are invited to make comments on the draft descriptive part within two weeks. This gives the parties an opportunity to ensure that all their key arguments are reflected in the descriptive part and to rectify errors and perceived imprecisions.

Findings, conclusions, recommendations & suggestions on implementation ……..

The latter part of the panel report is generally referred to as the "Findings". This is the section setting out the panel's reasoning to support its final conclusions as to whether the complainant's claim should be upheld or rejected. This reasoning is a comprehensive discussion of the applicable law in light of the facts established by the panel on the basis of the evidence before it and in the light of the arguments submitted by the parties (Article 12.7 of the DSU).

In the typical case of a violation complaint, the panel decides whether there has been a violation of the invoked provision(s) of one or more covered agreement(s). (As discussed above, the additional requirement of nullification or impairment, where applicable, takes up no more than a short paragraph at the end of the conclusions referring to the presumption of Article 3.8 of the DSU.) In the much less frequent case of a non-violation complaint, the panel decides whether a benefit accruing to the complainant under a covered agreement has been nullified or impaired as a result of a measure that nonetheless conforms with the covered agreement in question. Individual panelists have the right to express a separate opinion in the panel report, but they must do so anonymously (Article 14.3 of the DSU).

The panel's findings are usually very detailed and specific, often with long legal discussions of whether or not the respondent has acted inconsistently with the covered agreements invoked by the complainant. It is often said that the dispute settlement system has evolved over the years from a diplomatic forum to a more judicial or juridical system. In the early days of GATT 1947, panel conclusions were not always as specific and did not always express clear legal results as is the case today.[1]

Where the panel concludes that the challenged measure is inconsistent with a covered agreement, the panel report also contains a recommendation that the responding Member bring the challenged measure into conformity with (WTO) law (Article 19.1 of the DSU, first sentence). In practice, these recommendations are formulated as recommendations to the DSB that it request the Member concerned to bring its measure into conformity. The panel may also suggest ways in which the Member concerned could implement the recommendation (Article 19.1 of the DSU, second sentence). However, the panel is not obliged to make such a suggestion ("may"), even when requested by the complainant(s). If the panel makes use of its right to suggest possible ways of implementation, such "suggestions" on how the respondent "could" put itself into compliance are not binding on the responding party. The responding party enjoys the freedom to choose any of the various options that may exist to bring about compliance. All the respondent is obliged to do is to make its measure(s) fully compatible with WTO law.

When a non-violation complaint succeeds, there is no obligation for the responding party to withdraw the measure found to nullify or impair benefits under, or impede an objective of the relevant covered agreement. In such cases the panel recommends that the Member concerned make a adjustment that is mutually satisfactory to the parties (Article 26.1(b) of the DSU). A possible form of adjustment

would be that the respondent compensate the complainant with alternative trade opportunities to make up for the nullified or impaired benefit.

A special rule on the panel's recommendation also exists in respect of prohibited subsidies under the SCM Agreement: if the panel concludes that the challenged subsidy is prohibited, it must "recommend that the subsidizing Member withdraw the subsidy without delay" and must specify the time-period for this withdrawal (Article 4.7 of the SCM Agreement).

Interim review ……

The panel issues its report to the parties in an "interim" form and as a confidential document containing all the above elements, ideally two to four weeks after the receipt of comments on the descriptive part. The interim report contains the revised descriptive part, the findings, the conclusions and the recommendations, and, as the case may be, suggestions for implementation. It is thus a complete report, although it is not yet final. Parties are again entitled to make comments and may also request a meeting of the panel to further argue specific points raised with respect to the interim report. This is the interim review stage (Article 15 of the DSU). A party may request that the panel review precise aspects of the interim decision. The period of review must not exceed two weeks. The panel may hold an additional meeting with the two sides, which, in practice, the parties rarely request.

The interim report is the first substantial indication that the parties receive as to the likely outcome of the panel report. Although the interim report is confidential, one or more of the parties often leak its content to the press.

The interim review is designed for a reconsideration of precise aspects of the panel report; it is rare for the parties to ask the panel to completely overturn its interim decision. The likelihood of a panel overturning its own (interim) decision would probably not be very high; the panel already knows the arguments of the party in question and has made up its mind.

However, insofar as facts are concerned, the situation is different because the appellate review is limited to legal questions (Article 17.6 of the DSU). The establishment of facts falls exclusively in the domain of panels, and the Appellate Body does not review factual questions. Accordingly, the interim review is the last opportunity for the parties to rectify any factual mistake in the panel report and parties should make use of that opportunity.

Irrespective of whether or not the panel modifies its findings after the interim review, its final report must contain a reference to the arguments raised by the parties during the interim review stage (Article 15.3 of the DSU). This typically becomes a separate section, in which the panel discusses the merits of the parties' comments during the interim review stage.

Issuance and circulation of the final report ……..

The panel should submit its final report to the parties to the dispute within two weeks following conclusion of the interim review. Once the report is translated into the other official WTO languages[2], it is circulated to all WTO Members and becomes a public WT/DS document (the symbol ends on "R", thus WT/DS###/R).

In cases of multiple complaints on the same matter where a single panel is established, the panel must submit separate reports if one of the parties

Deadlines, timetable and suspension ……

Dispute settlement panels operate under strict deadlines, which illustrates the importance the Members attribute to a "prompt settlement"[1] of (WTO) disputes. As a general rule, a panel is required to issue the final report to the parties within six months from the date when it was composed (and, as the case may be, the terms of reference agreed). In cases of urgency, the panel attempts to issue its report to the parties within three months from the date of its composition (Article 12.8 of the DSU). When the panel considers that it cannot issue its report within six months (or three months in case of urgency), it must inform the DSB in writing of the reasons for the delay and provide an estimate of the period within which it will issue its report. The period from the establishment of the panel to the circulation of the report to the Members "should" in no case exceed nine months (Article 12.9 of the DSU). In practice, however, panel proceedings take an average of 12 months.

Panels may suspend their work at any time at the request of the complaining party for a period not exceeding 12 months. Such suspensions normally serve to allow the parties to find a mutually agreeable solution, which is the preference of the DSU (Article 3.7 of the DSU). If the suspension exceeds 12 months, the authority for the establishment of the panel lapses (Article 12.12 of the DSU). If unresolved, the dispute settlement proceedings would have to be started all over again.

Appendix 3 to the DSU provides a proposed timetable for panel work. This timetable may be adjusted depending on the circumstances of the case. There may also be additional, i.e. more than two substantive meetings with the parties (Articles 12.1 and 12.2 of the DSU). Appendix 3 provides for the following time-periods, counted from one step to the next:

1.	**Receipt of the first written submissions of the parties:** **(a) Complaining party:** **(b) Party complained against:**	**3-6 weeks** **2-3 weeks**
2.	**First substantive meeting with the parties; third party session:**	**1-2 weeks**
3.	**Receipt of written rebuttals of the parties:**	**2-3 weeks**
4.	**Second substantive meeting with the parties:**	**1-2 weeks**
5.	**Issuance of descriptive part of the report to the parties:**	**2-4 weeks**
6.	**Receipt of comments by the parties on the descriptive part of the report:**	**2 weeks**
7.	**Issuance of the interim report, including the findings and conclusions, to the parties:**	**2-4 weeks**
8.	**Deadline for party to request review of part(s) of report:**	**1 week**
9.	**Period of review by panel, including possible additional meeting with parties:**	**2 weeks**
10.	**Issuance of final report to parties to dispute:**	**2 weeks**
11.	**Circulation of the final report to the Members:**	**3 weeks**

In cases of multiple complaints on the same matter where more than one panel is established, the timetable for the process before each panel should be harmonized to the greatest extent possible (Article 9.3 of the DSU). This can result in one or the other time-period being shortened or extended. Where a single panel is established, it must organize its examination and present its findings to the DSB in such a manner so as not to impair the rights that the parties to the dispute would have enjoyed had separate panels examined the complaints (Article 9.2 of the DSU).

Accelerated procedures are available under the terms of the Decision of 5 April 1966[2] when a developing country Member brings a complaint against a developed country Member and the developing country Member makes use of its right to invoke those accelerated procedures (Article 3.12 of the DSU).[3]

The SCM Agreement provides for accelerated procedures with several shorter time-periods with respect to disputes on prohibited subsidies and actionable subsidies. Regarding prohibited subsidies, the complainant may request the establishment of a panel if consultations have not led to a mutually agreed solution within 30 days, and the DSB must immediately establish the panel, unless there is a consensus not to do so (Article 4.4 of the SCM Agreement). In other words, in a departure from the normal rules, the negative consensus rule applies at the first, and not just the second DSB meeting at which the request for establishment of the panel appears on the DSB agenda. The panel must circulate its report to all WTO Members within 90 days of the date of its composition and the establishment of its terms of reference (Article 4.6 of the SCM Agreement).

Dispute settlement with respect to actionable subsidies is also subject to some specific deadlines, including at the panel stage. For instance, the composition and terms of reference of the panel must be established within 15 days from the establishment of the panel (Article 7.4 of the SCM Agreement), and the panel must circulate its report to all Members within 120 days of the date of its composition and the establishment of its terms of reference (Article 7.5 of the SCM Agreement).

6.4 Adoption of panel reports.

Although the panel report contains the findings and conclusions ruling on the substance of the dispute, it only becomes binding when the DSB has adopted it. This is why the DSU describes the function of panels as assisting the DSB in discharging its responsibilities under the DSU and the covered agreements (and as making such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements, Article 11 of the DSU). The DSU provides that the DSB must adopt the report no earlier than 20 days, but no later than 60 days after the date of its circulation to the Members[1], unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report (Article 16.4 of the DSU).

If a party has notified its decision to appeal, the panel report cannot yet be adopted, given that the Appellate Body could modify or reverse it. In that case, the panel report will be considered for adoption by the DSB only after completion of the appeal (Article 16.4 of the DSU).

If there is no appeal by either party, the DSB is obliged to adopt the report, unless there is a so-called negative (or reverse) consensus, i.e. a consensus in the DSB against the adoption. This is (after the establishment of the panel) the second key instance in which the decision-making rule of reverse consensus applies in the WTO dispute settlement system. By contrast, under GATT 1947, a rule of positive consensus applied at the stage of adopting panel reports. This gave the losing party the ability to block or veto the adoption of a report.

Although the parties to a dispute are entitled to fully participate in the DSB's consideration of the panel report (Article 16.3 of the DSU), the adoption of panel reports no longer requires consensus in the (WTO) dispute settlement system. A single Member, typically the party having lost at the panel stage, cannot alone do much to prevent the adoption. One Member opposing the adoption of the report is not sufficient, nor is a majority; instead, what is needed to reject (or not to adopt) the panel report is a consensus against adoption by all Members represented at the relevant DSB meeting. In other words, one single Member insisting on adoption is sufficient in order to secure the adoption of the report. Normally, at least one party has an interest in the adoption because, overall, it prevailed with the panel. Even if many panel decisions are mixed in that not all the claims of violation of (WTO) law succeed, there is usually a "winner" (the complainant, if at least one claim is upheld, and the respondent, if all are dismissed) and a "loser" in the formal sense. Because the prevailing party has a natural interest in having the panel's conclusions become binding upon the parties, the adoption of panel reports is "quasi-automatic". Thus, rejection by (negative) consensus is more theoretical than real, and has never occurred in the WTO practice to date.

In order to be adopted in a DSB meeting, a panel report (which has not been appealed) must, however, be placed on the agenda of a DSB meeting. It is the practice that only WTO Members can request items to be put on the agenda of an upcoming DSB meeting (not the Secretariat). Thus, if no Member places a panel report on the DSB agenda for adoption, the adoption does not take place, even though this is not in conformity with Article 16.4 of the DSU. In the history of the WTO, only once has a panel report not been adopted for this reason (and not because a settlement between the parties intervened).[2]

The adoption procedure is without prejudice to the right of Members to express their views on a panel report (Article 16.4 of the DSU). The Members present at the DSB meeting in which a panel report is adopted, particularly Members that have been involved in the dispute as parties, often make use of this right to comment on the conclusions or the reasoning contained in the panel report. In circumstances where the panel developed unexpected reasoning or made unexpected findings, the parties and possibly other Members might want to put their objections on record.

In the early days of the WTO dispute settlement system, the chairperson of the DSB used to ask whether there was a consensus against the adoption of the report in question. Nowadays, he or she simply gives the floor to the parties to the dispute and then to other Members to express their opinions. It sometimes happens that a Member urges the other Members to oppose the report, but this typically has no consequence because a rejection of the report would require consensus of all the Members present at the meeting. The DSB chairperson, therefore, merely states that the DSB takes note of all the statements and adopts the report.

If there is no appeal, the dispute proceeds immediately to the implementation phase after the DSB has adopted the panel report.

There are special and additional rules with respect to the adoption of panel reports in the SCM Agreement. In disputes regarding both prohibited and actionable subsidies, the DSB must adopt the report within 30 days of its circulation to all Members, unless it decides by consensus not to adopt it or unless one of the parties notifies the DSB of its decision to appeal (Articles 4.8 and 7.6 SCM Agreement).

For the purposes of the description below of the further procedure, it is assumed that there is an appeal.

6.5 Appellate review.

The DSU does not devote many articles to the appellate review process. Except for Article 16.4 of the DSU, which refers to the notification of a party's decision to file an appeal, Article 17 is the only article dealing specifically with the structure, function and procedures of the Appellate Body. However, several general rules in the DSU are applicable both to the panel and the appellate processes, for instance, Articles 1, 3, 18 and 19 of the DSU. In addition, the Appellate Body has adopted its own Working Procedures for Appellate Review on the basis of the mandate and pursuant to the procedure stipulated in Article 17.9 of the DSU (in this section on appellate review referred to as "Working Procedures" [1]). The Appellate Body drew up its Working Procedures for the first time in 1996, and they have been amended several times since, the last time with effect from 1 May 2003.[2] These Working Procedures contain the detailed procedural rules for appeals and they range from the duties and responsibilities of Appellate Body members to the specific deadlines by which submissions must be filed in an appeal. The "gap-filling" Rule 16(1) of the Working Procedures permits an Appellate Body division under certain circumstances to adopt additional procedures for a particular appeal in which the need to do so arises.

Deadline for filing an appeal ……..

If the panel report is appealed, the dispute is referred to the Appellate Body and, for the time being, the panel report cannot be adopted by the DSB. Article 16.4 of the DSU implies that the panel report must be appealed before it is adopted by the DSB. The article does not specify a clear deadline for the filing of an appeal. Rather the appellant must notify the DSB of its decision to appeal before the adoption of the panel report. This adoption may take place, at the earliest, on the 20th day after the circulation of the panel report and it must (in the absence of an appeal and of a negative consensus against adoption) occur within 60 days after the circulation. For any day between those limits, the adoption of the panel report can, according to Article 16.4 of the DSU, be placed on the agenda of the DSB (with ten days' notice required for requesting items to be put on the agenda). Since the appeal must be filed before adoption actually occurs[3], the effective deadline for filing an appeal is variable and could be as short as 20 days, but it can also be longer, e.g. 60 days. Thus, if the party which emerged from the panel proceeding as the "winner" wants to shorten the deadline for the other party to file an appeal, it can do so by placing the panel report on the agenda for a DSB meeting to occur on the 20th day after the panel report has been circulated.

Right to appeal ……..

Article 16.4 of the DSU makes clear that only the parties to the dispute, not the third parties, can appeal the panel report. Both the "winning" and the "losing" party (i.e. more than one party) can appeal a panel report. The reason is that either party in the dispute may disagree with the panel's conclusions: the respondent, whose challenged measure has been found to be inconsistent with the WTO Agreement or to nullify or impair a benefit, or the complainant, whose claims of violation or nullification or impairment have been rejected. In addition, a complainant, even though it may have "won" at the panel stage, may nevertheless not have been successful with all its claims, for example, if the panel only upheld two out of six claims of violation.

In addition, parties have in the past also appealed isolated panel findings they disagreed with (i.e. a legal interpretation developed by the panel), even though these findings were part of a reasoning which ultimately upheld that party's position. For example, in the second appeal under the (WTO), in

Japan — Alcoholic Beverages II, the United States appealed the panel report, even though it had been successful with its claim of a Japanese violation of Article III:2 of GATT 1994, because it disagreed with the panel's interpretation of Article III. The United States was not aggrieved as such by the panel's conclusion on the claim, but it had a systemic interest, reaching beyond the individual dispute, as to how Article III should be interpreted. In such a case, there could be more than one appeal on the same issue, one coming from the party having lost at the panel stage, and one from the winning party which disagrees with the reasoning.

The Working Procedures refer to two options of how multiple appeals can be filed. One option is that of one party initiating the appeal pursuant to Article 16.4 of the DSU, and, once that appellant has filed its notice of appeal and its appellant's submission, another party, knowing the extent of, and the reasons for the challenge, joins in with its own appeal. Such an appeal would expand the overall scope of the appellate review to cover other alleged errors in the panel report (Rule 23(1) of the Working Procedures). In the Working Procedures and in Appellate Body reports, this form of appeal is called "other appeal" and informally sometimes "cross-appeal".

The second option is that of more than one party using its right of appeal under Article 16.4 of the DSU. In that case, the Appellate Body deals with the various appeals jointly (Rules 23(4) and (5) of the Working Procedures).

If both of the two parties to a dispute challenge the panel report on appeal, each of them is, at the same time, appellant and appellee, but usually with regard to different portions of the panel report, i.e. they address different issues of law or legal interpretations covered in the panel report. The generic term for parties participating in the appeal as appellant or appellee is "participants".

Third participants at the appellate stage …….

Third parties cannot appeal a panel report.[1] However, third parties that have been third parties at the panel stage may also participate in the appeal as a so-called "third participant". Article 17.4 of the DSU provides that third parties may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

A WTO Member that has not been a third party at the panel stage, in contrast, is excluded from participation in the appellate review. It cannot "jump on board", if it identifies its interest in the dispute, for instance, in the light of the content of the panel report. Under the current practice, however, such Members may seek to submit a so-called amicus curiae brief, which the Appellate Body is entitled to accept, but not obliged to consider.[2]

In the first years of the WTO dispute settlement system, third parties that wanted to participate in the appellate process as third participants had to file a written submission, stating their intention to participate as a third participant in the appeal and explaining the grounds and legal arguments in support of their position, within 25 days after the notice of appeal. Third parties who had not done so had no right to participate in the oral hearing before the Appellate Body. Over the years, however, a practice had developed of admitting such third parties as "passive observers" to the oral hearing, with the (explicit or tacit) agreement of the participants. Against the background of this practice and in an effort to enhance third party participation in appeals, the Working Procedures have recently been changed. They now no longer require a third party to file a third participants' submission in order to be entitled to attend the oral hearing before the Appellate Body. A third party now has the following

options, if it wants to be a third participant in an appellate review, with varying degrees of involvement. The third party may:

- **file a third participants submission within 25 days of the notice of appeal, appear at the oral hearing and make an oral statement, if desired (Rules 24(1) and 27(3)(a) of the Working Procedures); or**
- **not file any submission, but notify the Appellate Body Secretariat in writing and within 25 days of the intention to appear at the oral hearing, and make an oral statement, if desired (Rules 24(2) and 27(3)(a) of the Working Procedures);**
- **not file any submission, and not make any notification within 25 days, but notify the Appellate Body Secretariat, preferably in writing and at the earliest opportunity, of the intention to appear at the oral hearing and request to make an oral statement, and make an oral statement if the Appellate Body has acceded to the request (Rules 24(4) and 27(3)(b) and (c) of the Working Procedures);**
- **not file any submission, and not make any notification within 25 days, but notify the Appellate Body Secretariat, preferably in writing and at the earliest opportunity, of the intention to appear at the oral hearing and appear at the oral hearing as passive observer (Rules 24(4) and 27(3)(b) of the Working Procedures).**

Object of an appeal ……..

Appeals are limited to legal questions. They may only address issues of law covered in the panel report and legal interpretations developed by the panel (Article 17.6 of the DSU). An appeal cannot address the facts on which the panel report is based, for example, by requesting the examination of new factual evidence or by re-examining existing evidence. Evaluating the evidence and establishing the facts is the task of panels in the dispute settlement system. The distinction between legal and factual questions is therefore important in defining the scope of appellate review. In the abstract, it seems easy to distinguish between law and facts: e.g. whether or not a national authority has charged a 30% tariff rather than a 20% tariff on the importation of a certain shipment of goods and whether or not vodka and shochu are being produced through the distillation of fermented starch-containing products are clearly facts. More generally speaking, a fact is the occurrence of a certain event in time and space.[3]

In contrast, how the expression of "like products" in Article III:2 of GATT 1994 is to be interpreted is clearly a question of law. However, many of the more complex questions that regularly arise in disputes are mixed questions of law and facts, or, in other words, questions that can be answered only on the basis of both a factual and a legal assessment. For example, the question of whether shochu and vodka are "like products" in the sense of Article III:2 of GATT 1994 is such a mixed legal and factual question. In such cases, the identification of the legal issue that can be subject to appeal hinges upon a more detailed and differentiated analysis of the question involved. The Appellate Body jurisprudence to date gives some guidance in that regard.

For instance, the legal appreciation of facts, or, in other words, a panel's application of a legal rule to specific facts, is a legal question and subject to appellate review. As the Appellate Body has stated, "[t]he consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterisation issue. It is a legal question".[4]

In contrast, the panel's examination and weighing of the submitted evidence, and its establishment of the facts, fall within the panel's discretion as the trier of facts and are normally not subject to appeal.[5]

However, there are limits to the panel's discretion, to the extent that the panel's factual examination is subject to legal requirements, the compliance with which is a legal question that can be raised on appeal. Such a legal rule is contained in Article 11 of the DSU which obliges panels to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case". The question of "whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is a legal question which, if properly raised on appeal, would fall within the scope of appellate review." [6] Thus, the Appellate Body can review the panel's appreciation of the evidence where the panel has exceeded the bounds of its discretion.[7] Where exactly those bounds lie remains to be fully explored. The Appellate Body has already had the opportunity to give several examples, which do not exhaust the universe of possible legal errors in the establishment of facts.[8] The Appellate Body has ruled that for a panel to "disregard", "distort" or "misrepresent" evidence, or a panel's "egregious errors" that would call into question the good faith of a panel, are issues that can be appealed.[9]

Article 11 of the DSU is also relevant where the issue is whether the panel applied the correct standard of review. This, however, is clearly a legal question and not one of establishing facts, since it relates to determining what legal standard panels must apply. This in turn determines which facts pertaining to which period of time are relevant to the legal examination.

Notice of appeal …….

According to Article 16.4 of the DSU, the appeal process begins when "a party to the dispute formally notifies the DSB of its decision to appeal" within the time-frame discussed above (i.e. before the DSB adopts the panel report). Rule 20(1) of the Working Procedures requires a simultaneous filing of a notice of appeal with the Appellate Body Secretariat. Rule 20(2)(d)[1] of the Working Procedures requires that a notice of appeal include a brief statement of the nature of the appeal, including the allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel. The notice of appeal also becomes an official WT/DS document.

In accordance with the possible object of appellate review, these allegations of errors must relate to what the appellant wishes the Appellate Body to overturn. This can be a panel's conclusion, including the supporting reasoning that there is or there is not a violation of the covered agreement in question. It can also be an isolated legal finding which forms part of the panel's reasoning supporting a conclusion.

For example, the appellant can challenge a panel's conclusion and assert that the panel erred by finding that the respondent acted inconsistently with Articles X, Y or Z. The appellant can also challenge an isolated legal finding in the panel report and assert that the panel "erred in its interpretation of Article III:2 ... in finding that 'likeness' can be determined purely on the basis of physical characteristics, consumer uses and tariff classification without considering also the context and purpose of Article III ... and without considering ... whether regulatory distinctions are made ... 'so as to afford protection to domestic production'."

Another matter that has come up in several appeals is whether the notice of appeal was sufficiently precise to meet the requirements set out in Rule 20(2)(d) of the Working Procedures. The Appellate Body has so far rejected all requests by appellees to dismiss appeals for being vague, ruling that it is sufficient for the notice of appeal merely to identify those panel findings or legal interpretations that the appellant believes were erroneous. The notice of appeal is not designed to be a summary or outline

of the arguments of the appellant, which are to be set forth in the appellant's submission rather than in its notice of appeal.

However, as a matter of due process, the notice of appeal serves to give the appellee notice of the findings appealed so that it can prepare its defence. It is thus not necessary (nor sufficient) for the notice of appeal to cite the numbered paragraphs of the panel report containing the findings appealed, but it must be clear from the notice which panel findings or interpretations the Appellate Body is asked to review.[5] Conversely, the Appellate Body would generally exclude from the scope of appellate review a finding that is not "covered" in the notice of appeal or a claim of error (e.g. "the panel violated Article 11 DSU") that is not included[7] in the allegations of error set out in the notice of appeal.

After the filing of the notice of appeal, the (WTO) Secretariat transmits the complete panel record to the Appellate Body Secretariat pursuant to Rule 25 of the Working Procedures. The panel record includes the written submissions of the parties to the panel, their oral statements, their written responses to questions, exhibits introduced as evidence, the interim report, the interim review comments and the tapes of the substantive meetings.

Composition of Appellate Body divisions ……

Article 17.1 of the DSU provides that three of the seven Appellate Body members are to serve on each appeal and that the seven Members are to serve in rotation as further specified in the Working Procedures. Rule 6 of the Working Procedures calls this body of three Appellate Body members a "division". It provides for a selection of the three Members constituting a division on the basis of rotation, taking into account the principles of random selection but regardless of national origin. This is different from panels, where persons holding the citizenship of a party or third party cannot serve, except with the agreement of the parties. Thus, Appellate Body members who are citizens of Members involved in many disputes as either parties or third parties, like the United States or the European Union, are not excluded from serving on Appellate Body divisions hearing cases involving their countries of citizenship.

The three Appellate Body members who have been selected to serve on a particular appeal elect one of them to be presiding member of that division. The presiding member coordinates the overall conduct of the appellate proceeding, chairs the oral hearing and meetings related to that appeal and coordinates the drafting of the Appellate Body report (Rule 7(2) of the Working Procedures).

Appellate review procedure ……..

No later than ten days after the date when the notice of appeal was filed, the appellant must file its written submission, setting out in detail its legal arguments as to why the panel committed a legal error and, as appropriate, the ruling the appellant requests the Appellate Body to make with regard to the contested panel findings (Rule 21(2) of the Working Procedures). Ten days may seem a short time, but an appellant is able to begin preparing its submission well before filing the notice of appeal, indeed as soon as the interim panel report is issued or in any event when the final panel report is circulated.

Like all documents that are filed in an appeal, the appellant must serve its submission on all the other parties or third parties (Rule 18(2) of the Working Procedures).

Within 15 days from the notice of appeal, a party to the dispute other than the original appellant may join in that appeal or appeal on the basis of other alleged errors in the panel report ("other appeal" or (informally) "cross appeal", Rule 23(1) of the Working Procedures). Within 25 days from the notice of appeal, the appellee(s) have to file their submissions in which they respond to the allegations of error made by the appellant(s). The appellees'submissions must set out in detail whether or not and for what legal reasons the appellee(s) opposes(s) the appellant's challenge; and, in doing so, it will have to argue to what extent it agrees or disagrees with the Panel's conclusions (Rule 22(2) of the Working Procedures).

Also with 25 days from the notice of appeal, the third participant(s) must file their written submission(s), setting forth their position and legal arguments.

Approximately 30 to 45 days after the notice of appeal, the Appellate Body division assigned to the case holds an oral hearing (Rule 27(1) of the Working Procedures), which is not open to the public (Article 17.10 of the DSU). At this oral hearing, the participants and the third participants make a brief opening statement, after which the Appellate Body division poses questions to the participants and third participants. The oral hearing is thus similar to the substantive meetings at the panel stage. The main differences between an oral hearing and a substantive meeting of the panel are: (i) there is only one oral hearing on appeal;, (ii) oral statements are kept short; (iii) an oral hearing rarely lasts longer than one full day; and (iv) the participants in an oral hearing may not ask questions directly of each other.

Deliberation of the AB and preparation of the AB report ……

After the oral hearing, the division exchanges views on the issues raised in the appeal with the four other Appellate Body members not on the division. This exchange of views is intended to give effect to the principle of collegiality in the Appellate Body and serves to ensure consistency and coherence in the jurisprudence of the Appellate Body (Rule 4(1) of the Working Procedures). Divergent or inconsistent lines of jurisprudence that might otherwise arise would detract from the security and predictability of the multilateral trading system, which is one of the main objectives of the dispute settlement system (Article 3.2 of the DSU). Nevertheless, as prescribed by Article 17.1 of the DSU, only the assigned division may ultimately decide on the appeal (Rules 4(4) and 3(1) of the Working Procedures).

The Working Procedures also envisage that members of the Appellate Body and its divisions must make every effort to take their decisions by consensus. Where this is not possible, a majority vote takes place (Rule 3(2) of the Working Procedures). If an individual Appellate Body member includes a separate opinion in the Appellate Body report, it must be done so anonymously (Article 17.11 of the DSU).

Following the exchange of views with the other Appellate Body members, the division concludes its deliberations and drafts the Appellate Body report. After the report is finalized and signed by the Appellate Body members of the division, it is translated into the two other official languages of the

WTO. All deliberations of the Appellate Body are confidential, and the drafting of the report takes place without the presence of the participants and third participants (Article 17.10 of the DSU).

In contrast to the panel procedure, there is no interim review at the Appellate Body stage.

Mandate of the Appellate Body and completing the legal analysis …….

With regard to the content of an Appellate Body report, the DSU prescribes that the Appellate Body must address each of the legal issues and panel interpretations that have been appealed (Articles 17.6 and 17.12 of the DSU). The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel (Article 17.13 of the DSU). However, where certain legal findings of the panel are no longer relevant because they are related to or based on a legal interpretation reversed or modified by the division, the Appellate Body sometimes declares such panel findings as "moot and having no legal effect".

In many cases, the Appellate Body will partly modify the panel's legal findings and conclusions because it agrees with the panel's final conclusion but not necessarily with the panel's reasoning. If the Appellate Body agrees with both, it upholds the panel's findings and conclusions. Where the Appellate Body disagrees with the panel's conclusion, it reverses it.

Especially in this latter case, the function of the appellate proceeding must not only be seen in the review of panel reports. There is also a dispute to resolve (Articles 3.3 and 3.2 of the DSU). Where, for instance, the Appellate Body has reversed the panel's conclusion of a violation of a certain provision, the respondent's measure might instead be inconsistent with another WTO provision. Often, the complainant has also claimed an inconsistency with this other provision, either in the alternative, or cumulatively. However, often the panel, given its finding of a violation of the former provision, did not address this other alternative claim or it chose not to address the other cumulative claim for reasons of judicial economy. In such a case, if the Appellate Body has limited itself to reversing the panel's erroneous findings and conclusion, the dispute would not be fully resolved. The complainant would then have to start all over again by initiating a new dispute settlement proceeding.

Two approaches are common in the procedures of many appellate tribunals whose mandate is limited to questions of law. One is to decide the outstanding issue at the appellate level. Indeed, many appellate tribunals have this authority (often without obligation) where the case is "ripe" for such a decision (i.e. no further facts must be explored). The other approach (the only one where a factual question remains open) is to send the case back to the trier of facts. In this situation, the panel is the trier of facts. The authority to send a case back to the lower level is called remand authority but does not exist in the (WTO) system.

Given this absence of remand authority in the WTO, the first approach, that is, having the Appellate Body decide the outstanding issue, becomes more compelling. Indeed, the Appellate Body has on a number of occasions "completed the legal analysis" in order to resolve a dispute. This has been possible only where there were sufficient factual findings in the panel report or undisputed facts in the panel record to enable the Appellate Body to address and decide on the outstanding issue. Where this has not been the case, the Appellate Body has been unable to complete the legal analysis because it is not entitled to make new factual findings. Moreover, an insufficiency of the facts is not the only reason for the Appellate Body has declined to complete the legal analysis. In one instance, in EC — Asbestos, the Appellate Body declined to address a "novel" issue because it had not been argued in sufficient detail at the panel level, either in the case in question or in previous disputes.

Conclusions and recommendations of the Appellate Body ……..

An Appellate Body report has two sections: the descriptive part and the findings section. The descriptive part contains the factual and procedural background of the dispute and summarizes the arguments of the participants and third participants. In the findings section, the Appellate Body addresses in detail the issues raised on appeal, elaborates its conclusions and reasoning in support of such conclusions, and states whether the appealed panel findings and conclusions are upheld, modified or reversed. It also contains additional relevant conclusions, for instance if the respondent has been found in violation of another WTO provision than the one the panel addressed.

As for recommendations and suggestions, Articles 19 and 26 of the DSU apply to Appellate Body reports as well as to panel reports. Where the conclusion is that the challenged measure is inconsistent with a covered agreement, the Appellate Body recommends that the responding Member bring the inconsistent measure into conformity with its obligations under the covered agreement in question (Article 19.1 of the DSU, first sentence). In practice, these recommendations are addressed to the DSB, which is then to request the Member concerned to bring its measure into conformity with the relevant provisions of WTO law. Like the panel, the Appellate Body may also suggest ways in which the Member concerned could implement the recommendation (Article 19.1 of the DSU, second sentence), but the Appellate Body has not so far made use of this right. When a non-violation complaint succeeds, the Appellate Body would normally recommend that the parties find a mutually satisfactory adjustment (Article 26.1(b) of the DSU).

Finally, the Appellate Body report is circulated to all WTO Members and becomes a public WT/DS document (the symbol ends on "AB/R", thus WT/DS###/AB/R). The participants frequently receive a confidential copy of the report up to one day in advance.

Withdrawal of an appeal …….

Rule 30(1) of the Working Procedures permits an appellant to withdraw its appeal at any time. It falls within the discretion of WTO Members not only to initiate disputes, but also to terminate them. The possibility of withdrawing an appeal reflects the preference of the DSU for the parties to find a mutually agreeable solution to their dispute (Article 3.7 of the DSU).

A withdrawal normally terminates an initiated appellate procedure, as happened in India — Autos.[2] In that case, the Appellate Body issued a brief Appellate Body report setting out the procedural history of the appeal, and concluded that it had therefore completed its work in view of India's withdrawal.[3]

On three occasions, appellants have withdrawn their appeals in order to re-file an appeal shortly thereafter. Twice, this was done for scheduling reasons (i.e. to postpone the entire appeal process by a few weeks).[4] More recently, in EC — Sardines, the European Communities withdrew its appeal in response to Peru's challenge of the notice of appeal. Peru challenged the notice of appeal as insufficiently clear, to which the European Communities reacted by withdrawing and immediately filing a new, more detailed notice of appeal. As in two other cases of withdrawn appeals, the withdrawal was explicitly conditioned upon the right to file a new notice of appeal. Peru then challenged the European Communities' right to withdraw a notice of appeal conditionally and to file another, second appeal. The Appellate Body rejected Peru's request to reject the appeal as inadmissible. It saw "no reason to interpret Rule 30 as granting a right to withdraw an appeal only if that withdrawal is unconditional" unless the condition undermines the fair, prompt and effective

resolution of the dispute, and as long as the Member in question engages in dispute settlement procedures in good faith.

Deadline for the completion of the appellate review ……..

Appellate review proceedings must generally be completed within 60 days, and in no case take longer than 90 days from the date when the notice of appeal was filed. When an appellate procedure takes more than 60 days, the Appellate Body must inform the DSB of the reasons for the delay and give an estimate of the time until circulation of the report (Article 17.5 of the DSU). In most appeals thus far, the Appellate Body has circulated its report 90 days after the notification of appeal.[7] In a few cases of exceptional circumstances, and with the agreement of the participants, the Appellate Body has circulated its report later than within 90 days.

The SCM Agreement provides for a shorter appellate deadline in disputes on prohibited subsidies: 30 days as a general time-frame and 60 days as maximum (Article 4.9 of the SCM Agreement). This 60-day maximum has also been exceeded in two appeals.

6.6 Adoption of the reports by the Dispute Settlement Body.

The DSB must adopt, and the parties must unconditionally accept, the Appellate Body report unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members.[1] This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report (Article 17.14 of the DSU).

Regarding the automaticity of adoption (except where there is a "reverse" consensus), the expression of Members' opinions and the practical requirement that the Appellate Body report be placed on the DSB agenda, the process is the same as for a panel report, as explained above. However, the deadline for adoption of an Appellate Body report is only 30 days, possibly because no party needs to make up its mind whether to appeal. Article 17.14 also specifically provides that the parties to the dispute must accept the Appellate Body report "unconditionally", i.e. accept it as resolution of their dispute without further appeal.

Although Article 17.14 does not mention the panel report, it is understood that the Appellate Body report must be adopted together with the panel report because one can understand the overall ruling only by reading both reports together. The DSU also provides in Article 16.4 that the DSB will only consider the panel report for adoption after completion of the appeal. Thus, both reports are placed on the DSB agenda for adoption, and the DSB adopts the Appellate Body report together with the panel report, as upheld, modified or reversed by the Appellate Body report. To the extent that the panel's conclusions have not been reversed or modified, or have not been appealed, they are binding on the parties.

The SCM Agreement again provides for a shorter adoption deadline of 20 days in disputes on prohibited and actionable subsidies (Articles 4.9 and 7.7).

6.7 Implementation by the "losing" Member.

With the DSB's adoption of the panel (and Appellate Body) report(s), there is now a "recommendation and ruling" by the DSB addressed to the losing party (in the case of a successful violation complaint) to bring itself into compliance with (WTO) law or (in the case of a successful non-violation complaint) to find a mutually satisfactory adjustment.

Article 3.7the DSU states that in the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures found inconsistent with WTO law. Article 21.1the DSU adds that prompt compliance with the recommendations or rulings of the DSB is essential in order to ensure the effective resolution of disputes.

The DSB is the WTO body responsible for supervising the implementation of panel and Appellate Body reports (Article 2 of the DSU). As in the previous stages of the dispute settlement system, it is the WTO Members, whose delegates compose the DSB, that must take the initiative to place items on the DSB agenda (and not the WTO Secretariat).

Intentions of implementation …….

The first duty of the "losing" Member is to inform the DSB, at a meeting within 30 days after the adoption of the report(s), of its intentions to implement the recommendations and rulings of the DSB (Article 21.3 of the DSU).

Time-period for implementation ……

It is usually at that same meeting that the Member concerned states whether it is able to comply immediately with the recommendations and rulings. If immediate compliance is not possible, the implementing Member has a reasonable period of time for achieving that compliance (Article 21.3 of the DSU). It is thus clear that the reasonable period of time for complying with the recommendations and rulings is not available unconditionally, but only if immediate compliance is impracticable.[1] In practice, WTO Members very often claim that they cannot immediately comply with the DSB's recommendation and ruling. It is also true that the Member concerned is frequently required to amend its domestic law in order to achieve implementation. Where legislative changes are required, such changes take time.

The reasonable period of time should not be understood as a time during which the WTO Member concerned is acting in accordance with its obligations under the WTO Agreement (assuming a violation complaint that succeeded[2]). It has already been established in the adopted report(s) of the panel (and the Appellate Body) that this is not the case. Rather, the reasonable period of time is a grace period granted to the Member concerned, during which it continues to apply WTO-inconsistent measures[3], for bringing its measures into compliance. During that period, the Member concerned will not (yet) face the consequences foreseen by the DSU in the event of non-implementation (i.e. the need to offer compensation or face retaliation).

One should also note that the reasonable period of time of Article 21.3 of the DSU does not apply in all cases. In the event of prohibited subsidies, the panel must, pursuant to Article 4.7 of the SCM Agreement "recommend that the subsidizing Member withdraw the subsidy without delay" and must specify the time-period for this withdrawal.[4]

As for the determination of the reasonable period of time, which is counted as of the day of adoption of the report(s), Article 21.3 foresees three different ways. This time-period can be: (i) proposed by the Member concerned and approved by consensus[5] by the DSB; (ii) mutually agreed by the parties to the dispute within 45 days after adoption of the report(s); or (iii) determined by an arbitrator.

The first option, approval by the DSB, has so far never happened. The DSB has, however, on a few occasions approved the implementing Member's request to extend a reasonable period of time that had previously been awarded through arbitration.[6]

Where the DSB has not approved a Member's proposal and both parties cannot agree on the reasonable period of time, the parties may resort to arbitration under Article 21.3(c) of the DSU. This procedure is initiated by one party's request for arbitration, which it communicates to the chairperson of the DSB.[7] Although the arbitrator can be any individual or group of individuals[8], all arbitrators acting under Article 21.3(c) of the DSU so far have been current or former Appellate Body members. If the parties cannot agree on who should serve as the arbitrator(s) within ten days after referral of the matter to arbitration, the Director-General appoints the arbitrator within another ten days after consulting the parties (footnote 12 to Article 21 of the DSU).

A guideline for the arbitrator is that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of the report(s). However, that time may be shorter or longer, depending upon the particular circumstances (Article 21.3(c) of the DSU). The 15-month period is a "guideline", and not an average or standard period. This guideline is also expressed in the DSU as a maximum period, subject to "particular circumstances".[9] Recognizing the principle of prompt compliance, several arbitrators have held that "the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB." [10] This is not to give an advantage to those Members with a lengthy and cumbersome internal process of law and decision-making, but to give the implementing Member the time it truly needs under its normal procedures, making use of use any available flexibility, but "not having to utilize an extraordinary legislative procedures".[12]

The implementing Member bears the burden of proof to show that the duration of any proposed period of implementation constitutes a "reasonable period of time", and the longer the proposed period of implementation, the greater this burden.[13] Suggesting ways and means of implementation or assessing whether the step proposed by the implementing Member brings about conformity with WTO law is not part of the mandate of the arbitrator under Article 21.3(c) of the DSU. If there are several possible ways to bring about conformity, the implementing Member has the discretion to choose among these options. Whether the chosen option truly achieves full conformity is to be decided according to the procedure of Article 21.5 of the DSU.[14] For those reasons, arbitrators determine the "reasonable period of time" on the basis of the proposal of the implementing Member.

The reasonable periods of time awarded by arbitrators to date have ranged from six to fifteen months. Those that have been agreed between the parties have ranged from four to eighteen months.

In non-violation complaints, Article 26.1(c) of the DSU stipulates that the arbitrator acting under Article 21.3(c) "upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute."

Article 21.3(c) of the DSU contemplates an arbitration award to be issued within 90 days of the adoption of the panel (and Appellate Body) report(s), but this time-period is nearly always too short, also because the request for arbitration is often made at a late stage.[16] Thus, the parties have mostly agreed to extend the deadline. Parties may also ask the arbitrator to suspend the procedure or

withdraw the request for arbitration in view of a mutually agreed solution on the issue of implementation.

Timelines ……..

In addition to the specific deadlines of the individual procedural steps, the DSU provides for the period from the establishment of a panel until the date of determination of the reasonable period of time, not to exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has extended their deadlines, the additional time is to be added to the 15 months, but not to exceed 18 months, unless the parties agree that there are exceptional circumstances (Article 21.4 of the DSU).
Surveillance by the DSB ……

The DSB keeps implementation by a Member of its recommendations or rulings (in other words the implementation of adopted panel (and Appellate Body) reports) under surveillance. Any Member can raise the issue of implementation at any time in the DSB. Unless the DSB decides otherwise, the issue of implementation is placed on the agenda of the DSB six months following the date of establishment of the reasonable period of time.[1] The item remains on the DSB's agenda until the issue is resolved.[2] At least ten days before each such DSB meeting, the Member concerned is required to provide the DSB with a written status report of its progress in the implementation (Article 21.6 of the DSU). These status reports ensure transparency, and they may also give an incentive to advance implementation. When the implementing Member delivers these status reports in the DSB, it is common for other Members, particularly the complainant(s), to take the opportunity to demand full and expeditious implementation and to declare that they are following the matter with close attention.

The DSB must continue to keep under surveillance the implementation of the recommendations or rulings it has adopted. This includes cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with (WTO) law have not been implemented (Article 22.8 of the DSU).

Compliance review under Article 21.5 of the DSU ……..

When the parties disagree on whether the losing Member has implemented the recommendations and rulings, either of them can request a panel under Article 21.5 of the DSU. Unless the Member required to bring itself into conformity has done nothing at all, such disagreements can easily arise if, for instance, a new regulation or law has been passed and the original respondent believes that this achieves full compliance, but the complainant(s) disagree(s). This procedure is sometimes referred to as the "compliance" panel procedure.

Wherever possible, the DSB will refer the matter to the individuals serving on the original panel, which is supposed to decide in an expedited fashion, normally within 90 days (Article 21.5 of the DSU). It is not yet settled whether consultations are required before this compliance panel procedure. Although not specifically mentioned in Article 21.5 of the DSU, the practice has shown that appeals against compliance panel reports are possible and even quite frequent.

As for the mandate of the Article 21.5 panel, the Appellate Body has clarified that the panel's task is not limited to examining whether the implementing measure fully complies with the recommendations and rulings adopted by the DSB. In other words, the task is not only that of scrutinizing whether the implementing measure remedies the violation or other nullification or impairment as found by the

original panel. Rather, compliance panels must consider the new measure in its totality, including its consistency with a covered agreement.[3] This can include, if the complainant raises such claims, any question of WTO consistency of the new measure. Such claims may be new and different from those raised in respect of the original measure in the original panel (and Appellate Body) proceeding.

6.8 Non-implementation.

If the losing Member fails to bring its measure into conformity with its (WTO) obligations within the reasonable period of time, the prevailing complainant is entitled to resort to temporary measures, which can be either compensation or the suspension of WTO obligations, as discussed below. Neither of these temporary measures is preferred to full implementation of DSB recommendations and rulings (Articles 3.7 and 22.1 of the DSU).

6.9 Compensation.

If the implementing Member does not achieve full compliance by the end of the reasonable period of time, it has to enter into negotiations with the complaining party with a view to agreeing a mutually acceptable compensation (Article 22.2 of the DSU). This compensation does not mean monetary payment; rather, the respondent is supposed to offer a benefit, for example a tariff reduction, which is equivalent to the benefit which the respondent has nullified or impaired by applying its measure.

The parties to the dispute must agree upon the compensation, which must also be consistent with the covered agreements (Article 22.1 of the DSU). This latter requirement is probably one of the reasons why (WTO) Members have hardly ever been able to work out compensation in cases reaching this stage. Conformity with the covered agreements implies, notably, consistency with the most-favoured-nation obligations (Article I of GATT 1994, among others). Therefore, WTO Members other than the complainant(s) would also benefit, if compensation is offered e.g. in the form of a tariff reduction. This makes compensation less attractive to both the respondent, for whom this raises the "price", and the complainant, who does not get an exclusive benefit. These obstacles could to some extent be overcome, however, if the parties were to select a trade benefit (e.g. tariff reduction) in a sector of particular export interest to the complainant and other Members had little export interest in that sector or product.

6.10 Countermeasures by the prevailing Member (suspension of obligations).

Prerequisites and objectives …….

If, within 20 days after the expiry of the reasonable period of time, the parties have not agreed on satisfactory compensation, the complainant may ask the DSB for permission to impose trade sanctions against the respondent that has failed to implement. Technically, this is called "suspending concessions or other obligations under the covered agreements" (Article 22.2 of the DSU).

Concessions are, for example, tariff reduction commitments which (WTO) Members have made in multilateral trade negotiations and are bound under Article II of GATT 1994. These bound concessions are just one form of WTO obligations. "Obligations" is the generic term in Article 22 (concessions or other obligations) used in this Guide for the sake of brevity (even though the most typical form practised so far is the suspension of concessions through the imposition of tariff surcharges). Suspending WTO obligations in relation to another Member requires a previous authorization of the DSB. The complainant is thus allowed to impose countermeasures that would

otherwise be inconsistent with the WTO Agreement, in response to a violation or to non-violation nullification or impairment. This is informally also called "retaliation" or "sanctions". Such suspension of obligations takes place on a discriminatory basis only against the Member that failed to implement.

Retaliation is the final and most serious consequence a non-implementing Member faces in the WTO dispute settlement system (Article 3.7 of the DSU). Although retaliation requires prior approval by the DSB [1], the countermeasures are applied selectively by one Member against another.

There is some debate whether the purpose of the suspension of obligations is to enforce recommendations and rulings, or merely to rebalance reciprocal trade benefits (at a new and lower level). Irrespective of the answer, it is clear that the suspension of obligations has the effect of rebalancing mutual trade benefits. It is also clear that the complainants who suspend obligations often do so with the intention of inducing compliance.

Accordingly, the suspension can have the effect of inducing the respondent to achieve implementation. The DSU also makes clear that the suspension of obligations is temporary and that the DSB is to keep the situation under surveillance as long as there is no implementation. The issue remains on the agenda of the DSB at the request of the complaining party until it is resolved. The suspension must be revoked once the Member concerned has fully complied with the DSB's recommendations and rulings.

Most observers agree that suspending obligations in response to the failure of timely implementation is problematic because it usually results in the complainant responding to a (WTO-inconsistent) trade barrier with another trade barrier, which is contrary to the liberalization philosophy underlying the WTO. Also, measures erecting trade barriers come at a price because they are nearly always economically harmful not only for the targeted Member but also for the Member imposing those measures. That said, it is important to note that it is the last resort in the dispute settlement system and is not actually used in most cases. It is clearly the exception, not the rule, for a dispute to go this far and not be resolved at an earlier stage through more constructive means.[2]

Rules governing the suspension of obligations …….

The level of suspension of obligations authorized by the DSB must be "equivalent" to the level of nullification or impairment (Article 22.4 of the DSU). This means that the complainant's retaliatory response may not go beyond the level of the harm caused by the respondent. At the same time, the suspension of obligations is prospective rather than retroactive; it covers only the time-period after the DSB has granted authorization, not the whole period during which the measure in question was applied or the entire period of the dispute.

Regarding the type of obligations to be suspended, the DSU imposes certain requirements. In principle, the sanctions should be imposed in the same sector as that in which the violation or other nullification or impairment was found (Article 22.3(a) of the DSU). For this purpose, the multilateral trade agreements are divided into three groups in accordance with the three parts of Annex 1 to the WTO Agreement (Annex 1A comprises the GATT 1994 and the other multilateral trade agreements on trade in goods, Annex 1B the GATS), and Annex 1C the TRIPS Agreement) (Article 22.3(g) of the DSU). Within these agreements, sectors are defined. With regard to TRIPS, the categories of intellectual property rights and the obligations under Part III and those under Part IV of the TRIPS Agreement each constitute separate sectors. In the GATS, each principal sector as identified in the

current "Services Sectoral Classification List" is a sector. With respect to goods, all goods belong to the same sector (Article 22.3(f) of the DSU). The general principle is that the complainant should first seek to suspend obligations in the same sector as that in which the violation or other nullification or impairment was found. This means that, for example, the response to a violation in the area of patents should also relate to patents. If the violation occurred in the area of distribution services, then the countermeasure should also be in this area. On the other hand, a WTO-inconsistent tariff on automobiles (a good) can be countered with a tariff surcharge on cheese, furniture or pyjamas (also goods).

However, if the complainant considers it impracticable or ineffective to remain within the same sector, the sanctions can be imposed in a different sector under the same agreement (Article 22.3(b) of the DSU). This option has no relevance in the area of goods, but, for example, a violation with regard to patents could be countered with countermeasures in the area of trademarks, and a violation in the area of distribution services could be countered in the area of health services.

In turn, if the complainant considers it impracticable or ineffective to remain within the same agreement, and the circumstances are serious enough, the countermeasures can be taken under another agreement (Article 22.3(c) of the DSU). The objective of this hierarchy is to minimize the chances of actions spilling over into unrelated sectors while at the same time allowing the actions to be effective. The possibility of suspending concessions in other sectors or under another agreement is often referred to as "cross-retaliation".

Particularly for smaller and developing country Members, the possibility of suspending obligations under a different sector or different agreement can be quite important. First, smaller and developing countries do not always import goods and services or intellectual property rights (in sufficient quantities) in the same sectors as those in which the violation or other nullification or impairment took place. This may make it impossible to suspend obligations at a level equivalent to that of the nullification or impairment committed by the respondent, unless the complainant can suspend obligations in a different sector or under a different agreement. Second, the suspension in the same sector or under the same agreement could be ineffective or impracticable because the bilateral trade relationship is asymmetrical in that it is relatively important for the complainant and relatively unimportant for the respondent, particularly if the latter is a big trading nation. In that case, the effects of the suspension of obligations and the imposition of trade barriers might not even be visible in the respondent's trade statistics. Third, it might be economically unaffordable for the developing country complainant to impose trade barriers against imports following the suspension of obligations under GATT 1994 or GATS because this would reduce the supply and/or increase the price of these imports on which the complainant's producers and consumers might depend.

For these reasons, it is important for developing countries to be able to use methods of suspending obligations that do not result in trade barriers. Suspending obligations under the TRIPS Agreement is an example of how to do so.

6.10 Countermeasures by the prevailing Member (suspension of obligations).

Authorization and arbitration ……..

The DSB must grant the authorization to suspend obligations within 30 days of the expiry of the reasonable period of time, unless it decides by consensus to reject the request. This is the third key situation where the DSB decides by "reverse" or "negative" consensus. In other words, the approval

is virtually automatic, because the requesting Member alone could prevent any possible consensus against granting the authorization.

If the parties disagree on the complainant's proposed form of retaliation, arbitration may be requested (Articles 22.6 and 22.7 of the DSU). This disagreement can relate either to the question of whether the level of retaliation is equivalent to the level of nullification or impairment or to the question of whether the principles governing the form of permitted suspension are respected. If the original panelists are available, it is the original panel that carries out this arbitration; otherwise the Director-General appoints an arbitrator. Article 22.6 of the DSU also stipulates that the deadline for completing the arbitration is 60 days after the date of expiry of the reasonable period of time and that the complainant must not proceed with the suspension of obligations during the course of the arbitration.

The arbitrators determine whether the level of the proposed suspension of concessions is equivalent to the level of nullification or impairment. This means that they calculate the approximate value of the trade lost due to the measure found to be (WTO)-inconsistent or otherwise to nullify or impair benefits. If there is a claim that the principles and procedures for cross-retaliation (Article 22.3 of the DSU) have not been followed, the arbitrator also examines that claim (Article 22.7 of the DSU).

The parties must accept the arbitrator's decision as final and not seek a second arbitration. The DSB is informed promptly of the outcome of the arbitration. Upon request, the DSB grants authorization to suspend obligations provided that the request is consistent with the decision of the arbitrator, except if there is a consensus to reject the request (Article 22.7 of the DSU).

Despite having obtained authorization from the DSB to suspend obligations, a complainant may choose not to proceed with the suspension but rather to use the authorization as a bargaining tool with the implementing Member.

Special rules on countermeasures (SCM Agreement) ……

Again, special rules exist in the SCM Agreement. In the area of prohibited subsidies, where the respondent has not followed the DSB's recommendation within the time-period specified by the panel for the withdrawal of the subsidy, the DSB grants authorization to the complaining Member to take "appropriate countermeasures", unless there is a negative consensus against it (Article 4.10 of the SCM Agreement). The arbitrator under Article 22.6 of the DSU is mandated to determine whether the proposed countermeasures are appropriate (Article 4.11 of the SCM Agreement).

In dispute settlement practice, the standard of "appropriateness" has been found to permit countermeasures that may be higher rather than strictly "equivalent" to the level of nullification or impairment caused by the prohibited subsidy. This appears to permit countermeasures that have a stronger effect in inducing compliance under the SCM Agreement than under the ordinary rules of the DSU.

On actionable subsidies, Article 7.9 of the SCM Agreement provides that the DSB must (unless there is a consensus to the contrary) grant authorization to the complainant to take countermeasures if the subsidy is not withdrawn or the adverse effects removed within six months from the adoption of the report(s). These countermeasures must be commensurate with the degree and nature of the adverse effects determined to exist. In the arbitration pursuant to Article 22.6 of the DSU, the arbitrator

determines whether the countermeasures are commensurate with the degree and nature of the adverse effects (Article 7.10 of the SCM Agreement).

"Sequencing" …….

One of the contentious issues arising in the implementation stage of the dispute settlement system is the relationship between Article 21.5 and Article 22.2 of the DSU. The issue is which of the two procedures, if any, has priority: the compliance proceeding or the suspension of obligations. In other words, the issue is whether the complainant is entitled to request authorization to suspend obligations before a panel (and the Appellate Body) has established pursuant to Article 21.5 of the DSU that there has been a failure to comply with rulings and recommendations of a panel (or the Appellate Body). On the one hand, Article 22.6 of the DSU mandates the DSB to grant the authorization to suspend obligations within 30 days of the expiry of the reasonable period of time (if there is no negative consensus). A possible arbitration on the level or form of retaliation must conclude within 60 days after the expiry of the reasonable period of time. This time is not sufficient to complete the compliance review under Article 21.5 of the DSU (90 days for the panel, plus possible appeal) in order to establish whether there has been full implementation of the DSB recommendations and rulings (i.e. whether there now is WTO-compliance or whether a satisfactory adjustment to a situation of non-violation nullification or impairment has occurred). On the other hand, Article 23 of the DSU prohibits WTO Members from deciding unilaterally whether a measure is inconsistent with the covered agreements or whether it nullifies or impairs benefits.

This conflict came to a head in the EC — Bananas III dispute. In subsequent cases, the parties have usually reached an ad hoc agreement on the sequencing of procedures under Article 21.5 and Article 22. In some cases, the parties have agreed to initiate the procedures under Article 21.5 and Article 22 simultaneously and then to suspend the retaliation procedures under Article 22 (the DSB authorization and the Article 22.6 arbitration) until the completion of the Article 21.5 procedure.[1] In other cases, the parties have agreed to initiate the procedures under Article 21.5 before resorting to the retaliation procedures under Article 22 with the understanding that the respondent would not object to a request for authorization of suspension of concessions under Article 22.6 of the DSU because of the expiry of the 30-day deadline for the DSB to grant this authorization.

Attempts to find a solution to the issue of sequencing through an authoritative interpretation or amendment of the DSU have so far been unsuccessful in both past and current DSU review negotiations.

6.11 Surveillance until final implementation.

The DSB's surveillance continues (even where compensation has been agreed or obligations have been suspended) as long as the recommendation to bring a measure into conformity with the covered agreements has not yet been implemented (Article 22.8 of the DSU).

6.12 Special procedures for non-violation and situation complaints.

Non-violation complaints …….

Although the procedures explained in this chapter, including on implementation, also apply to non-violation complaints, there are several differences. Some relate to those provisions that contain an explicit reference to a measure found inconsistent with the covered agreements, without simultaneously referring to nullification or impairment of benefits caused by (WTO)-consistent

measures. These provisions are not applicable to non-violation complaints. In addition, Article 26.1 of the DSU contains several special provisions applying only to non-violation complaints departing from the normal procedures. These special features have already been referred to in the relevant context, so it is sufficient to briefly summarize the most important procedural aspects:

- **there is no obligation to withdraw a WTO-consistent measure found to nullify or impair benefits or to impede the attainment of an objective;**
- **the panel (and the Appellate Body) accordingly recommends that that the Members concerned find a mutually satisfactory adjustment;**
- **the arbitration under Article 21.3(c) of the DSU on the reasonable period of time may, upon request by either party, include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment;**
- **compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute. (Under the general rules, compensation is only temporary pending final implementation. However, in non-violation cases, the obligation of implementation is not that of withdrawing the measure, but to make an adjustment, and this adjustment can notably take the form of compensation).**

Situation complaints …….

Situation complaints are quite different in that the general procedures of the DSU apply only up to the point of the circulation of the panel report (Article 26.2 of the DSU). This panel report must in any event be a separate panel report on the situation complaint, even if it is coupled with a simultaneous violation or non-violation complaint (Article 26.2(b) of the DSU).

As regards adoption and surveillance and implementation of recommendations and rulings in situation complaints, the GATT dispute settlement rules and procedures contained in the Decision of 12 April 1989[1] continue to apply. This means that the reverse consensus rule does not apply to the adoption of the panel report and to the authorization of the suspension of obligations in the event of a failure to implement. In other words, any Member, including the "losing" party, can block these decisions in the DSB by opposing a positive consensus. Article 26.2 of the DSU also implicitly excludes the possibility of an appeal against a panel report based on a situation complaint. Similarly, the DSU procedures on the compliance review in Article 21.5 of the DSU, the reasonable period of time to comply with the recommendations and rulings (and accordingly the arbitration on the reasonable period of time) and on the arbitration on the level of suspension of concessions do not automatically apply.

Chapter 7 -- Legal effect of panel and appellate body reports and DSB recommendations and rulings.

The previous chapters gave a explanation of the various procedures set out in the DSU. This chapter and the following ones will address specific issues of interest. This chapter addresses the legal effect of rulings made by panels, the Appellate Body and the DSB.

7.1 Legal effects within the context of a particular dispute.

Recommendations and rulings of the DSB ……..

After the DSB adopts a report of a panel (and the Appellate Body), the conclusions and recommendations contained in that report become binding upon the parties to the dispute. The DSU

states that, when the parties cannot find a mutually agreeable solution, the first objective is normally to secure the withdrawal of the measure found to be inconsistent with the (WTO) Agreement (Article 3.7 of the DSU). In a successful violation complaint, the panel (and the Appellate Body) has found an inconsistency with the WTO Agreement and has expressed this finding in its conclusions. The panel (and the Appellate Body) then concludes by recommending that the Member concerned bring its measure into conformity with WTO law (Article 19.1 of the DSU). Article 21.1 of the DSU adds that prompt compliance with the recommendations or rulings of the DSB is essential in order to ensure the effective resolution of disputes.

The DSU clearly stipulates that compensation and suspension of concessions (countermeasures) are only temporary alternatives that fall short of resolving the dispute (Articles 3.7, 21.6 and 22.1 of the DSU). The only permanent remedy is for the losing party to "bring its measure into conformity" with the relevant covered agreements, as provided in Article 19 of the DSU. Moreover, for the reasons explained below, the term "recommendation" in Article 19.1 and the phrase "recommendation and ruling" should not be understood to give the party discretion as to whether to follow the recommendation.

First, it is worth recalling that panels and the Appellate Body only apply WTO law as it is contained in the covered agreements. They cannot add to or diminish the rights and obligations provided in the WTO Agreements (Articles 3.2 and 19.2 of the DSU). A panel's or the Appellate Body's conclusion that a certain measure is inconsistent with WTO law therefore merely reflects and declares the legal situation which exists by virtue of the WTO Agreement, independently of the dispute settlement ruling. Because the provisions of the covered agreements constitute binding legal obligations with which all Members must comply [1], such provisions already contain an obligation to refrain from any inconsistent action. The (adopted) report of a panel or the Appellate Body, therefore, constitutes an obligation for the losing party to put to an end the WTO inconsistency (and is in addition to the primary obligation not to maintain WTO-inconsistent measures in the first place).

Second, the DSU makes clear that a Member that does not bring its WTO-inconsistent measure into conformity with the WTO Agreement risks consequences: it either has to provide compensation with the agreement of the complainant, or it may face retaliatory countermeasures.

Third, the DSU specifically states that there is no obligation to withdraw the WTO-consistent measure in the event of a successful non-violation complaint (Article 26.1(b) of the DSU). This suggests there is such an obligation in the event of a successful violation complaint.

For these reasons, one can say that the recommendation contained in an adopted panel (and Appellate Body) report — if it concludes that there is a WTO violation — for the respondent to bring its measure into conformity with the WTO Agreement is binding upon the respondent.

The situation is different for non-violation complaints. The adopted panel (and Appellate Body) report is also binding with regard to the panel's or the Appellate Body's conclusion as to whether or not a benefit accruing to the complainant under a covered agreement has been nullified or impaired. However, the DSU specifically states that there is no obligation to withdraw the WTO-consistent measure that resulted in nullification or impairment. The panel or the Appellate Body, therefore, only recommends that the parties find a mutually satisfactory adjustment (Article 26.1(b) of the DSU).

An adopted panel (and Appellate Body) report is also binding on the complainant. This is relevant especially in those cases where the complainant does not prevail with all its claims of violation or of non-violation nullification or impairment. Article 23.2(a) of the DSU prohibits the complainant from

determining unilaterally that a violation of the WTO Agreement or that nullification or impairment of a benefit has occurred if this is inconsistent with the findings contained in the panel or Appellate Body report adopted by the DSB.

Obligations in the event of a "regional or local violation" ……

A qualification to the above applies when a successful violation complaint relates to a measure taken by regional or local governments or authorities within the territory of a Member. Such measures are attributable to the Member in question and can be the object of a dispute. The difference between such measures and those taken by the authorities belonging to that Member's central government is that the central government, which represents the Member at the WTO (including in the dispute settlement proceedings), might not be able to secure the withdrawal of the measure. The domestic law of that Member, for instance the Constitution, might limit the central government's powers over the regional or local levels of government. This may, for example, be the case in federal States, where the central government is not always entitled to interfere with regional or local legislative or administrative acts.

Accordingly, the implementation obligations of the responsible Member are limited to such reasonable measures as may be available to it to ensure observance of WTO law (Article 22.9 of the DSU). Article XXIV:12 of GATT 1994 contains identical language. This is a specific and limited exception to the principle that subjects of international law are responsible for the activities of all branches of power within their system of governance, including all regional levels or other subdivisions of government.

The qualifications of Article 22.9 should not be generalized and extrapolated to other authorities of a Member enjoying a degree of independence, for example, independent judiciaries. Even if a government is unable to remedy a WTO violation because an independent judicial body committed it, the Member in question is fully responsible for this violation in WTO dispute settlement. It is a general principle of international law that it is not possible to invoke domestic law as justification for the failure to carry out international obligations.

Article 22.9 only limits a Member's implementation obligations insofar as the achievement of conformity with the WTO Agreement (by withdrawing the inconsistent measure) is concerned. The dispute settlement provisions relating to compensation and the suspension of obligations fully apply where the Member concerned has not been able to secure the observance of the WTO Agreement in its territory (Article 22.9).

7.2 Legal status of adopted/unadopted reports in other disputes.

A dispute relates to a specific matter and takes place between two or more specific Members of the (WTO). The report of a panel or the Appellate Body also relates to that specific matter in the dispute between these Members. Even if adopted, the reports of panels and the Appellate Body are not binding precedents for other disputes between the same parties on other matters or different parties on the same matter, even though the same questions of WTO law might arise. As in other areas of international law, there is no rule of stare decisis in WTO dispute settlement according to which previous rulings bind panels and the Appellate Body in subsequent cases. This means that a panel is not obliged to follow previous Appellate Body reports even if they have developed a certain interpretation of exactly the provisions which are now at issue before the panel. Nor is the Appellate Body obliged to maintain the legal interpretations it has developed in past cases. The Appellate Body has confirmed that conclusions and recommendations in panel reports adopted under GATT 1947

bound the parties to the particular dispute, but that subsequent panels were not legally bound by the details and reasoning of a previous panel report.

If the reasoning developed in the previous report in support of the interpretation given to a WTO rule is persuasive from the perspective of the panel or the Appellate Body in the subsequent case, it is very likely that the panel or the Appellate Body will repeat and follow it. This is also in line with a key objective of the dispute settlement system which is to enhance the security and predictability of the multilateral trading system (Article 3.2 of the DSU). In the words of the Appellate Body, these GATT and WTO panel reports — and equally adopted Appellate Body reports[1] — "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute".[2]

Although unadopted panel reports have no formal legal status in the GATT or WTO system, the reasoning contained in an unadopted panel report can nevertheless provide useful guidance to a panel or the Appellate Body in a subsequent case involving the same legal question.[3]

Chapter 8 -- Dispute Settlement without recourse to Panels and the Appellate Body.

The previous chapters have devoted much attention to the involvement of panels and the Appellate Body in the WTO dispute settlement system. However, it is important to stress that panels and the Appellate Body are not always involved in a WTO dispute and there are various other ways to solve disputes within the framework of the (WTO). Indeed, the parties often use these other ways and manage to solve their dispute in a cooperative manner and not through recourse to adjudication by panels and the Appellate Body. In this regard, parties can settle a dispute by finding a mutually agreed solution in bilateral negotiations or with the help of dispute resolution mechanisms such as good offices, conciliation or mediation. In addition, they can also agree to refer their dispute to an arbitrator.

In domestic judicial systems, the out-of-court solution of disputes is often referred to as an "alternative" form of dispute resolution. One could also talk about an "alternative" to panels and the Appellate Body in the WTO dispute settlement system, when parties settle their dispute with a mutually agreed solution, or through arbitration. However, these forms of dispute settlement are provided for in the DSU and are therefore formally part of, and not an alternative to, the WTO dispute settlement system.

8.1 Mutually agreed solutions.

The DSU expresses a preference for the parties to settle their disputes through mutually agreed solutions (Article 3.7 of the DSU). However, unlike many other judicial systems, the DSU does not allow the parties to settle their dispute on whatever terms they wish. Solutions mutually acceptable to the parties to the dispute must also be consistent with the WTO Agreement and must not nullify or impair benefits accruing under the agreement to any other Member (Articles 3.5 and 3.7 of the DSU). If the matter has been formally raised in a request for consultations, the mutually agreed solutions must be notified to the DSB and the relevant Councils and Committees (Article 3.6 of the DSU). This is meant to inform the other WTO Members and to give them an opportunity to raise whatever concern they may have with regard to the settlement. Implicit in these rules is an acknowledgement of the danger that the parties to a dispute might be tempted to settle on terms that are detrimental to a third Member not involved in the dispute, or in a way that is not entirely consistent with WTO law. Mutually agreed solutions must therefore be notified to the DSB with sufficient information for other Members.

In bilateral consultations or afterwards …….

Bilateral consultations, which are required to take place at the beginning of any dispute, are intended to provide a setting in which the parties to a dispute should attempt to negotiate a mutually agreed solution. However, even when the consultations have failed to bring about a settlement and the dispute has progressed to the stage of adjudication, the parties are encouraged to continue their efforts to find a mutually agreed solution.

For instance, panels should consult regularly with the parties and give them adequate opportunity to develop a mutually satisfactory solution (Article 11 of the DSU). When panels suspend their work at the request of the complaining party (Article 12.12 of the DSU), this is usually to allow the parties to find a mutually agreed solution. In one case, the parties to the dispute reached a mutually agreed solution prior to the issuance of the interim report.[1] In another case, they did so after the issuance of the interim report, but before the issuance of the final report to the parties.[2] In yet another case, the parties reached a mutually agreed solution after the issuance but prior to the circulation[3] of the panel report to all Members.[4] Where the parties have found a settlement of the matter, the panel issues a report in which it briefly describes the case and reports that the parties have reached a mutually agreed solution (Article 12.7 of the DSU).

At the stage of appellate review, the appellant may withdraw the appeal at any time. One possible reason to do so would be that the parties have found a mutually agreed solution.

Mediation, conciliation and good offices …….

Sometimes, the involvement of an outside, independent person unrelated to the parties of a dispute can help the parties find a mutually agreed solution. To allow such assistance, the DSU provides for good offices, conciliation and mediation on a voluntary basis if the parties to the dispute agree (Article 5.1 of the DSU). Good offices normally consist primarily of providing logistical support to help the parties negotiate in a productive atmosphere. Conciliation additionally involves the direct participation of an outside person in the discussions and negotiations between the parties. In a mediation process, the mediator does not only participate in and contribute to the discussions and negotiations, but may also propose a solution to the parties. The parties would not be obliged to accept this proposal.

Good offices, conciliation and mediation may begin at any time (Article 5.3 of the DSU), but not prior to a request for consultations because that request is necessary to trigger the application of the procedures of the DSU, including Article 5 (Article 1.1 of the DSU). For example, the parties can enter into these procedures during their consultations. If this happens within 60 days after the date of the request for consultations, the complainant must not request a panel before this 60-day period has expired, unless the parties jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute (Article 5.4 of the DSU). However, these procedures can be terminated at any time (Article 5.3 of the DSU). If the parties so agree, these procedures may continue while the panel proceeds with an examination of the matter (Article 5.5 of the DSU).

The proceedings of good offices, conciliation and mediation are strictly confidential, and do not diminish the position of either party in any following dispute settlement procedure (Article 5.2 of the DSU). This is important because, during such negotiations, a party may offer a compromise solution, admit certain facts or divulge to the mediator the outer limit of the terms on which it would be prepared to settle. If no mutually agreed solution emerges from the negotiations and the dispute goes

to adjudication, this constructive kind of flexibility and openness must not be detrimental to the parties.

As regards the independent person to be involved, the DSU states that the Director-General of the (WTO) may offer good offices, conciliation or mediation with a view to assisting Members to settle their dispute (Article 5.6 of the DSU). Due to the absence of recourse to the procedures of Article 5 of the DSU, the Director-General issued a formal communication to the Members of the WTO.[1] In this communication, the Director-General called the Members' attention to his readiness to assist them as contemplated in Article 5.6 of the DSU, with a view to helping settle disputes without recourse to panels and the Appellate Body. The communication also details the procedures to be followed when Members request the Director-General's assistance for good offices, conciliation or mediation.

The communication contemplates that the Director-General or, with the concurrence of the parties, a designated Deputy Director-General would handle the proceedings. Unlike panel and Appellate Body proceedings, the process of good offices, conciliation or mediation should not result in legal conclusions, but assist in reaching a mutually agreed solution. The Director-General may involve Secretariat staff to support the process, but these staff members must be insulated from subsequent dispute settlement procedures (i.e. at the panel stage).[2] A request to the Director-General must also identify whether it is for good offices, conciliation and/or mediation, even though the Director-General's role may change during the Article 5 procedure. Finally, the communication stipulates that ex parte communications (between one party and the Director-General to the exclusion of the other party) would be permitted, that all communications during the process would remain confidential and that no third party may participate in the process, except if the parties agree.

As already stated, the procedures of Article 5 have so far not been used in WTO dispute settlement. In one instance, three WTO Members jointly requested the Director-General (or a person designated by the Director-General with the requesting Members' agreement) to mediate. The mediator was requested to examine the extent to which a preferential tariff treatment granted to other Members unduly impaired legitimate export interests of two of the requesting Members. The task of the mediator was also to possibly to propose a solution.

The requesting Members considered the matter not to be a "dispute" within the terms of the DSU, but agreed that the mediator could be guided by procedures similar to those envisaged for mediation under Article 5 of the DSU. The Director-General nominated a Deputy Director-General to be the mediator[3], whose conclusions it was agreed by the parties would remain confidential upon completion of the procedure.

The DSU specifically foresees good offices, conciliation and mediation for disputes involving a least-developed country Member. Where the consultations have not resulted in a satisfactory solution and the least-developed country Member so requests, the Director-General or the Chairman of the DSB must offer their good offices, conciliation and mediation. Here as well, the aim is to assist the parties to settle the dispute before the establishment of a panel (Article 24.2 of the DSU).

8.2 Arbitration pursuant to Article 25 of the DSU.

As an alternative to adjudication by panels and the Appellate Body, the parties to a dispute can resort to arbitration (Article 25.1 of the DSU). The parties must agree on the arbitration as well as the procedures to be followed (Article 25.2 of the DSU). The parties to the dispute are thus free to depart from the standard procedures of the DSU and to agree on the rules and procedures they deem

appropriate for the arbitration, including the selection of the arbitrators. The parties must also clearly define the issues in dispute.

Before the beginning of the arbitration, the parties must notify their agreement to resort to arbitration to all (WTO) Members. Other Members may become party to an arbitration only with the agreement of the parties engaged in the arbitration. The parties to the arbitration must agree to abide by the arbitration award, which, once issued, must be notified to the DSB and the relevant Councils and Committees overseeing the agreement(s) in question (Articles 25.2 and 25.3 of the DSU). The provisions of Articles 21 and 22 of the DSU on remedies and on the surveillance of implementation of a decision apply to the arbitration award (Article 25.4 of the DSU).

To date, in only one dispute, have the parties resorted to arbitration under Article 25 of the DSU. The procedure was not used as an alternative to the panel and Appellate Body procedure, but at the stage of implementation, when the panel report had already been adopted. The parties asked the arbitrators to determine the level of nullification or impairment of benefits caused by the violation established in the panel report. Under the standard procedures of the DSU, parties can obtain a binding determination of the level of nullification or impairment by recourse to arbitration under Article 22.6 of the DSU. A prerequisite for such arbitration is that the complainant has requested the DSB's authorization for the suspension of obligations and that the respondent disagrees with the proposed level of retaliation. In the case where the parties resorted to arbitration under Article 25 of the DSU, they agreed that the award of the arbitrators would be final. Recourse to Articles 21 and 22 of the DSU is available to implement and enforce the conclusions of these arbitration awards.

Chapter 9 -- Participation in dispute settlement proceedings.

9.1 Parties and third parties and principle of confidentiality.

Earlier chapters have already explained that only (WTO) Member governments have direct access to the dispute settlement system either as parties or as third parties.[1] In addition, the entire procedure is confidential, which covers the consultations (Article 4.6 of the DSU), the panel procedure until the circulation of the report (Articles 14.1 and 18.2 of the DSU and paragraph 3 of the Working Procedures in Appendix 3 to the DSU), and the proceedings of the Appellate Body (Article 17.10 of the DSU).

It is true that Members may make use of their right to disclose their own submissions to the public (Article 18.2 of the DSU and paragraph 3 of the Working Procedures in Appendix 3 to the DSU). The reports of panels and the Appellate Body also give a description of the proceeding, including the positions taken by the various participants. However, this does not give non-participants any opportunity to make a contribution to the dispute settlement proceeding while it is ongoing (i.e. before decisions are made). For that reason, there is a great deal of interest in the question of who can participate in dispute settlement proceedings.

9.2 Legal representation.

A question that arose early in the life of the DSU was whether the parties and third parties to a dispute could only send government officials as their representatives to the meetings with the panel and the oral hearing of the Appellate Body. The DSU does not specifically address the issue of who may represent a party before panels and the Appellate Body.

In EC — Bananas III, one party challenged the right of parties or third parties to have independent private legal counsel (i.e. barristers/solicitors/attorneys) as their representatives, even if these individuals are professionals who had been hired for that specific purpose and were not permanently employed by the government. The practice under GATT 1947 (where private legal counsel was not allowed) was invoked in support of denying such a possibility. The Appellate Body, however, made clear that nothing in the WTO Agreement or in general international law prevents a WTO Member from determining for itself the composition of its delegation in WTO dispute settlement proceedings.

This is valid for hearings of the Appellate Body as well as for the substantive meetings with the panel. It is, therefore, now common practice for private legal counsel to appear in panel and Appellate Body proceedings as part of a Member's delegation and to present arguments on their behalf. Even more common is the involvement of private law firms in the preparation of parties' written submissions, even though this is usually not visible because the party involved would file these submissions with its government's letterhead. This is quite relevant for developing country Members, as it may enable them to take part in dispute settlement proceedings even when they lack human resources with specific expertise in (WTO) dispute settlement.[2] The Member concerned is of course responsible for these representatives, as for all its governmental delegates, and must ensure that these outside representatives respect the confidentiality of the proceedings.

9.3 Amicus Curiae submissions

A controversial issue has been whether panels and the Appellate Body may accept and consider unsolicited submissions they receive from entities not a party or third party to the dispute. These submissions are commonly referred to as amicus curiae submissions. Amicus curiae means "friend of the court". These submissions often come from non-governmental organizations, including industry associations, or university professors. Neither the DSU nor the Working Procedures for Appellate Review specifically address this issue.

Amicus Curiae submissions in panel proceedings …….

According to the Appellate Body, the panels' comprehensive authority to seek information from any relevant source (Article 13 of the DSU) and to add to or depart from the Working Procedures in Appendix 3 to the DSU (Article 12.1 of the DSU) permits panels to accept and consider or to reject information and advice, even if submitted in an unsolicited fashion.[1]

The Appellate Body has confirmed this ruling several times, but the issue remains extremely contentious among WTO Members. Many Members are of the strong view that the DSU does not allow panels to accept and consider non-requested amicus curiae submissions. They consider WTO disputes as procedures purely between Members and see no role whatsoever for non-parties, particularly non-governmental organizations.[2]

To date, only a few panels have in fact made use of their discretionary right to accept and consider unsolicited briefs. On the basis of the Appellate Body's interpretation, panels have no obligation whatsoever to accept and consider these briefs. Accordingly, interested entities, which are neither parties nor third parties to the dispute, have no legal right to be heard by a panel.

Amicus Curiae submissions in the appellate procedure ……..

Amicus curiae submissions have frequently been filed in Appellate Body proceedings. When these briefs are attached to the submission of a participant (appellant or appellee), for instance as exhibits,

the Appellate Body considers such material to be an integral part of the submission of that participant who also assumes responsibility for its content.[3]

When the Appellate Body receives unsolicited briefs directly from an amicus curiae, the entity filing the brief has no right to have it considered. Nonetheless, the Appellate Body maintains that it has the authority to accept and consider any information it considers pertinent and useful in deciding an appeal, including unsolicited amicus curiae submissions. The Appellate Body believes such a right flows from its broad authority to adopt procedural rules, provided they do not conflict with the DSU or the covered agreements (Article 17.9 of the DSU).

In one appeal, the Appellate Body foresaw that it might receive a high number of amicus curiae briefs and adopted an additional procedure pursuant to Rule 16(1) of the Working Procedures for the purpose of that appeal only. This procedure specified several criteria for such submissions. Persons other than the parties and third parties intending to file such a submission were required to apply for leave to file that submission. Upon review of the applications, however, the Appellate Body denied all applicants leave to file briefs. In reaction to the adoption of these additional procedures, the General Council of the (WTO) discussed the matter in a special meeting where a majority of WTO Members that spoke considered it unacceptable for the Appellate Body to accept and consider amicus curiae briefs.

Recently, the Appellate Body received an amicus curiae submission from a WTO Member that had not been a third party before the panel and, therefore, could not become a third participant in the appellate proceeding. The Appellate Body recalled that it had the authority to receive amicus curiae briefs from private individuals or organizations, and concluded that it was equally entitled to accept such a brief from a WTO Member. However, the Appellate Body did not believe it was required to consider the content of that brief.

Despite the controversy surrounding this issue, the Appellate Body has never considered any unsolicited submission to be pertinent or useful, and thus, has never considered any that have been submitted.

Chapter 10 -- Legal issues arising in WTO dispute settlement proceedings.

10.1 Standing.

There is no DSU requirement for a complainant to have a "legal interest" as a prerequisite for requesting the establishment of a panel in a dispute. Indeed, complainants have already been allowed to bring complaints against violations of the WTO Agreement, even though such violations were to the detriment of other Members. However, the issue of standing (the right to bring a complaint) was not specifically raised in those disputes. In the one case where the respondent specifically challenged the complainant's standing to bring a violation claim under GATT 1994, the Appellate Body was satisfied with the fact that the complainant was a producer and potential exporter of the product in question. Moreover, the claims in that case were interwoven with claims under other covered agreements, for which the complainant's standing had not been challenged. The Appellate Body also relied on a Member's interest in enforcing WTO rules due to the possible direct or indirect economic effects of a WTO violation.

10.2 Claims versus arguments; autonomous reasoning of a panel.

By its terms of reference (Article 7 of the DSU), a panel is restricted to addressing only those claims that are specifically set out in a Member's panel request with sufficient precision. The complainant

must, therefore, include all the claims it wants the panel to address in the request for the establishment of the panel. If the request does not specify a certain claim, then the original request cannot subsequently be "cured" by a complaining party's argumentation in the written submissions or in the oral statements to the panel. The panel would be precluded from ruling on such a subsequent claim.

However, there is a significant difference between the claims identified in the panel request, and the arguments supporting those claims. "Claim" means an assertion that the respondent has violated, nullified or impaired benefits accruing under an identified provision of a covered agreement. "Arguments" are put forward by the complainant to demonstrate that the respondent has indeed infringed the identified provision or otherwise nullified or impaired benefits. Arguments are not required to be included in the request for the establishment of the panel. Rather, the parties usually develop extensive legal arguments only in the further stages of the proceedings (i.e. in their written submissions and oral statements to the panel).

A panel is not limited to using the parties' arguments. Rather, a panel is free to accept or reject such arguments and has the discretion to develop its own legal reasoning to support its findings and conclusions. In other words, a panel can develop its own autonomous reasoning.

10.3 Necessity for the respondent to invoke exceptions.

There is one important deviation from the principle that panels and the Appellate Body are free autonomously to apply (WTO) law in reviewing the complainant's claims and to develop their own legal reasoning. It relates to the application of WTO legal exceptions. When the respondent intends to rely on a legal exception to the obligation, a violation of which the complainant has claimed, the respondent must expressly invoke such an exception. Examples of such exceptions are Article XX of GATT 1994[1] or Article 5.7 of the SPS Agreement.[2] A panel and the Appellate Body cannot apply such exceptions if they have not been invoked by the respondent.

10.4 Judicial economy.

Under its terms of reference, a panel has a mandate to address all the complainant's claims. However, complainants often allege that the challenged measure violates simultaneously a number of different (WTO) provisions in either the same or various covered agreements.

In such cases, panels are not required to address all the legal claims that the complainant makes. It is sufficient for a panel to deal with the claims that are necessary to resolve the matter at issue in the dispute. If the panel has already found that the challenged measure is inconsistent with a particular provision of a covered agreement, it is generally not necessary to go on and to examine whether the same measure is also inconsistent with other provisions the complainant invokes. Panels have the discretion to decline to rule on these further claims[3], but they must do so explicitly.

There is a limit to this discretion, however, since the principle of judicial economy must be applied consistently with the objective of the dispute settlement system: to resolve the matter at issue and "to secure a positive solution to a dispute" (Article 3.7 of the DSU). The Appellate Body has cautioned that it would be false judicial economy to provide only a partial resolution of the matter at issue. A panel must, therefore, address all those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member "in order to ensure effective resolution of disputes to the benefit of all Members" (Article 21.1 of the DSU).

Where a panel dismisses a complaint, there is obviously no scope for the application of judicial economy. Each and every claim cited in the complaint must be addressed and rejected in such a case. Sometimes, complainants make several claims of violation, but some of them only in a conditional manner: "If the panel does not find a violation of Article Y, we assert that the measure in dispute violates Article Z". This is also not a situation where a panel has any discretion to apply judicial economy. It would first examine Article Y and address Article Z if, and only if, it has found no violation of Article Y.

10.5 Standard of review.

The general rule in Article 11 of the DSU ……..

A panel's standard of review is stipulated in Article 11 of the DSU. A panel has to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

As to the establishment of the facts in a case, this "objective assessment" has been understood as mandating neither a de novo review (i.e. the complete repetition of the fact-finding conducted by national authorities) nor "total deference" to domestic authorities (i.e. the simple acceptance of their determination).

In the area of safeguard measures[2], this has been considered to mean that a panel must assess whether the national authorities have examined all the relevant facts and provided a reasoned explanation of how the facts support their determination.[3] National authorities must look for and evaluate relevant information, irrespective of whether any interested party involved in the national proceedings has relied upon it.[4] Panels must critically examine the competent authorities' explanation as to whether it fully addresses the nature, and the complexities, of the data, and responds to other plausible interpretations of that data.[5] However, panels must not consider evidence which did not exist at the time when the Member made its determination.

Special standard of review in Article 17.6 of the Anti-Dumping Agreement ……..

One covered agreement, the Anti-Dumping Agreement, sets out a special standard of review (Article 17.6 of the Anti-Dumping Agreement). This special provision is intended to give a greater margin of deference to the Member's anti-dumping determination than would Article 11 of the DSU.

In its assessment of the facts of the matter in an anti-dumping dispute, a panel must determine whether the establishment of the facts by the anti-dumping authorities was proper and whether their evaluation of those facts was unbiased and objective. If that is the case, the panel must accept the anti-dumping determination, even though it might have reached a different conclusion about those facts.

As regards the standard of legal review, Article 17.6 (ii) confirms that the panel must interpret the relevant provisions of the Anti-Dumping Agreement in accordance with customary rules of interpretation of public international law.[7] Where a relevant provision can have more than one permissible interpretation, the panel must find the anti-dumping measure to be in conformity with the Anti-Dumping Agreement if it is based upon one of those permissible interpretations.

10.6 Burden of proof.

The DSU does not include any express rule concerning the burden of proof in panel proceedings. The concept of the burden of proof generally has two important aspects in any judicial or quasi-judicial system: (i) Who should "lose" the dispute if the facts remain unclear? In whose favour should a panel decide if, based on the available evidence, it cannot establish the facts necessary to determine whether or not the respondent has violated a certain provision of the covered agreements? For example, Article 11.3 of the Agreement on Safeguards prohibits (WTO) Members from encouraging or supporting non-governmental measures equivalent to a voluntary import or export restraint. How should the panel rule, if the available evidence leaves open whether an alleged act of governmental support has taken place or not? (ii) What level of proof suffices for a panel to establish a fact? Above this level, the panel would consider the fact at issue as established and would base its decision, among other things, upon this fact. In turn, below this level, the panel cannot consider the fact as established; if it is a fact that is necessary to satisfy the legal provision, the panel would rule against the party bearing the burden of proof.

The Appellate Body has recognized that the concept of a burden of proof is implicit in the WTO dispute settlement system. The mere assertion of a claim does not amount to proof. In line with the practice of various international tribunals, the Appellate Body has endorsed the rule that the party who asserts a fact, whether the complainant or the respondent, is responsible for providing proof thereof. The burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.

This means that the party claiming a violation of a provision of the WTO Agreement (i.e. the complainant) must assert and prove its claim. In turn, the party invoking in defence a provision that is an exception to the allegedly violated obligation (i.e. the respondent) bears the burden of proof that the conditions set out in the exception are met.[2] Such exceptions are, for example, Articles XX and XI:2(c)(i) of GATT 1994.

As regards the required level of proof, the Appellate Body has clarified that the party bearing the burden of proof must put forward evidence sufficient to make a prima facie case (a presumption) that what is claimed is true. When that prima facie case is made, the onus shifts to the other party, who will fail unless it submits sufficient evidence to disprove the claim, thus rebutting the presumption.[3] Precisely how much and precisely what kind of evidence will be required to establish a presumption that what is claimed is true (i.e. what is required to establish a prima facie case) varies from measure to measure, provision to provision, and case to case.

10.7 The panel's right to seek information.

Article 13 of the DSU entitles panels to seek information from any appropriate source for the exploration and establishment of the facts necessary to adjudicate in a dispute. This right is broad and comprehensive and its exercise is left to the discretion of the panel.[1] One aspect of Article 13 is the panel's right to resort to experts. In addition, Article 13 has been understood as an unconditional right which includes the panels' right to request and obtain information from the Members who are party to the dispute.

Despite the language in Article 13.1, third sentence, that a Member "should respond promptly and fully" to any request for information, the Appellate Body has ruled that Members, including the

parties to the dispute, are under a full legal obligation to surrender the requested information.[3] If a Member violates this obligation by refusing to submit the requested information, the panel has the discretionary right to draw negative inferences from the attitude of the non-cooperating Member.[4] This means it may interpret the factual matter in doubt to the disadvantage of that Member.

10.8 The nature of domestic legislation as an object of a dispute.

The characterization of domestic legislation, which becomes the object of dispute settlement, is an interesting aspect relating to the distinction between questions of law and questions of facts. This distinction is relevant, among other things, for the scope of the appellate review.

Domestic law is frequently at issue in disputes. Article XVI:4 of the WTO Agreement provides that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." For example, often in a dispute, a complaint will not address whether an internal tax imposed by the respondent on a certain shipment of imports, say imported vodka, was consistent with Article III:2 of GATT 1994. Rather, the complainant will directly challenge the internal tax law as such as being inconsistent with Article III:2 of GATT 1994 where different internal taxes are imposed under the law on two different kinds of "like" products, say shochu and on vodka. In other words, the complaint is directed at the existence of the law rather than a specific application of the law. In such cases, several issues relating to the domestic legislation must be reviewed before the question of its (WTO) conformity can be decided.

Probably the most important of these issues is whether the domestic legislation in question is mandatory or discretionary in providing for an act in contravention of WTO law. As has already been discussed, Members can successfully challenge laws as such (i.e. the existences of the law itself) only if such laws are mandatory. However, it is not always clear whether a particular domestic law is mandatory or discretionary with respect to WTO-inconsistent acts. The question could depend on a host of factors such as the domestic legal framework, how the law in question operates together with other domestic legal provisions, the relationship between the different branches of government and how the authorities and courts interpret domestic law. A panel would then have to make a determination in light of these factors of whether the law is mandatory or discretionary in the WTO sense. Under domestic law, such determination would certainly be a legal question. However, is it also a legal question within the framework of WTO dispute settlement? If so, the panel's assessment of whether or not the domestic law is mandatory would be subject to appellate review. However, if it is a question of fact, it would not be subject to appellate review. There are other issues relating to the nature, content, and structure of challenged domestic laws or measures that raise the same question: is this a question of law or a question of fact from the perspective of WTO law? The Appellate Body has had an opportunity to express itself on the question of how to qualify, for purposes of WTO law, domestic legal characterizations.

In India — Patents (US), for example, the Appellate Body insisted that it was the panel's task to determine whether India's "administrative instructions" were in conformity with its obligations under the TRIPS Agreement. For that purpose, the panel was entitled to and even obliged to seek a detailed understanding of the operation of the domestic provisions in question. From this, the Appellate Body concluded that it was also necessary for the Appellate Body to review the panel's examination of the same Indian domestic law.[1] In US — Section 211 Appropriations Act, the Appellate Body concluded on the basis of its own prior jurisprudence that "municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations. … Such an assessment is a legal characterization by a

panel. And, therefore, a panel's assessment of municipal law as to its consistency with WTO obligations is subject to appellate review under Article 17.6 of the DSU." [2]

In contrast, the panel in US — Section 301 Trade Act stated that it was "called upon to establish the meaning of Sections 301-310 as factual elements and to check whether these factual elements constitute conduct by the US contrary to its WTO obligations." [3] Under this approach, it would seem that the panel's establishment of these factual elements would not be a question of law subject to appellate review.

Chapter 11 -- Developing countries in WTO dispute settlement.

Previous chapters have addressed at least in part where the DSU specifically refers to developing country Members and provides for special rules applicable to disputes involving a developing country Member. Nevertheless, these rules providing special and differential treatment are the subject of this separate chapter in order to examine the subject in more detail. This chapter also addresses other aspects of the developing countries' role in the dispute settlement system.

11.1 Developing country Members in dispute settlement — theory and practice.

It is generally agreed that the very existence of a compulsory multilateral dispute settlement system is itself a particular benefit for developing country and small Members. Such a system, to which all Members have equal access and in which decisions are made on the basis of rules rather than on the basis of economic power, empowers developing countries and smaller economies by placing "the weak" on a more equal footing with "the strong". In this sense, any judicial law enforcement system benefits the weak more than the strong because the strong would always have other means to defend and impose their interests in the absence of a law enforcement system.

Such a view has been challenged by some as being overly formal and theoretical. Nonetheless, it must be noted that, in practice, the (WTO) dispute settlement system has already offered many examples of developing country Members prevailing in dispute settlement over large trading nations, including the withdrawal of the WTO-inconsistent measures the developing country Member had challenged.

At the same time, it is clear that developing country Members wanting to avail themselves of the benefits of the dispute settlement system face considerable burdens. For example, developing countries, especially the smaller ones, often do not have a sufficient number of specialized human resources who are experts in the intricacies of the substance of WTO law or the dispute settlement procedure. The growing body of jurisprudence developed by panels and the Appellate Body makes it increasingly difficult for trade officials around the globe to master both the substance and the procedural aspects of WTO law, including the latest developments. In addition, it is often difficult for a small trade administration to be able to assign one of its few officials — who already face the challenge of keeping up with the whole breadth of WTO matters — to a dispute. A single dispute could well keep an official busy for large periods of time — up to two years. It may also be difficult for a developing country Member to endure the economic harm arising from another Member's trade barrier for the entire period of the dispute settlement proceedings. If such a trade barrier undermines the export opportunities of the developing country and is found to be inconsistent with the WTO, its withdrawal may not occur until two or three years after the filing of a WTO dispute settlement complaint.

Despite these difficulties, developing country Members have been active participants in the dispute settlement system over the past eight years. Since 1995, they have been the complainants in over one

third of all disputes[1] and respondents in roughly two fifths of all cases. Developing countries initiate disputes against developed country Members as well as against other developing country Members. In one year, 2001, developing country Members accounted for 75% of all complaints. Least-developed country Members have so far been neither complainant nor respondent in any WTO dispute. Third party participation of developing country Members is quite frequent and provides a valuable experience for Members not regularly involved in dispute settlement proceedings.

On the other hand, it is true that in the majority of WTO disputes so far, the complainant has been a developed country Member, and the same is true as far as respondents are concerned. Taking account of the fact that the majority of WTO Members are developing countries, one could conclude that the developed countries make a disproportionate use of the dispute settlement system. Jumping to this conclusion, however, would disregard the fact that these Members, who are complainants and respondents in a majority of WTO disputes, account for most of world-wide trade. They often have trade relationships that are very broad (in all sectors of goods and services) and deep (in terms of the volume of trade in quantity or value). Such trade relationships significantly increase the probability of frictions arising as a result of trade barriers, which the exporting Member may be willing to challenge in dispute settlement.

This, in turn, reveals a problematic reality from the perspective of developing country Members. The moderate trade volume affected by a possibly WTO-incompatible trade barrier maintained by another Member might not always justify the considerable investment of time and money necessary for a WTO dispute. There is thus no question that developing country Members are in a special situation which, to some extent, the current dispute settlement system also addresses. There is also no question that the ability of developing country Members to make effective use of the dispute settlement system is essential for them to be able to reap the full benefits they are entitled to under the WTO Agreement. The tools to address the particular situation of developing country Members are the rules of special and differential treatment[2] and legal assistance as elaborated in the following sections.

11.2 Special and differential treatment.

Special and differential treatment takes a different form in the DSU than in the other covered agreements, which contain the substantive rules governing international trade. The DSU recognizes the special situation of developing and least-developed country Members by making available to them, for example, additional or privileged procedures and legal assistance.

Developing countries may choose a faster procedure, request longer time-limits, or request legal assistance. (WTO) Members are encouraged to give special consideration to the situation of developing country Members. These rules will be specifically addressed below. Some are applied very frequently, but others have not yet had any practical relevance. A general criticism is that several of these rules are not very specific.

Special and differential treatment in consultations ……

During consultations, Members should give special attention to the particular problems and interests of developing country Members (Article 4.10 of the DSU). If the object of the consultations is a measure taken by a developing country Member, the parties may agree to extend the regular periods of consultation. If, at the end of the consultation period, the parties cannot agree that the consultations have concluded, the DSB chairperson can extend the time-period for consultations (Article 12.10 of the DSU).

Special and differential treatment at the panel stage ……

Special and differential treatment is also available at the panel stage. When a dispute is between a developing country Member and a developed country Member the panel must, upon request by the developing country Member, include at least one panelist from a developing country Member (Article 8.10 of the DSU).

If a developing country Member is the respondent, the panel must accord it sufficient time to prepare and present its defence. However, this must not affect the overall time period for the panel to complete the dispute settlement procedure (Article 12.10 of the DSU). One panel has already applied this provision by granting the responding developing country Member, upon request, an additional period of ten days to prepare its first written submission to the panel, despite the complainant's objection.[1]

When a developing country Member is party to a dispute and raises rules on special and differential treatment of the DSU or other covered agreements, the panel report must explicitly indicate the form in which these rules have been taken into account (Article 12.11 of the DSU). This is meant to make transparent how effective these rules have been in a given case and to show how they have actually been applied.

Special and differential treatment in implementation ……..

At the stage of implementation, the DSU mandates that particular attention be paid to matters affecting the interests of developing country Members (Article 21.2 of the DSU). This provision has already been applied repeatedly by arbitrators acting under Article 21.3(c) of the DSU in their determination of the reasonable period of time for implementation.[2] One arbitrator has, relying on Article 21.2 of the DSU, explicitly granted an additional period of six months for implementation in the particular circumstances of the case.[3]

In the framework of supervising the implementation, the DSB must consider what further and appropriate action it might take in addition to surveillance and status reports, if a developing country Member has raised the matter (Article 21.7 of the DSU). In considering what appropriate action to take in a case brought by a developing country Member, the DSB has to consider not only the trade coverage of the challenged measures, but also their impact on the economy of developing country Members concerned (Article 21.8 of the DSU).

Accelerated procedure at the request of a developing country Member — Decision of 5 April 1966 ……

If a developing country Member brings a complaint against a developed country Member, the complaining party has the discretionary right to invoke, as an alternative to the provisions in Articles 4, 5, 6 and 12 of the DSU, the accelerated procedures of the Decision of 5 April 1966.[4] The rules and procedures of the 1966 Decision prevail over the corresponding rules and procedures of Articles 4, 5, 6 and 12 of the DSU to the extent that there is a difference (Article 3.12 of the DSU).

This Decision provides, first, that the Director-General may use his good offices, and conduct consultations at the request of the developing country with a view to facilitating a solution to the dispute, where the consultations between the parties have failed. Second, if these consultations conducted by the Director-General do not bring about a mutually satisfactory solution within two months, the Director-General submits, at the request of one of the parties, a report on his action. The

DSB then establishes the panel with the approval of the parties. Third, the panel must take due account of all circumstances and considerations relating to the application of the challenged measures, and their impact on the trade and economic development of the affected Members. Fourth, the Decision provides for only 60 days for the panel to submit its findings from the date the matter was referred to it. Where the Panel considers this time-frame insufficient it may extend it with the agreement of the complaining party.

The time-frames of the Decision were applied only once under GATT 1947[5], but have not yet been applied in the WTO. In practice, developing country Members tend to prefer to have more time to prepare their submissions. However, they often insist that the panel respect the overall time-frames for the completion of the procedure.

Least-developed country Members involved in a dispute ……..

All of the above rules of special and differential treatment apply to least-developed country Members, which are included in the group of developing country Members. In addition, the DSU sets out a few particular rules applicable only to least-developed country Members.

Where a least-developed country Member is involved in a dispute, particular consideration must be given to the special situation of that Member at all stages of the dispute. Members must exercise due restraint in bringing disputes against a least-developed country Member and in asking for compensation or seeking authorization to suspend obligations against a least-developed country Member that has "lost" a dispute (Article 24.1 of the DSU).

For disputes involving a least-developed country Member, the DSU also specifically foresees good offices, conciliation and mediation. Where consultations have not resulted in a satisfactory solution and the least-developed country Member so requests, the Director-General or the Chairman of the DSB must offer their good offices, conciliation and mediation. The aim is to assist the parties to settle the dispute before the establishment of a panel. In providing such assistance, the Director-General or the Chairman of the DSB, may consult any source either considers appropriate (Article 24.2 of the DSU).

Legal assistance ……

The (WTO) Secretariat assists all Members in respect of dispute settlement at their request, but it provides additional legal advice and assistance to developing country Members. To this end, the Secretariat is required to make available a qualified legal expert from the WTO technical cooperation services to any developing country member which so requests (Article 27.2 of the DSU).

The Institute for Training and Technical Cooperation, a division in the WTO Secretariat, currently employs one full-time official and, on a permanent part-time basis, two independent consultants for this purpose. These experts must assist the developing country Member in a way that respects the continued impartiality of the Secretariat (Article 27.2 of the DSU).

The WTO Secretariat also runs technical cooperation activities in Geneva and in the capitals of Members by conducting special training courses concerning the dispute settlement system (Article 27.3 of the DSU). The courses that take place in Geneva are also accessible for representatives of developed country Members.

Private counsel & the Advisory Centre on WTO Law …….

As already mentioned, private legal counsel may appear before panels and the Appellate Body as part of a party's delegation. Also, private law firms often participate in the preparation of the parties' written submissions to a panel or the Appellate Body. This is important for developing country Members, as it may enable them to take part in dispute settlement proceedings even when they lack human resources with specific expertise in WTO dispute settlement.[1] Resorting to private law firms, however, is costly, especially because lawyers specialized and experienced in WTO law are mostly established in the capitals of developed countries (e.g. Washington, Brussels, Geneva, Paris and London).

Developing country Members can receive effective assistance in dispute settlement from the recently established, Geneva-based Advisory Centre on WTO Law. The Advisory Centre is a "legal aid" centre in the form of an independent intergovernmental organization. It is separate and independent from the WTO. It was established by an international agreement signed by 29 Members of the WTO in Seattle on 1 December 1999, the "Agreement Establishing the Advisory Centre on WTO Law". This Agreement entered into force on 15 June 2001 and the official opening of the Advisory Centre took place on 5 October 2001. There are currently some 30 members. Every WTO Member, whether a developing country or not, as well as countries and independent customs territories in the process of accession to the WTO, can become members of the Advisory Centre.

The Advisory Centre functions essentially as a law office specialized in WTO law. It provides legal services and training to developing countries or countries with economies in transition, as well as to all least-developed countries that are WTO Members or accession candidates. The legal services fall into two categories. First, the Advisory Centre provides legal assistance in WTO dispute settlement proceedings. This means representing WTO Members throughout dispute settlement proceedings (e.g. by drafting documents addressed to the DSB, submissions to panels and the Appellate Body and by appearing on behalf of those Members before panels and the Appellate Body). Since July 2001, the Advisory Centre has regularly represented developing country Members in WTO disputes. For these services, the "clients" pay (discounted) rates at varying levels that depend on the level of economic development and on whether they are members of the Advisory Centre.

Second, the Advisory Centre provides legal advice on matters that are not or not yet the subject of a WTO dispute settlement proceeding. These services are free of charge for all least-developed countries and members of the Advisory Centre that are developing countries or countries with economies in transition up to a certain amount of hours. The Advisory Centre also provides legal assistance, at a commercial rate, to developing countries that are not its members. The Advisory Centre also provides training on WTO dispute settlement and plans to offer paid internships in order to contribute to capacity building (by enhancing the WTO expertise of developing country officials). The staff of the Advisory Centre is small, but comprises legal experts, some with long experience in matters of WTO law in general and WTO dispute settlement in particular.

Chapter 12 -- Evaluation of the WTO dispute settlement system: results to date.

12.1 Statistics: the first eight years of experience.

The first eight and a half years of the operation of the (WTO) dispute settlement system (from January 1995 to June 2003) have produced the following numbers. In total, Members have filed 295 requests for consultations over that period. In 124 of those 295 disputes, or in 42% of the cases, a

developing country Member was the complainant,. Since 2000, developing country Members were the complainants in nearly two thirds of all complaints (69 out of 110). In one year, 2001, developing country Members filed three quarters of all requests for consultations.

The annual number of requests for consultations peaked in 1997 with 50 requests, then fell to 40 in 1998 and, since then, has fluctuated between 23 and 37. The covered agreement most frequently invoked by complainants has been the GATT 1994. In a distant second place are the SCM Agreement, the Agreement on Agriculture and the Anti-Dumping Agreement. So far, the TRIPS Agreement and the GATS have rarely been invoked as the basis of a dispute. Very often, complainants invoke more than one agreement in their request for consultations.

The DSB established 110 panels between January 1995 and June 2003, which shows that consultations are often able to settle the disputes. In the same period, the DSB adopted 71 panel reports and 47 Appellate Body reports. While the parties appealed nearly every single panel report in the early years of the dispute settlement system, the appeal rate has significantly decreased over the past few years.

There have been 14 compliance disputes under Article 21.5 of the DSU. Only seven times has the DSB granted authorization to a complainant to suspend obligations, and in all seven cases, arbitration took place because the respondent disagreed with the complainant's proposal for the suspension.

12.2 Achievement of the objectives?

The above statistics support the conclusion that, on the whole, the operation of the dispute settlement system has been a success. The large number of cases in which parties invoked the dispute settlement system in the first eight and a half years of the (WTO) (which is already significantly larger than the number of disputes brought under GATT 1947 during a period of nearly 50 years) suggests that Members have faith in the system. It appears that the WTO dispute settlement system has fulfilled its main function: to contribute to the settlement of trade disputes. Moreover, the reports of panels and the Appellate Body have served to provide clarification of the rights and obligations contained in the covered agreements (Article 3.2 of the DSU).

The fact that many cases do not go through all stages of the process — as one moves forward in the dispute settlement procedure from consultations to panels and the Appellate Body to compliance reviews and finally to the authorization of suspension — is to some extent a positive sign. In most cases, it is not necessary to have recourse to retaliation in the dispute settlement system because most cases are resolved at earlier stages.

12.3 Strengths and weaknesses.

The system has both strengthens and weaknesses. For example, with respect to its weaknesses, despite the deadlines, a full dispute settlement procedure still takes a considerable amount of time, during which the complainant suffers continued economic harm if the challenged measure is indeed (WTO)-inconsistent. No provisional measures (interim relief) are available to protect the economic and trade interests of the successful complainant during the dispute settlement procedure. Moreover, even after prevailing in dispute settlement, a successful complainant will receive no compensation for the harm suffered during the time given to the respondent to implement the ruling. Nor does the "winning party" receive any reimbursement from the other side for its legal expenses. In the event of non-implementation, not all Members have the same practical ability to resort to the suspension of obligations. Lastly, in a few cases, a suspension of concessions has been ineffective in bringing about implementation. However, these cases are the exception rather than the rule.

How successful one considers the dispute settlement system to have been depends on the benchmark one applies. If one compares the WTO dispute settlement system with the previous dispute settlement system of GATT 1947, the current system has been far more effective. Moreover, its quasi-judicial and quasi-automatic character enables it to handle more difficult cases. These features also provide greater guarantees for Members that wish to defend their rights. Compared with other multilateral systems of dispute resolution in international law, the compulsory nature and the enforcement mechanism of the WTO dispute settlement system certainly stand out.

12.4 Current negotiations.

Although there is broad consensus that the current (WTO) dispute settlement system has worked reasonably well, there also is a widely shared view that improvements are desirable. Since the new WTO dispute settlement system was substantially different from the old system, the ministers of the WTO Members called for a full review of the DSU within four years after the entry into force of the WTO Agreement when they concluded the Uruguay Round.[1] This review started in 1997 but did not result in any agreed outcomes.

Building "on the work done thus far", the Doha Ministerial Declaration contained a mandate for "negotiations on improvements and clarifications" of the DSU.[2] Despite intensive negotiations over the past year and a half[3] and significant progress in many areas, Members were unable to conclude negotiations by the end of the deadline stipulated in the Doha Ministerial Declaration (end of May 2003). A proposal to extend the deadline until May 2004 was agreed by the General Council at its meeting in July 2003.[4]

Chapter 13 -- Further information.

Glossary.

All documents produced in the (WTO) dispute settlement system (with the exception of the parties' submissions) are public. They are accessible via the dispute settlement gateway of the WTO's website: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

This section will briefly explain the symbols of the most important WTO dispute settlement documents. The main categories of documents are:

WT/DSB	**Documents of the Dispute Settlement Body (minutes of meetings, indicative list of panelists, annual reports etc.)**
WT/AB	**Documents of the Appellate Body outside of the framework of disputes (Working Procedures for Appellate Review)**
WT/DS	**WTO dispute settlement documents (from the requests for consultations to the authorization of the suspension of obligations)**

WTO dispute settlement (WT/DS) documents can be looked for and recognized as follows:

	Requests for consultations
WT/DSnumber/1	
WT/DSnumber/##	**Requests for the establishment of a panel, requests for arbitration, status reports, notification of appeals, decision of arbitrators under Article 21.3(c) of the DSU etc.**

WT/DSnumber/R/	**Panel reports**
WT/DSnumber/RW/	**Panel reports in compliance reviews under Article 21.5 of the DSU**
WT/DSnumber/AB/R/	**Appellate Body reports**
WT/DSnumber/AB/RW/	**Appellate Body reports in compliance reviews under Article 21.5 of the DSU**
WT/DSnumber/ARB	**Decisions of the Arbitrators under Article 22.6 of the DSU**
WT/DS/OV/##	**Update of WTO dispute settlement cases**

Information and documents on the WTO Website …….

The above documents are accessible on the WTO website. The following sites are particularly relevant for the dispute settlement system:

Dispute settlement gateway	**http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm**
Panel and Appellate Body reports	**http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm**
Legal Texts (WTO Agreements)	**http://www.wto.org/english/docs_e/legal_e/legal_e.htm**
GATT panel reports	**http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm**
Official Documents of the WTO	**http://docsonline.wto.org**

The WTO's Documents Online database (http://docsonline.wto.org) allows users to search for all WTO documents. One can search for documents using their documents symbols, numbers, key words, or by date.

Reference books ……

The first edition of the WTO Analytical Index[1] has recently been published. The WTO Analytical Index contains excerpts from documents relating to the application of the entire WTO Agreement and the development of WTO law. It includes a chapter on the DSU containing extracts from panel and Appellate Body reports relating to the various articles of the DSU.

For the dispute settlement practice under GATT 1947, the GATT Analytical Index[2] remains relevant.

WORLD TRADE REPORT – Link Between Subsidies, Trade & WTO (2006).

http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report06_e.pdf

Evolution of subsidy rules in the GATT/WTO.

GATT Article XVI.

From the beginning, multilateral subsidy rules have focused on the potentially distortive effects of subsidies on trade flows, with any given subsidy disciplined or tolerated in direct relation to its trade-distortive potential. In the early years of GATT , however, the subsidy rules, which were contained in Article XVI, were neither well developed nor imposing.296 The entirety of the first multilateral subsidy discipline was contained in Paragraph 1 of Article XVI of the GATT , which was taken from the Havana Charter. All Paragraph 1 required was that signatories should notify "any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory...". The notification was required to specify the extent and nature of the subsidization, its estimated effects on exports and imports, and the circumstances making the subsidization necessary. If the subsidization was deemed to cause serious prejudice to the interests of any other party, the subsidizing contracting party was only required to discuss the possibility of limiting the subsidization. Thus, no form of subsidization was prohibited, but instead the focus was on the demonstration of trade effects – namely, serious prejudice to other countries' interests. Over the years, subsidy disciplines have become much more specific and imposing.

The Uruguay Round Agreements relevant to subsidies.

The Agreement on Subsidies and Countervailing Measures.

The SCM Agreement had far-reaching implications, both in its substantive modifications to subsidy disciplines and in the fact that, by virtue of the "Single Undertaking", the new Agreement applied to the entire WTO membership. The new Agreement defined subsidies for the first time and further elaborated on subsidy disciplines, classifying subsidies into three categories (prohibited, actionable and non-actionable). It also developed definitions, concepts and methodologies relating to adverse effects, and established procedural rules for multilateral remedies. The Agreement expanded and developed existing procedural and substantive rules on the use of countervailing measures.

Members hoped that this added precision would increase the certainty and predictability of the rules, and thus help to constrain the use of trade distortive subsidies. Similarly, they hoped that the clarifications to the countervail rules would help to ensure that such measures were only used when

warranted. As an integral component of these disciplines and rules, Part VII of the SCM Agreement sets out enhanced provisions on notification and surveillance – that is, transparency provisions (a feature of the WTO rules in all policy areas). As discussed in some detail in D E, available information on subsidies has oftentimes been incomplete or non-existent, notwithstanding the obligations set out in this area. This represents a serious lacuna in WTO practice in an important policy area.

As noted above, by virtue of the "Single Undertaking", the subsidy rules applied to all Members, implying considerable additional obligations for developing countries, particularly for those that had not been parties to the Tokyo Round Code. To modulate this impact, the SCM Agreement contains extensive S&D provisions. As we shall see in the discussion below, these provisions have received attention in the broader debate about "development space" under the trading rules.

Turning to the basic structure of the Agreement, it should be noted, first, that the concepts of "subsidy" and "specificity", which are found respectively in Articles 1 and 2, are key to the entire Agreement. They define which measures are subject to the multilateral subsidy disciplines, including remedies. Article 1 of the SCM Agreement states that a subsidy is deemed to exist if a financial contribution or income or price support is provided by a government, and a benefit is thereby conferred, and that such subsidy is subject to the Agreement if it is "specific". Article 2 defines the concept of specificity, which is deemed to exist when access to the subsidy is limited, explicitly or in fact, to certain enterprises.

As noted above, the SCM Agreement had three categories of specific subsidies when it entered into force: prohibited, actionable (permitted, but potentially subject to action) and non-actionable (permitted, and shielded from action). Prohibited subsidies (see below) are irrebuttably presumed to distort trade. Certain kinds of subsidies within the actionable category were deemed, via a rebuttable presumption, to cause serious prejudice. In addition to the actionable subsidies in respect of which serious prejudice was presumed, other subsidies in the actionable category could be subject to remedial action by trading partners if they were demonstrated to cause defined kinds of adverse trade effects – namely serious prejudice, injury to the industry of an importing Member, or nullification or impairment of benefits. The difference between actionable subsidies rebuttably presumed to cause serious prejudice and other actionable subsidies turned on the question of where the burden of proof fell. Non-actionable subsidies were deemed to be non-specific within the meaning of Article 2 or to meet certain other specified requirements relating to their form and purpose. The latter encompassed certain research-related subsidies, regional subsidies and environment-related subsidies.

The provisions in the SCM Agreement on the rebuttable assumption of serious prejudice ("deeming"

provisions) in the actionable category and on the non-actionable subsidy category were subject to review after five years. The provisions were not renewed and therefore lapsed on 1 January 2000, leaving only two categories of specific subsidies covered by the Agreement – prohibited and actionable.

Both these categories of subsidy may be challenged either through multilateral dispute settlement or through the imposition of countervailing duties. For multilateral challenges through dispute settlement, the complaining party must demonstrate either that the measure is a prohibited subsidy, in which case it must be withdrawn, or that the measure is an actionable subsidy that has caused adverse trade effects, in which case the measure must be withdrawn or its adverse effects removed. For countervailing measures, the importing Member must conduct an investigation which demonstrates that the subsidized imports are causing injury to its domestic industry.

Two types of subsidies are prohibited by the SCM Agreement: (1) export subsidies, and (2) local content or import substitution subsidies. Export subsidies are those that are contingent, in law or in fact, whether solely or as one of several conditions, on export performance. An illustrative list of certain export subsidies is annexed to the Agreement. Local content subsidies are those that are contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

These prohibitions are not new. As discussed above, developed countries had already accepted the prohibition on export subsidies in the 1960s under GAT Article XVI. Similarly, the ban on local content subsidies can be traced back to Article III:4 of GATT , on national treatment, specifically the prohibition on measures favouring the use of domestic goods. The main changes introduced in this regard by the SCM Agreement relate to the extension of these prohibitions (although subject to considerable S&D treatment) to all developing country Members and Members in transition, as well as the creation of a rapid (three-month) dispute settlement mechanism for complaints regarding prohibited subsidies. The prohibitions did not take effect immediately. For export subsidies, developed Members were allowed three years from the date on which the SCM Agreement entered into force to phase out prohibited subsidies, while developing countries and countries in transition were permitted longer transition periods.

These and other S&D treatment provisions for developing countries are set out in Part VIII of the Agreement, which consists of one article (Article 27) with 15 paragraphs. Concerning export subsidies, developing country Members that meet the criteria spelt out in Annex VII are exempted from the prohibition of export subsidies as set out in Article 3. These include Least-Developed-Countries (LD Cs) as defined by the United Nations and a group of countries below a per capita GNP threshold as set out in paragraph (b) of Annex VII. Other developing country Members were allowed to retain their export subsidies for a period of eight years from the entry into force of the Agreement and subject to further conditions as spelled out in SCM Article 27.4. SCM Article 27.4 also contains a mechanism for developing country Members to seek extensions from the Committee on Subsidies and Countervailing Measures to the period for the use of export subsidies with annual reviews by the Committee of any extensions, and a final grace period of two years to phase out the measure if an extension is not granted after a review. By contrast, the longest transition period for local content subsidies, seven years, was not extendable, and thus all Members are now fully subject to the prohibition on these subsidies.

The S&D provisions on export subsidies described above were the subject of Ministerial Decisions on Implementation-Related Issues adopted in November 2001 at the Fourth WTO Ministerial Conference held in Doha. In one of these decisions, Members agreed to streamlined procedures for extensions under SCM Article 27.4 for certain developing countries.304 These procedures are contained in a document adopted via paragraph 10.6 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns. The SCM Agreement is not silent on the impact of permissible export subsidies. SCM Articles 27.5 and 27.6 provide that the permitted export subsidies of developing Members (including those permitted by virtue of Article 27.4 extensions) must be phased out in respect of a particular product if the subsidizing Member achieves "export competitiveness" in that product. In another implementation decision by Ministers, Members reinterpreted the GNP threshold in Annex VII, and created a mechanism for Members listed in Annex VII to re-enter that Annex after graduation if their GNP level falls below the threshold.

Since the focus of this Report is on subsidies, we do not analyse further the countervailing duty remedy available to Members under these agreements. Suffice it to say that countervailing duties may be imposed on a subsidized product up to the estimated amount of the subsidy, provided that it is established, via a properly conducted investigation, that the subsidization causes or threatens material injury to an established domestic industry or materially retards the establishment of a domestic industry. As already noted, these provisions have been modified over the years. Much of the discussions and negotiations leading to these modifications have been conducted in the context of anti-dumping duties and then extended by agreement to countervailing duty provisions. Changes to the rules have included the elaboration of the requirements of an investigation, the calculation of the benefit amount from different forms of subsidization, the existence or threat of injury, and the establishment of causal links between subsidization and its effects on domestic industries.

The Agreement on Agriculture.

The Agreement on Agriculture (AoA) that emerged from the Uruguay Round was the most complete attempt to date to frame explicit multilateral rules for agricultural trade. Separate provisions dealt with each of the three policy pillars defined in the Agreement – market access, domestic support and export subsidies. The latter two of these categories are relevant to subsidies as defined in this Report. Domestic support reduction commitments are expressed in terms of an aggregate measure of support (AMS) and entered into Members' Schedules of Annual and Final Bound Commitment Levels, with the exception of the subsidies in blue and green boxes. Export subsidies are simply defined as subsidies contingent upon exports, under Article 1(e). Article 9 of the Agreement does, however, make specific reference to particular measures such as stock disposal at non-commercial prices, marketing subsidies, subsidies to transport charges, and subsidies on agricultural products that are inputs to exported products.

The subsidy provisions on agriculture differ from those applying to non-agricultural products in two important ways. First, the AoA envisages reduction commitments on both domestic support measures and export subsidies. These commitments are conceptually comparable to the commitments traditionally made in negotiating rounds on import tariffs and have no counterpart in the non-agricultural sector, nor for that matter in the services area. Second, the reduction commitments on export subsidies underlie the reality that unlike subsidies on manufactures, the original efforts at disciplining agriculture protection did not contemplate the possibility of completely eliminating export subsidies. At the Sixth WTO Ministerial Meeting held in Hong Kong in December 2005, however, Members agreed to the elimination of export subsidies in agriculture by 2013.

WTO: 2006 PRESS RELEASES (27 November 2006).

Anti-dumping investigations decline, new final measures show increase.

http://www.wto.org/english/news_e/pres06_e/pr458_e.htm

The WTO Secretariat reported on 27 November 2006, based on the latest available figures, that in the period 1 January — 30 June 2006, the number of initiations of new anti-dumping investigations continued its recently-reported declining trend, while the number of new final measures increased relative to the corresponding period of 2005.

The WTO Secretariat reported, based on the latest available figures, that in the period 1 January — 30 June 2006, the number of initiations of new anti-dumping investigations continued its recently-reported declining trend, while the number of new final measures increased relative to the corresponding period of 2005. During January-June 2006, 20 Members reported initiating a total of 87 new investigations, down from 105 initiations in the corresponding period of 2005. A total of 15 Members reported applying 71 new final anti-dumping measures during January-June 2006, compared with 55 new measures applied during January-June 2005 (a 29 per cent increase). Thirty-one of the 87 new initiations were opened by developed Members, and nine of the 71 new final measures were applied by developed Members, during the first half of 2006. This compares with 22 new initiations opened and 20 new measures applied by developed Members during the first half of 2005.

The Members reporting the most new initiations during January-June 2006 were, in descending order: India, with 20 new initiations, up from 14 during the corresponding period of 2005; the European Communities (17); Australia (9); and Argentina, Indonesia and Turkey (5 each). These figures compare with 16 initiations by the European Communities, 2 by Australia, 1 by Argentina, zero by Indonesia, and 8 by Turkey, during the corresponding period of 2005. Thus, the numbers of initiations reported by India, the EC, Australia, Indonesia, and Argentina increased, while the number reported by Turkey declined. Other Members reporting new initiations in January-June 2006 were Canada (4); Brazil, China and Mexico (3 each); Egypt, Peru and South Africa (2 each); and Chinese Taipei, Colombia, Costa Rica, Jordan, Korea, New Zealand, and Pakistan (1 each). Israel and the United States, which had reported new initiations in the first half of 2005, reported initiating no new investigations during the first half of 2006.

China remains the most frequent subject of anti-dumping inquiries, accounting for 32 of the 87 new initiations during January-June 2006 compared with 23 out of 105 during the corresponding period of 2005. The United States and Chinese Taipei were distant seconds, with six new investigations each directed at their exports, followed by Thailand (5), and the European Communities and Member

states, Japan, Korea, and Malaysia, each of which was the subject of four new investigations. During the corresponding period of 2005, the comparable figures were: United States (7), Chinese Taipei (9), Thailand (7), European Communities and Member states (3), Japan (4), Korea (6), and Malaysia (6). The countries affected by fewer than four new investigations each during January-June 2006 were: Brazil, Canada, Chile, Egypt, Hong Kong China, India, Indonesia, Philippines, Russia, Singapore, Switzerland, Turkey, Ukraine, and Viet Nam.

The products that were most frequently subject to the reported new investigations during January-June 2006 were in the base metals sector (19 initiations), followed by machinery (16 initiations), plastics (13 initiations), and chemicals (11 initiations). Of the 19 initiations reported in respect of base metals, five each were reported by Australia and Indonesia, three by Canada, two each by the European Communities and India, and one each by Colombia and Mexico.

Concerning new final anti-dumping measures, China reported applying the largest number (15) during the first half of 2006, up from 10 reported for January-June 2005. Following China was Turkey, reporting 11 new measures, compared with four for the first half of 2005. India reported applying eight new measures and Egypt reported applying seven, during the first half of 2006, compared with seven and zero, respectively, during the corresponding period of 2005. The European Communities, Mexico and Pakistan each reported applying five new measures during January-June 2006, while, Argentina, Australia, Colombia, Indonesia, Korea, Peru, South Africa and the United States each reported applying three or fewer new measures.

Products exported from China continued as the most frequent subject of new measures, accounting for 15 of the new measures reported for the first half of 2006, down from 18 one year earlier. India and Korea were in second place, with six measures each in respect of their exports during January-June 2006, compared with one and four measures, respectively, during the first half of 2005. Next were Brazil, the European Communities and Member states, Japan, and the United States, each of which was subject to five new measures during January-June 2006, compared with two, four, four, and six new measures during the corresponding period of 2005. Argentina, Chile, Chinese Taipei, Indonesia, Malaysia, Mexico, Norway, Romania, Russia, Thailand, Ukraine, and United Arab Emirates each was subject to four or fewer new measures during the first half of 2006.

WTO: 2006 PRESS RELEASES (29 November 2006).

WTO announces latest statistics on safeguards actions.

http://www.wto.org/english/news_e/news06_e/sfg_29nov06_e.htm

The WTO Secretariat, on 29 November 2006, published the latest statistics on safeguards actions notified by WTO Members pursuant to the Agreement on Safeguards.

According to these statistics, since 1 January 1995 and until 23 October 2006, a total of 155 safeguard investigations were initiated, and a total of 76 safeguard measures were imposed. These figures are far smaller compared to anti-dumping (2938 initiations and 1875 measures for the period 1 January 1995 — 30 June 2006) and relatively small compared to countervailing duty (183 initiations and 113 measures for the period 1 January 1995 — 30 June 2006).

The number of safeguard investigations newly initiated during the most recent period, 1 January — 23 October 2006, was 13. The number of new initiations of safeguard investigations peaked in 2002 at 34, and the figure has stayed low since then, with 15 initiations, 14 initiations, and 7 initiations in 2003, 2004 and 2005, respectively.

The Member notifying the largest number of new initiations since 1995 was India, with 15 initiations. Chile and Jordan followed with 11 initiations each, and Turkey and the United States with 10 initiations each. The 13 initiations reported for the most recent period (1 January- 23 October 2006) were by Argentina, Chile, Indonesia, Jordan, Panama, the Philippines, Tunisia (2 initiations) and Turkey (5 initiations).

Concerning application of new final safeguard measures, during the period 1 January — 23 October 2006, 6 new measures (of which Turkey notified 4) have been imposed. This is basically in line with the recent level — 4 new measures in 2004 and 6 new measures in 2005. Since 1995, India reported the largest number of measures (8), followed by Chile, Turkey and the United States (6 measures each), followed by Jordan and the Philippines (5 measures each).

The most frequent subject of investigations since 1995 were chemical products (26 initiations), metals and metal products (21 initiations), foodstuffs (16 initiations), and ceramics and vegetables (14 initiations each). For the period 1 January — 23 October 2006, the products subject to newly notified investigations were electrical appliances (4 initiations), ceramics and footwear (2 initiations each) and animal products, mineral products, chemical, plastics and vehicles (1 initiation each).

SNAPSHOT OF WTO CASES INVOLVING THE UNITED STATES.

USTR. Updated: November 3, 2005.

http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/asset_upload_file291_5696.pdf

UNITED STATES AS COMPLAINING PARTY -- of the total of 76 complaints (70) and compliance proceedings (6) the United States has filed so far, 52 (including 1 that is partially concluded) have been concluded; 3 were merged with other complaints; 5 are in the litigation stage (for one complaint, consultations continue on one of the products at issue); and 18 are either in the pre-litigation consultation stage or currently inactive, as follows:

24-resolved to U.S. satisfaction without completing litigation:

(1) Korea-shelf-life restrictions; (2) EU-grain imports; (3) Japan protection of sound recordings; (4) Portugal-patent protection; (5) Pakistan-patent protection; (6) Turkey-tax on movies; (7) Hungary agricultural subsidies; (8) Philippines-pork & poultry imports; (9) Brazil-auto regime; (10) India-patent protection (compliance proceedings); (11) Sweden- intellectual property protection; (12) Australia-salmon imports; (13) Greece-intellectual property protection; (14) Ireland-intellectual property protection; (15) Denmark-intellectual property protection; (16) Romania-customs valuation; (17) Philippines auto regime; (18) Belgium-rice imports; (19) Brazil-patent law; (20) EU-corn gluten imports; (21) Mexico-hog imports; (22) Argentina patent protection (partial); (23) China-VAT; (24) Egypt-apparel tariffs 24-U.S. won on core issue(s) (1) Japan-liquor taxes; (2) Canada-magazine imports; (3) EU-banana imports; (4) EU-banana imports (compliance proceedings); (5) EU hormone-treated beef imports; (6) India-patent protection; (7) Argentina-textile imports; (8) Indonesia-auto regime; (9) Korea-liquor taxes; (10) Japan-fruit imports; (11) Canada-dairy sector; (12) Canada dairy sector (compliance proceedings); (13) Australia- leather subsidies; (14) Australia-leather subsidies (compliance proceedings); (15) India import licensing; (16) Mexico-antidumping duties on high-fructose corn syrup; (17) Mexico-antidumping duties on high-fructose corn syrup (compliance proceedings); (18) Canada-patent law; (19) Korea-beef imports; (20) India-auto regime; (21) Japan-apples (fire blight); (22) Mexico-telecom barriers; (23) EU-geographical indication protection (*two complaints consolidated into one case*); (24) Japan apples (fire blight) (compliance proceedings).

4-U.S. did not prevail on core issue(s):

(1) Japan-film imports; (2) EU/Ireland/UK-tariff classification of computer equipment (*three complaints consolidated into one case*); (3) Korea-airport procurement; (4) Canada-wheat 1-in appellate stage (1) Mexico-AD duties on beef and rice (rice) 4-in panel stage: (1) EU-biotech products; (2) Mexico-beverage tax; (3) EU-customs; (4) EU-Aircraft 4-in consultations: (1) Argentina-patent

protection (partial); (2) Venezuela-import licensing; (3) Mexico-AD duties on beef and rice (beef); (4) Turkey-rice.

14-monitoring progress or otherwise inactive:

(1) Korea-import clearance; (2) Japan-Large Stores Law; (3) Belgium yellow pages; (4) EU-dairy subsidies; (5) Chile-liquor taxes; (6) Belgium-tax subsidies; (7) France-tax subsidies; (8) Greece-tax subsidies; (9) Ireland-tax subsidies; (10) Netherlands-tax subsidies; (11) EU/France-avionics subsidies; (12) Argentina-footwear imports; (13) Brazil-customs valuation; (14) EU-Steel safeguards.

UNITED STATES AS RESPONDING PARTY -- of the total of 105 complaints (97) and compliance proceedings (8) filed against the United States so far, 54 have been concluded; 22 were merged with other complaints; 11 are in the litigation stage; and 18 are either in the pre-litigation consultation stage or currently inactive, as follows:

15-resolved without completing litigation:

(1) Autos (Japan); (2) Wool coats (India); (3) Various products (EU); (4) Tomatoes (Mexico); (5) Poultry (EU); (6) Urea (Germany); (7) Brooms (Colombia); (8) Helms-Burton Act (EU); (9) TVs (Korea); (10) Cattle, swine & grain (Canada); (11) Textiles (EU) ***(two complaints consolidated into one case)*****; (12) Massachusetts government procurement (EU, Japan)** ***(two complaints consolidated into one case)*****; (13) DRAMs (Korea) (compliance proceedings); (14) Steel safeguards (Chinese-Taipei); (15) Orange juice (Bzl).**

13-U.S. won on core issue(s):

(1) Sections 301-310 of Trade Act of 1974 (EU); (2) "Shrimp/turtle" law (India, et al.) (compliance proceedings); (3) CVD regulations (Canada); (4) AD-steel plate (India); (5) CVD-German steel (EU); (6) Section 129 (Canada); (7) Rules of origin-textiles and apparel products (India); (8) Ad sunset review (Japan); (9) CVD-softwood lumber (final) (Canada); (10) Ad softwood lumber (final) (Canada); (11) Gambling and betting services (Antigua & Barbuda); (12) CVD - Semiconductors (Korea); (13) AD – OCTG (Mexico).

26-U.S. did not prevail on core issue(s):

(1) Gasoline (Venezuela, Brazil) ***(two complaints consolidated into one case)*****; (2) Underwear (Costa Rica); (3) Wool shirts (India); (4) "Shrimp/turtle" law (India, et al.); (5) DRAMs (Korea); (6) UK leaded bars (EU); (7) Music licensing provision in US copyright law (EU); (8) 1916 Revenue Act (EU, Japan;** ***two complaints consolidated into one case*****); (9) Bonding requirements (EU); (10) Wheat gluten import safeguard (EU); (11) Stainless steel AD (Korea); (12) Lamb meat import safeguard (Australia, New Zealand;** ***two complaints consolidated into one case*****); (13) Hot-rolled steel AD (Japan); (14) Cotton yarn (Pakistan); (15) Section 211 of Omnibus Appropriations Act (EU); (16) Taxes on Foreign Sales Corporations (EU); (17) Taxes on Foreign Sales Corporations (EU) (compliance proceedings); (18) Line pipe safeguard (Korea); (19) CVD-steel products (EU); (20) CDSOA (Australia, et al.;** ***eleven complaints consolidated into one case*****); (21) CVD-softwood lumber (prelim) (Canada); (22) Steel safeguards (EU, et al.;** ***eight complaints consolidated into one case*****); (23) Injury-softwood lumber (Canada); (24) AD-sunset review (Argentina); (25) Cotton subsidies (Brazil); (26) Privatization (compliance proceedings) (EU) 1-in appellate stage: (1) CVD-softwood lumber (final) (Canada) (compliance proceedings).**
10-in panel stage:

(1) Safeguards on steel line pipe and wire rod (EU); (2) CVD-steel plate (Mexico); (3) AD - cement (Mexico); (4) "Zeroing" of AD margins (EU); (5) Injury-softwood lumber (Canada) (compliance proceedings); (6) Taxes on Foreign Sales Corporations (EU) (compliance proceedings II); (7) EU hormones sanctions; (8) "Zeroing" of AD margins (Japan); (9) AD-softwood lumber (final) (Canada) (compliance proceedings); (10) Aircraft (EU) 9-in consultations: (1) CVD-steel (Brazil); (2) AD-steel pipe (Italy); (3) AD-silicon metal (Brazil); (4) AD/CVD-sunset reviews (EU); (5) Wheat injury (Canada); (6) CVD-softwood lumber reviews (Canada); (7) AD-UK steel bar (EU);(8) ADShrimp (Thailand); (9) "Zeroing" of AD margins (Mexico).

9-monitoring progress or otherwise inactive:

(1) Salmon (Chile); (2) Peanuts (Argentina); (3) Harbor maintenance tax (EU); (4) Live cattle (Canada); (5) Sugar syrups (Canada); (6) Section 337 of Tariff Act of 1930 (EU); (7) Amendment to Section 306 of Trade Act of 1974 (EU); (8) U.S. patent law (Brazil); (9) AD-softwood lumber (prelim) (Canada).

DISPUTE SETTLEMENT BODY – Annual Report (2005).

Overview of the State of Play of WTO Disputes.

WT/DSB/39/Add.1 (11 November 2005)

http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#dsb

Dispute	Recourse to Article 22.2	Request for Arbitration under Article 22.6	Report of the Arbitrator	Authorization by the DSB to Suspend Concessions
. European Communities – Regime for the Importation, Sale and Distribution of Bananas	14.01.99 US **WT/DS27/43**	29.01.99 EC **WT/DS27/46**	09.04.99 **WT/DS27/ARB**	Pursuant to the US request **(WT/DS27/49)** authorization was granted at the DSB meeting on 19.04.99 **(WT/DSB/M/59)**
. European Communities – Regime for the Importation, Sale and Distribution of Bananas	08.11.99 Ecuador **WT/DS27/52**	19.11.99 EC **WT/DS27/53**	24.03.00 **WT/DS27/ARB/ECU**	Pursuant to Ecuador's request **(WT/DS27/54)** authorization was granted at the DSB meeting on 18.05.00 **(WT/DSB/M/80)**
European Communities – Measures Concerning Meat and Meat Products (Hormones)	17.05.99 US **WT/DS26/19** 20.05.99 Canada **WT/DS48/17**	02.06.99 EC **WT/DS26/20** **WT/DS48/18**	12.07.99 **WT/DS26/ARB** **WT/DS48/ARB**	Pursuant to the US request **(WT/DS26/21)** and Canada's request **(WT/DS48/19)** authorization was granted at the DSB meeting on 26.07.99 **(WT/DSB/M/65)**
Australia – Measures Affecting Importation of Salmon	15.07.99 Canada **WT/DS18/12**	27.07.99 Australia **WT/DS18/13**	N.A.	N.A.
Brazil – Export Financing Programme for Aircraft	10.05.00 Canada	22.05.00 Brazil	28.08.00 **WT/DS46/ARB**	Pursuant to Canada's request

Dispute	Recourse to Article 22.2	Request for Arbitration under Article 22.6	Report of the Arbitrator	Authorization by the DSB to Suspend Concessions
	WT/DS46/16	**WT/DS46/18**		**(WT/DS46/25)** authorization was granted at the DSB meeting on 12.12.00 **(WT/DSB/M/94)**
United States – Tax Treatment for "Foreign Sales Corporations"	17.11.00 EC **WT/DS108/13**	28.11.00 US **WT/DS108/17**	30.08.02 **WT/DS108/ARB**	Pursuant to the EC's request (**WT/DS108/26**) authorization was granted at the DSB meeting on 07.05.03 (**WT/DSB/M/149**)
Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products	16.02.01 US **WT/DS103/17** 16.02.01 New Zealand **WT/DS113/17**	28.02.01 Canada **WT/DS103/18** **WT/DS113/18**		
United States – Anti–Dumping Act of 1916	07.01.02 EC **WT/DS136/15** 07.01.02 Japan **WT/DS162/18**	17.01.02 United States **WT/DS136/16** **WT/DS162/19**	24.02.04 **WT/DS136/ARB**	
United States – Section 110(5) of the US Copyright Act	07.01.02 EC **WT/DS160/19**	17.01.02 United States **WT/DS160/20**		
Canada – Export Credits and Loan Guarantees for Regional Aircraft	23.05.02 Brazil **WT/DS222/7 and Corr.1**	21.06.02 Canada **WT/DS222/8**	17.02.03 **WT/DS222/ARB**	Pursuant to Brazil's request (**WT/DS222/10**) authorization was granted at the DSB meeting on 18.03.03 (**WT/DSB/M/145**)

Dispute	Recourse to Article 22.2	Request for Arbitration under Article 22.6	Report of the Arbitrator	Authorization by the DSB to Suspend Concessions
United States – Continued Dumping and Subsidy Offset Act of 2000	15.01.04 Brazil **WT/DS217/20** Chile **WT/DS217/21** EC **WT/DS217/22** India **WT/DS217/23** Japan **WT/DS217/24** Korea **WT/DS217/25** Canada **WT/DS234/25** Mexico **WT/DS234/26 and Corr.1**	23.01.04 US **WT/DS217/26** **WT/DS217/27** **WT/DS217/28** **WT/DS217/29** **WT/DS217/30** **WT/DS217/31** **WT/DS234/27** **WT/DS234/28**	31.08.04 **WT/DS217/ARB/BRA** **WT/DS217/ARB/CHL** **WT/DS217/ARB/EEC** **WT/DS217/ARB/IND** **WT/DS217/ARB/JPN** **WT/DS217/ARB/KOR** **WT/DS234/ARB/CAN** **WT/DS234/ARB/MEX**	Pursuant to the requests by Brazil **(WT/DS217/38)**; the EC **(WT/DS217/39)**; India **(WT/DS217/40)**; Japan **(WT/DS217/41)**; Korea **(WT/DS217/42)**; Canada **(WT/DS234/31)**; Mexico **(WT/DS234/32)**, authorization was granted at the DSB meeting on 26.11.04 **(WT/DSB/M/178)** Pursuant to the request by Chile **(WT/DS217/43)** authorization was granted at the DSB meeting on 17.12.04 **(WT/DSB/M/180)**
Japan – Measures Affecting the Importation of Apples	19.07.04 US **WT/DS245/12**	29.07.04 Japan **WT/DS245/13**		
United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada	04.01.05 Canada **WT/DS257/16**	13.01.05 US **WT/DS/257/17**		
United States – Investigation of the International Trade Commission in Softwood Lumber from Canada	15.02.05 Canada **WT/DS277/9**	23.02.05 US **WT/DS277/10**		
United States – Final Dumping Determination on Softwood Lumber from Canada	19.05.05 Canada **WT/DS264/17**	31.05.05 US **WT/DS264/19**		
United States – Subsidies on Upland Cotton	05.07.05 Brazil **WT/DS267/21**	14.07.05 US **WT/DS267/23**		

HONG KONG WTO MINISTERIAL 2005: BRIEFING NOTES.

http://www.wto.org/english/thewto_e/minist_e/min05_e/brief_e/brief10_e.htm

Background.

It was negotiated during the Uruguay Round, and is a legally-binding agreement committing member governments to settle their disputes in an orderly and multilateral fashion. It is the first such system for settling trade disputes between governments. When the Uruguay Round ended in April 1994 at the Marrakesh Ministerial Conference, ministers agreed that their governments would complete a full review of this new system by January 1999, and to decide whether to continue, modify or terminate it. During the review several members proposed possible improvements and clarifications to the agreement. But even after extending the review to July 1999, members did not reach an agreed conclusion.

All member governments share the conviction that the dispute settlement system has served them well since it started operating in January 1995. More than 330 disputes have been filed under the system since then, of which some 130 have gone through a full legal examination. Most of the rest have been settled without litigation, to the mutual benefit of the disputing countries. All of them have been handled without any lingering acrimony. It is this quasi-judicial characteristic — a blend of political flexibility and legal integrity — which makes this a unique process for settling international disputes peacefully through force of argument rather than through argument of force.

The Doha mandate.

The Doha Ministerial Declaration mandates negotiations on improvements and clarifications of the DSU. It states that the negotiations will not be part of the single undertaking — i.e. that they will not be tied to the success or failure of the other negotiations mandated by the declaration. The Doha mandate also set a deadline of May 2003. In July 2003, the General Council extended the deadline to May 2004. A further extension was agreed by the General Council in the context of the "July package" on 1 August 2004 without setting a new deadline.

Developments since Doha to May 2004.

As a measure of the DSU's pivotal role in the whole multilateral trading system of the WTO, more member governments have participated actively in these talks than in any other negotiation (except agriculture) under the Doha mandate. Well over 80 WTO members have subscribed to more than 40 proposals, each of which contains several suggested changes, covering virtually all stages of the dispute settlement system.

Some of the proposed changes address housekeeping issues such as how to deal with inactive cases which remain dormant for several years without any indication that the complaining countries want to pursue these any further. In such cases countries would be expected to formally withdraw their complaints. Other proposals seek to introduce new stages such as the possibility of remanding, or referring, the case back to the original panel if a factual issue arises at the appellate stage which had not been examined by the panel. Several proposals contain suggestions for enhancing the special and differential treatment of developing and least-developed countries.

The issue on which there is, perhaps, the most widespread support for change is the procedural issue of "sequencing". The issue arises from a lack of clarity in the Dispute Settlement Understanding's text as to the order in which two phases of the procedure should occur when a member believes that another has failed to comply fully with the final rulings.

Conversely, the issue on which members are, perhaps, the most strongly divided is external transparency — what kind of access the public might have to panel proceedings or their input into the procedure by means of amicus curiae briefs (see explanation below).

On 16 May 2003, the chairman of the negotiations circulated a draft legal text under his own responsibility. The text contained members' proposals on a number of issues, including: enhancing third-party rights; introducing an interim review and "remand" (referring a case back to a panel) at the appeals stage; clarifying and improving the sequence of procedures at the implementation stage; enhancing compensation; strengthening notification requirements for mutually-agreed solutions; and strengthening special and differential treatment for developing countries at various stages of the proceedings.

According to the chairman, a number of other proposals by members were not included in his text due to the absence of a sufficiently high level of support. These proposals covered issues such as accelerated procedures for certain disputes; improved panel selection procedures; increased control by members on the panel and Appellate Body reports; clarification of the treatment of amicus curiae briefs; and modified procedures for retaliation, including collective retaliation or enhanced surveillance of retaliation.

Members continued to discuss the chairman's text until the end of May 2003. Some felt that the text captured the essential elements for a final agreement; others felt that there were serious omissions in the text. All members, however, expressed a readiness to continue work beyond 31 May 2003 towards an agreement.

At its meeting on 24 July 2003, the General Council agreed to extend negotiations from 31 May 2003 to 31 May 2004.

Current status of negotiations.

Although all proposals are still on the table, during the last year or so, active negotiations have centered on the following issues:

Third-party rights: Under the current DSU rules, it is possible for members, under certain conditions, to join in consultations in a dispute in which they are not the complaining or responding party, to become third-parties at the panel stage, and to become third-participants in the appellate stage. Members are generally supportive of enhanced third-party rights, provided that an adequate balance between the rights of main parties and third-parties is maintained.

Remand authority: At present, the Appellate Body's function is limited to the examination of issues of law and legal interpretation developed by panels, and it is not empowered to make factual findings. This can lead to difficulties if a factual issue arises at the appellate stage which had not been examined by the panel. The issue therefore arises as to whether the Appellate Body should have the possibility to remand the case back to the panel.

Sequencing: The word "sequencing" is shorthand for the procedural steps and time-periods needed to deal with a situation where the complaining country claims that the defending country has not implemented the rulings.

- **Article 21.5 states that where the two parties disagree whether the rulings have been implemented or not, a panel examines within 90 days.**

- **Article 22.2 states that if the defending country fails to implement, the complaining country can ask the Dispute Settlement Body to authorize it to retaliate. Article 22.6 states that,** within 30 days **from the end of the reasonable period of time for implementation, the Dispute Settlement Body authorizes the complaining country to retaliate.**

So, there are two key steps with their own time-periods: 90 days for a panel to examine whether a ruling has been implemented; and 30 days for Dispute Settlement Body to authorize retaliation. The wording of the Dispute Settlement Understanding does not specify whether these steps have to come one after the other. Hence, according to the current wording of the agreement, it seems that the 30-day period for the Dispute Settlement Body to authorize retaliation runs out before the panel has examined whether the defending country has implemented or not.

Post-retaliation: The issue arises from the fact that the DSU does not provide any specific procedure for the removal of an authorization to retaliate, once the member concerned has complied, or claims to have complied, with the rulings.

Composition of panels: The DSU currently provides for disputes to be examined by panelists selected on an ad hoc basis for each case, in consultation with the parties. This process can often cause delay. Negotiators are discussing the possibility of a permanent roster of individuals, retained on a full-time basis, from which panelists would be drawn for each case to speed up the process and to reinforce the independence of panels and quality of their reports.

Time savings: Some negotiators have proposed ways of streamlining the procedures, while others are concerned that the procedures already impose a tight schedule and that any shortening of timeframes would prejudice developing countries ability to effectively defend their rights.

Additional guidance to WTO adjudicative bodies: Proposals have been submitted relating to the manner in which the Appellate Body and panels carry out their functions, and aimed at increasing the level of member-control over the content of rulings of these bodies.

Transparency: Dispute settlement proceedings are confidential to the main parties and, where appropriate, third parties to a dispute. Transparency means opening up the dispute settlement proceedings either to the public (i.e. external transparency) or to WTO members other than those who are already parties to the dispute (i.e. internal transparency). Some developed countries have proposed opening dispute settlement proceedings, while a number of developing countries have opposed such proposals.

Some terms frequently used in DSU negotiations.

Implementation (DSU Articles 21 & 22): After the Dispute Settlement Body has adopted the final rulings in a case, the defending country has to implement these rulings by changing or completely removing its trade measure which has been ruled illegal.

Reasonable period of time (DSU Article 21.3): If the defending country cannot comply with the rulings immediately, it is given a "reasonable period of time" to implement the rulings. This period of time is either agreed mutually between the two parties, or, failing that, it is decided by an arbitrator. Article 21.3(c) states that a guideline for the arbitrator should be that the reasonable period of time "should not exceed 15 months from the date of adoption".

Determination of compliance (DSU Article 21.5): Article 21.5 addresses a situation where the two parties disagree whether the rulings have been implemented or not. It states that such a dispute "shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel" which has 90 days to report its findings. The panel is referred to as a "compliance panel" — i.e. it examines whether the defending country has complied with the rulings.

Besides referring to "these dispute settlement procedures" and a 90-day panel, Article 21.5 does not specify any other elements or time-periods for determining compliance. However, normal procedures under the Dispute Settlement Understanding also include a 60-day period for consultations, a possibility of two Dispute Settlement Body meetings before a panel is established, a possibility of appeal of the panel findings, and a 2-3 months appeal process — together, they add up to more than 90 days.

Compensation (DSU Articles 3.7, 22.1, & 22.2): Compensation can be negotiated between the two parties in a dispute if the defending country fails to comply with the rulings within the reasonable period of time for implementation. Articles 3.7 & 22.1, however, state that compensation is a temporary measure pending full implementation. Article 22.2 allows 20 days, from the end of the period of implementation, to conclude negotiations. If the negotiations conclude unsuccessfully, the complaining country is allowed to request authorization from the Dispute Settlement Body to retaliate.

Suspension of concessions or other obligations (DSU Articles 3.7, & 22): This is commonly referred to as "retaliation" or "sanctions". A concession is, for example, an importing country's legal commitment not to raise its customs duty on an import above a certain agreed level of tariff. A suspension of this concession would mean that the importing country would raise the tariff. An obligation is, for example, a country's legal responsibility to provide protection for intellectual property rights, such as patents and copyrights etc. A suspension of this obligation would mean that the country would be free of its legal responsibility to provide such protection. According to the Dispute Settlement Understanding, suspension of concessions or other obligations should be used as a last resort by the complaining country subject, of course, to authorization by the Dispute Settlement Body (Art.3.7), and is a temporary measure pending full implementation (Art.22.1).

Cross-retaliation (DSU Article 22.3): The phrase "cross-retaliation" does not appear in the Dispute Settlement Understanding, but is shorthand to describe a situation where the complaining country retaliates (i.e. suspends concessions or other obligations) under a sector or an agreement which has not been violated by the defending country. The circumstances under which cross-retaliation can be

authorized are explained in the agreement's Article 22.3. In preparing its request for authorization by the Dispute Settlement Body to suspend concessions or other obligations (i.e. to retaliate), the complaining country should first seek to retaliate in the same sector where the violation has occurred. If that is not practicable or effective it can seek to retaliate in another sector but under the same agreement where the violation has occurred. And if that is also impracticable or ineffective it can seek to retaliate under another agreement.

Carousel: Among the procedures and disciplines for retaliation, the Dispute Settlement Understanding does not contain any obligation on the retaliating country to submit a list of products targeted for sanctions. Nor does the agreement contain any mention of whether or not the retaliating country can change its selection of targeted products. The word "carousel" refers to the possibility of changing the targeted products as and when the country wants, so long as it stays within the authorized level of retaliation.

Amicus curiae briefs: Amicus curiae means "friend of the court" or "disinterested adviser".

SELECTED ARTICLES.

Trade Litigation and Global Governance – Five Lessons for the U.S.

By Stuart S. Malawer

http://www.vsb.org/publications/valawyer/apr03/malawer.pdf

After eight years of litigation before the World Trade Organization, five important lessons have emerged from the global trading system for the United States and for global governance.

In an astonishingly short time, the WTO's dispute settlement system has become central to the world trading system—think of it as a Supreme Court for global trade that decides rules for many nations. The system's drafters did not foresee this historic development; moreover, many within the U. S. opposed its formulation. Yet today, this system of resolving disputes is one of the most momentous developments in the history of international trade relations.

Renato Ruggiero, a former director-general of the WTO, called the dispute resolution system "the central pillar of the multilateral trading system and the WTO's most individual contribution to the stability of the global economy."[1]1

The new director-general, Supachai Panitchpakdi, said that the creation of the dispute resolution system and the legal framework "binds the multilateral trading system together … ensur[ing] that trade flows as smoothly, predictably and freely as possible."2

A recent treatise on the dispute resolution system stated:

> **"For the first time in history … (the WTO) applies principles of fairness, open-dealing and mutual benefit by 'law' to trade relations between sovereign economies…. (It is) a unique global effort to maintain peace in world trade …. The WTO is the only international body dealing with the rules of trade between nations. Few areas of international relations see more passion, hot tempers and bitter argument than trade and commerce …. (This is) a new approach to international relations that has**

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1 Renato Ruggiero, "The Future Path of the Multilateral Trading System," (Speech on April 17, 1997). http://www.wto.org/english/news_e/sprr_e/seoul_e.htm

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Speech by Supachai Panitchpakdi – "From DOHA to Cancun and Beyond."(WTO on September 20, 2002).

never been tried before."[3]

In the 1990s, after the fall of the Berlin Wall and the disintegration of the Soviet Union and the Communist bloc, global trade became the most important foreign policy issue in international relations. The WTO become the core multilateral institution governing global trade. This historically unique dispute resolution process, within the WTO, enforced newly negotiated trade rules. This reliance upon legislated rules, and utilizing litigation to enforce them, reflected the broad American belief in the rule of law applied to international transactions and global trade.

Background

When the WTO became effective on January 1, 1995, the international trading regime achieved equal status with the other great postwar global economic institutions—the World Bank and the International Monetary Fund. The WTO, as the premiere world trade institution, became a full partner with global financial institutions that were envisioned after the Second World War. Now the global trading regime had its own institutional organization and the United States formally adhered to it. Questions of legitimacy or legality (that plagued the former General Agreement on Tariffs and Trade[GATT])— were laid to rest. Congress delegated authority to the President to negotiate and conclude the Uruguay Round of Agreements pursuant to "fast track" procedures, which led to the passage of implementing legislation.

Under U.S. Constitutional law, the Uruguay Agreements are not formal treaties, but "international agreements." They are not within the President's inherent authority in foreign affairs. They are executive agreements pursuant to a congressional delegation of authority, viewed under U.S. Constitutional law as binding international agreements and accepted by other countries as firm international obligations.

The GATT system governed global trade since 1947, when the proposed International Trade Organization (Havana Charter) failed to secure U.S. and international acceptance. The WTO system, that emerged in 1995, cured two major defects of the previous system: It created an integrated system binding states to the same set of rules and eliminated an ad hoc acceptance of rules by individual states; and it created a binding dispute resolution system applicable to all states. States faced sanctions for failing to follow these rules. The WTO was to negotiate global trade rules and to adjudicate them. States agreed that global trade should be governed by rules, not power.

The United States supported this system because it sought to create a quasi-judicial or quasi-adjudicative system utilizing a litigative approach (when consultations fail) to resolve trade dispute.[4] This new process complemented the development of trade and commerce rules that would be the cornerstone of a new global trading system. The global community has accepted this American vision of enforceable rules as a precondition to fostering greater global trade and national economic development. But the American vision does not stop at trade: It espouses a broader policy goal of promoting the critical linkage between liberalizing global trade and democratizing of civil society. The WTO system that emerged was a culmination of the market-opening strategy focusing on a

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[3] P. Gallagher, *Guide to Dispute Settlement* 1, 2, 3 (2002).

[4] The Dispute Resolution System was established as one of the Uruguay Round Agreements entitled "Understanding on Rules and Procedures Governing the Settlement of Disputes." *http://www.wto.org/english/docs_e/legal_e/28-dsu.doc*. This is commonly referred to as the "DSU."

multilateral approach. It enforced the principle of non-discrimination in trade that is enshrined in the two cardinal principles governing global trade among nations: the "Most-Favored-Nation-Principle" and the "National Treatment Principle."

The dispute resolution system was not adopted to make case law or to be a relief act for international lawyers. There is a condition of consultation before a panel will hear the case. Most cases end in negotiated settlements and never go to the panel process. The purpose of the WTO system is to negotiate trade rules and enforce them. The challenge for the WTO in the ongoing DOHA round of trade negotiations (those trade negotiations authorized at the Ministerial meeting in Doha, Qatar, in November 2001) is expanding the openness and legitimacy of these two functions. "(T)here has been little progress in making the WTO more transparent. This failure is especially egregious when it comes to the organization's dispute settlement process. There is also a case for greater openness in the way the WTO negotiates new rules."[5] This failure is recognized by most states and the WTO. Protests at the Seattle Ministerial meeting, in 1999, concerning the WTO and globalization, galvanized the pace of self-examination. Self-examination is now a part of the DOHA mandate for the current trade negotiation round. Some progress has been made, but it has been slow.[6]

The innovative dispute settlement system was viewed as an essential pillar of the new World Trade Organization. "The WTO dispute settlement system is unique among international tribunals for imposing judgments that members have agreed, in advance, to accept. No other international tribunal—including the International Court of Justice (the "World Court")— is in quite the same position."[7] This new dispute resolution system was integrative, compulsory, binding and enforceable. It was given jurisdiction over all the agreements completed at Uruguay. States could not pick and choose agreements to which they wanted to be bound—jurisdiction was compulsory. The WTO was authorized to issue binding decisions. No state could block the adoption of a decision, and the decisions were enforceable by imposition of trade sanctions. A mandatory consultation process—that serves as a precondition to the binding panel process—resolves disputes informally. However, when the informal resolution process fails, the system ensures the resolution of the dispute in an adversarial proceeding that adopts characteristics of both common law and civil law countries.

A panel and appeal process binds states—they are required to bring their laws into conformity with the rendered decisions.[8] The decisions do not invalidate national laws. If states do not comply, they may face withdrawal of concessions (tariff surcharges on goods) as a trade sanction. "Losing parties are encouraged to comply with the WTO rulings. However, they may accept retaliation or provide compensation … as an interim measure."[9] Even after a matter is decided, the WTO retains authority (most likely the original panel that rendered the decision) to supervise or provide surveillance of the implementation of the decision. Additional proceedings have been brought by states, after initial panel decisions. These resolved disagreements relating to the adequacy of measures taken by states to

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[5] Editorial – " Open Trade," *Washington Post*, A38 (December 26, 2002).

[6] "Negotiations, Implementation and Development: The Doha Agenda," at http://www.wto.org/english/tratop_e/dda_e/dda_e.htm

[7] P. Gallagher, *Guide to Dispute Settlement* 12 (2002).

[8] Article 19 of the *Dispute Settlement Understanding* (DSU).

[9] *World Trade Organization: Issues in Dispute Settlement* 7 (General Accounting Office/NSIAD-000219) (August 2000).

bring their laws into conformity with the decisions concerning the contested measure and the relevant trade agreement.

Significant concerns and fears were expressed during the negotiation and implementation process leading to the creation of the WTO's dispute resolution system. At the outset, the United States was concerned about political and judicial sovereignty. The Europeans feared a failure of the United States to live up to adverse decisions. Trade diplomats in Latin America and Asia felt powerless to prevent the United States from using this new system against them—an extension of the cowboy litigation viewed as pervasive within the United States.

The United States and WTO Litigation

The WTO caseload discloses a boom of trade litigation in which the United States is the most aggressive and successful complainant.

Between January 1, 1995, and October 29, 2002, the WTO received 273 complaints, which resulted in 63 appellate body and panel reports being adopted, according to the WTO's most recent statistical study of the dispute resolution system. [10] (This figure of adopted reports or cases does not include cases that were also decided under the "surveillance of implementation" procedures, since they are best viewed as supplemental proceedings.[11]) Many cases are settled during the mandatory consultation stage. In reviewing all decided cases, in 1999, the WTO concluded that the most often cited agreements were those concerning sanitary and technical measures, agriculture, textiles, investment measures, intellectual property and the services.[12]

For a similar period, the United States was involved in 43 cases as a complainant or respondent. The United States was a complainant in 18 cases, winning 16 and losing two cases. As a respondent in 25 cases, the United States won three and lost 22 cases. While the United States brought actions concerning newer trade issues, such as intellectual property rights, it sought adjudication in a considerable number of cases dealing with agriculture issues—a traditional trade concern. At the same time, the United States was subject to a number of actions concerning its steel (anti-dumping), textile and trade law matters (for example, "retaliation" as Section 301 cases).

The cases in the following charts are arranged in chronological order and identified by the essential subject matter of the proceeding. The cases include all substantive decisions decided by either a panel or the appellate body. A large number of actions filed were resolved in the consultation stage that is required before a panel is established. Therefore, they are not reflected in these charts.

The U. S. was the respondent in the last few years, more so than in earlier years of the WTO. The United States has been the respondent in cases that include "Section 301 retaliation," criminal anti-dumping legislation, trademark and copyright legislation, the "Byrd Amendment" (concerning anti-dumping proceeds), steel tariffs and export tax subsidies.

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[10] *Update of WTO Dispute Settlement Cases*, WTO document WT/DS/OV/9 (October 29, 2002). This is prepared by the WTO Secretariat. An annual update also appears in the WTO ANNUAL REPORTS.

[11] Cases decided under Article 21.5 of the Dispute Settlement Understanding.

[12] *"Disputes Facts and Stats,"* (as of October 18, 1999) at *http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/19dis2_e.htm*

The following two bar graphs from the 2000 GAO WTO report show the U.S. involvement as complainant and respondent.. The GAO Report highlights how the United States, as a complainant, relied on scientific testing concerning import of foods and intellectual property rights—newer trade issues. The three areas relied upon by states bringing actions against the United States were anti-dumping, textiles and Section 301 matters ("retaliation")—traditional trade issues.

On the WTO's fifth anniversary in 2000, the General Accounting Office assessed the U.S. record before the WTO.[13] The report concluded that the United States benefited from litigation within the WTO dispute resolution system. It achieved commercial benefits from most of the cases it filed. The challenges against the U. S. practices had limited impact.

The report noted that the United States filed cases most often involving agriculture/sanitary and phytosanitary measures, intellectual property rights, tax/subsidies, investment measures, textiles and antidumping. The United States was a respondent in cases related to anti-dumping (steel), textiles, Section 301, agriculture/sanitary and phytosanitary measures, environment and tax/subsidies.

In 2002 and early 2003, the United States lost high profile cases dealing with the "Byrd Amendment" (allowing anti-dumping and countervailing duties to be paid to the affected domestic parties) and the "Foreign Sales Corporation" legislation (providing export tax subsidies). The United States is, unfortunately, slow in conforming to the WTO decision. I wrote that "In the case of U.S. export subsidy legislation, off-the-books and offshore entities are utilized to avoid reporting income. Are the tax-trade actions of the United States concerning export subsidies ultimately self-defeating by deprecating the legal rules of the global trading system?" [14] Questions remain about whether the United States will implement this major decision. In many ways, this situation has become a litmus test for the continued adherence to the WTO's structure and multilateral approach to global trade championed by the United States.

Most recently, the European Union restricted the importing of genetically modified foods into the European Union. This restriction led Ambassador Robert Zoellick, the U. S. Trade Representative, in early 2003, to threaten the EU with new litigation. "President Bush's trade representative blasted the European Union for its moratorium on U.S. biotech crops and said he favors taking the fight to the World Trade Organization, in what would be one of the biggest trade disputes in years between the U.S. and Europe."[15] The new director-general of the WTO, Supachai Panitchpakdi, criticized both the U.S. and EU for setting poor examples for less developed countries and inadvertently encouraging trade disputes.[16] A recent treatise described the policy issue:

> **"[T]he central question that needs to be addressed is what wise policy makers ought to do to preserve the strengths of the rules-based trading regime while responding to the pressures on it."[17]**

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[13] *World Trade Organization: Issues in Dispute Settlement* (General Accounting Office/NSIAD-000219) (August 2000).

[14] Malawer, "Trade and Tax: Is the United States the Enron of Trade?" *Daily Record* (March 23, 2002).

[15] "U.S. Trade Representative Slams EU Over Biotech Crops," *Wall Street Journal* (January 10, 2003).

[16] "WTO Chief Says U.S., Europe Foster Other Trade Disputes," *Wall Street Journal* (October 27, 2002).

[17] G. Sampson, *The Role of the World Trade Organization in World Governance* 5 (2001).

Lessons that the United States learned through litigation in the dispute resolution system of the WTO offer insights into possible policy options that must be further developed as the DOHA round of trade negotiations proceeds.

Lesson #1 - When the U.S. Sues, It Wins—and When Sued, It Loses.

The United States brings cases dealing with agriculture and high tech issues. Other nations seek relief from the United States on textile, agricultural and environmental restrictions. The United States has been by far the most aggressive complainant, followed closely by the European Union. Other major complainants have been Canada, Japan, Mexico and Thailand. The United States and the European Union have been the most often-cited respondents, followed by Japan, Korea, India and Brazil. The WTO litigation system produced an equitable global trading system, where enacted rules are applied and enforced. A wide range of countries has used the system to resolve trade issues.

The United States almost always won when it brought a matter to a panel. The U. S. won 16 of 18 cases as the complainant. It won significant cases against Japan and the EU concerning market access of agricultural products. The U. S. almost always lost when other nations sought action against it, especially in cases concerning anti-dumping and textiles. It won only three and lost 22 cases as a respondent. For the United States, the first lesson is (as with most countries) it tends to win cases it files, and conversely, loses cases where it is the respondent. In almost all cases, the challenged trade restrictions were eventually removed—benefiting both the winning and losing parties, and the global trading system.

Lesson #2 - Global Trade Law Affects Core Environmental and Economic Legislation.

Interestingly, the first case decided by the WTO was a case Venezuela filed against the United States, in early 1995, the first year of WTO operations. The United States lost that case, which involved the validity of the Clean Air Act regulations in relation to foreign imported oil. The Environmental Protection Agency's (EPA) regulations were found to be discriminatory against foreign refineries. The United States subsequently brought its regulations into conformity with the WTO decision. Subsequently, the United States lost two cases concerning textile restrictions. In 1998, the WTO ruled against the United States' regulations concerning the banning of shrimp not harvested in accordance with the regulations of the Endangered Species Act. Actions against the United States concerning its steel tariffs, including President's Bush's recent actions, are routinely taken to the dispute resolution system. In 2003, the United States lost another case concerning the "Foreign Sales Corporation"—a long-standing dispute concerning export tax subsidies going back to the DISC (Domestic International Sales Corporation) legislation of the 1970s. It was determined on appeal that such corporate income tax legislation amounted to an illegal export subsidy. Thus, the second lesson is that WTO disciplines apply not only to traditional issues of trade such as tariffs and quotas (including textiles), but impact highly important areas of national economic legislation relating to environment and corporate taxation.

Lesson #3 - Many Countries Utilize the Dispute Resolution System Involving Varied Issues to Develop a Clearer Body of Rules More Acceptable to All States.

An examination of cases brought against the United States discloses that a wide range of countries such as Venezuela, Brazil, Costa Rica, India, Korea, and the European Union have brought actions. These actions have involved a broad range of issues: energy, textiles, fisheries, computer chips, antidumping, trademarks and taxation. Most interestingly, the recent GAO study determined that

among the frequently cited agreements or subjects forming the bases of complaints were those involving anti-dumping and textiles.[18] Meanwhile, the United States, in its complaints, relied upon agreements concerning scientific testing relating to food imports and intellectual property rights. Thus, the third lesson is that many countries have used the dispute resolution system to adjudicate various issues, involving both traditional trade issues (agriculture and textiles) and newer trade issues (computer chips, corporate income taxation, scientific testing and intellectual property rights). Since the WTO rulings affect a large number of states, it creates a body of decisions that provides a consistent interpretation of WTO obligations and principles applicable to all states. States now find it easier to understand their obligations and are more willing to implement them.

Lesson #4 - Both the United States and the EU have Resisted Implementation.

As noted previously, the United States brought its regulations into conformity with the WTO decision concerning importation of foreign oil under the Clean Air Act. The United States also took measures to bring its legislation into conformity in other cases. However, the United States resists making its export tax legislation conform to the decision of the WTO. The United States continues to use Section 301, even though the Uruguay Round intended to restrict unilateral actions. The European Union has moved slowly to implement adverse decisions in the banana and beef-hormone cases. This delay is ironic, because the EU was concerned about possible U.S. implementation during the negotiations. A compromise that was reached with the United States required offending measures to be brought "into conformity," rather than negated. Nevertheless, lesson four is that the both the United States and the EU need to conform promptly to adverse decisions if the WTO is to be effective in avoiding trade tensions and to set the example for other trading nations.

Lesson #5 - WTO Decisions Create Global and National Obligations that Bolster a Rule-Based Economy and Civil Society.

A WTO dispute resolution decision creates international obligations and, when implemented, new national law that is binding within countries. This system bolsters the rule of law in trade relations among states and in individual countries. Such a system observes rules and their implementation fosters global trade and economic development. Failure to create a predictable and rule-based system halts the flow of capital. Furthermore, it stalls investment and trade transactions—witness Russia. (To the contrary, witness China's accession to the WTO, and, after only one year, the rush of new foreign direct investment into its telecom, wireless and financial services industries.) The importance of the new dispute resolution system is not limited to deciding trade cases. Its decisions influence domestic fields of law such as contracts, corporate ownership, intellectual property rights, administrative law, judicial review and legal institutions.

Even more important for countries not accustomed to upholding legal and individual rights, that the observance of such laws influences the development of a governing mindset and culture—restricting governance by bureaucratic whim. This expands the rights of individuals and develops democratic institutions. With these goals in mind, the importance of China's admission to the WTO cannot be overstated. When announcing the deal concerning China's accession to the WTO Charlene Barshefsky proclaimed: "And the notion that China will become a member of this rules-based regime

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18 ***World Trade Organization: Issues in Dispute Settlement*** **10, 12 (General Accounting Office/NSIAD-000219) (August 2000).**

is of extraordinary long-term importance, not only on the commercial side, but with respect to the development of a more full body and robust legal system within China."[19] Indeed, China's WTO membership has brought one surprise. An expected flood of complaints against China has failed to materialize.[20] Lesson five is that for both the United States and other countries, the dispute resolution system acts as a critical vehicle and lever to overcome internal pressures to comply with international rules.

Conclusion.

Using the dispute resolution system for contested and decided cases of the WTO is in the U.S. national interest. The United States has aggressively used the system as a complainant, while playing an equally important role—especially to other nations—as a respondent. The United States has won many cases and lost some. It has changed its offending legislation and regulations to comply with WTO decisions. Other countries have also been active litigants. However, implementation is a newer and troubling problem. But guess what? This is also true in purely domestic litigation.

Many of the trade disputes decided by the dispute resolution system were not limited to tariffs or traditional trade issues concerning the movement of merchandise between countries. They have involved newer issues that were once considered to be only domestic and non-trade issues. With the emergence of the WTO in the 1990s, along with the dramatic developments concerning globalization, international lawyers, foreign policy analysts and international relations experts are focusing on global trade relations, and the way global trade rules are negotiated and implemented. Issues concerning implementation and openness of the dispute resolution system have become obvious. The Ministerial Declaration in DOHA, in November 2001, acknowledges this and commits the WTO to address these and related issues during the DOHA round of trade negotiations.[21] The United States has already made suggestions increasing transparency and public access to the DSU settlement proceedings,[22] even though much of the trading community still views the negotiation and adjudication functions of the WTO in a more traditional diplomatic context. Previously, trade was always viewed as part of the secretive diplomatic scene.

Nevertheless, for the United States and the global trading system, the dispute resolution system has already proven central to U.S. and global trade policy. It is possible that this system can have an even a greater effect on creating a more effective global legal system—something akin to the integrative role that the United States Supreme Court or the European Court of Justice.

A recent article in *Foreign Affairs* used such phrases as "ascendant legalism," "improper judicial activism" and "deep ambivalence" to describe the new dispute resolution system.[23] This is

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19 "Barshefsky – Following Negotiations with China on WTO," (USTR Press Release, November 15, 1999). *http://www.ustr.gov/releases/1999/11/cbchina.html*

20 "China Takes Seat at WTO on Side of Free Traders," *Wall Street Journal* (December 17, 2002).

21 "Ministerial Declaration." (DOHA WTO Ministerial Declaration adopted November 20, 2001) (WT/MIN(01)/Dec/1).

22 "United States Proposes Greater Openness for WTO Disputes – Proposal Advances Discussions on DOHA Agenda." (United States Trade Representative Press Release, August 9, 2002).

23 Esserman and Howe, "The WTO on Trial," 82 *Foreign Affairs* 130 (January / February 2003).

unfortunate. This system holds the promise of removing the theatrics from trade disputes and ratchets down a notch the noise level that has surrounded all too many trade disputes between some of our closest allies.

> **" Conducting world trade according to multilateral agreed rules has been a major contributor not only to the enormous expansion of the world economy over the half-century, but also to the avoidance of international conflict."[24]**

A seminal treatise assessing the WTO's dispute resolution system correctly highlights the larger issues of global governance and peaceful relations:

> **"[T]he entrenchment of a working system of international law … protects the world economy from arbitrary political interference and governments from narrow sectional interests …. {This is} a basis for peaceful relations among – and within states. Although rule-governed trade may not guarantee peace, it does remove a potent cause of conflict."[25]**

What has emerged since 1995 has been different from what was feared. Many countries are using the system. The United States is complying with adverse decisions, and the decisions being made are providing the impetus for changing questionable domestic trade regulation. Cases are brought, litigated and decisions are implemented. What is developing is a new way of conducting global transactions in this digital era of global trade and commerce has developed. Disputes are being settled peacefully in a multilateral and quasi-judicial setting, which is better than in a divisive and highly politicized, unilateral context. This successful method for resolving conflicts among states is essential for global trade and is good for law, among and within states.

> **"[E]conomic globalization is feeding the rule-of-law imperative by putting pressure on governments … [The] aim [is] the deeper goal of increasing government's compliance with law …."[26]**

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[24] Sampson at vii.

[25] P. Gallagher, *Guide to Dispute Settlement T* 185 (2002)

[26] Carothers, "The Rule of Law Revival," 77 *Foreign Affairs* 97, 98 (March-April 1998).[1] Renato Ruggiero (Director-General of the World Trade Organization), "*The Future of the Multilateral Trading System.*" (Speech in Seoul, Korea on April 17, 1997). http://www.wto.org/english/news_e/sprr_e/seoul_e.htm

U.S. & WTO LITIGATION -- *10th Year Review (1995-2005).*

By Stuart S. Malawer
http://www.vsb.org/publications/valawyer/jul05/wto_malawer.pdf

Introduction.

As the tenth anniversary of the World Trade Organization's (WTO) dispute resolution system was on January 1, 2005, it is truly amazing to review its historical emergence as the central pillar of the global trading system and as the WTO's most important contribution to the multilateral trading system. Renato Ruggiero, the former Director-General of the WTO made this assessment in 1997.[1] Then his statement was prematurely, but now Ruggiero's assessment is fully born out.

The dispute resolution system, launched on January 1, 1995, without much fanfare or recognition, has become the most effective system ever to adjudicate and implement global trade rules. The recent report of the committee of experts appointed by the current Director-General Supachai Panitchpakdi to assess the WTO on its tenth anniversary declared in early 2005 that *"The Dispute Settlement Understanding (DSU) is a significant and positive step forward in the general system of rules-based international trade diplomacy."*[2] Indeed, the Director-General in introducing the report proclaimed that "*The WTO was now a major player not only in the conduct of trade relations but in global governance.*"[3]

At the outset of the new system global leaders hoped that it would develop through the application of rules negotiated and agreed on by consensus within the WTO. It was designed to be a system not based upon power politics or the law of the jungle, but on mutual consent; a global system where unilateralism would be restricted and rules would be adjudicated and enforced through a system of consultation and litigation. The new system would be governed by compulsory jurisdiction, binding decisions, and effective sanctions. In other words, the WTO's dispute resolution system would be a truly global legal system benefiting all members. Initially, some diplomats and trade experts from both developing and developed countries feared that importing an American rule-of-law approach to the trading system – or the legalization of the system – would harm them. Even within the United States, concerns were raised over the historical American recalcitrance of recognizing foreign decisions as derogating American sovereignty.
The intent of its primary architect, the United States, was for the WTO dispute resolution system to interpret and to apply rules of global trade. As the Director-General, Supachai Panitchpakdi,

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2 The Future of the WTO – Addressing Institutional Challenges in the New Millennium 80 (by the WTO Consultative Board, 2005).

[3] Id. at page 2.

recently stated: "It was the United States, perhaps more than any other nation, which recognized the importance of the rule of law during Uruguay Round and sought to broaden and deepen its relevance to international trade."[4] Recently, the new European Commissioner for Trade, Peter Mandelson, declared, "Smaller countries … are more protected because the system is based on the rule of law."[5]

The principal objective of this new system was to foster a rule-based trading system through consultations and litigation. The United States pictured a system that would lead to the rule of law within the multilateral trading system as well as, hopefully, in other areas of international relations, not to mention within transitional and developing states. To a great extent, those intentions for the trading system have become a reality. But as the United States has lost more cases recently, changes in United States' practices have been required and sanctions have been authorized or threatened against it. As a result, challenges to the dispute resolution system have recently emerged, and antagonism toward the system has grown within Congress[6] and has influenced U.S. negotiations during the current Doha round of trade negotiations.[7]

This article reviews the evolution of litigation and consultation within the WTO during this ten-year period. The evaluation is primarily from an empirical basis, relying heavily on my recent analysis and several parallel statistical studies from the Office of the United States Trade Representative (USTR),[8] the WTO[9] and my prior statistical analysis appearing in a prior issue of the *Virginia Lawyer*.[10]

This article focuses on the general experience of the United States. The period covered begins with the first decision ever rendered by the WTO against the United States in an action concerning importation of oil[11] and U.S. environmental regulations and ends with the adverse decision in November 2004, which involved Internet gambling[12] and a favorable decision in December 2004, concerning geographical indicators for foods. (The U.S. case against the EU concerning genetically-modified foods[13] is yet to be determined as is the newer *Airbus - Boeing cases*[14].) The article concludes

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[4] Supachai Panitchpakdi, "*The WTO After 10 Years: The Lessons Learned and the Challenges Ahead*." (March 11, 2005). http://www.wto.org/english/news_e/spsp_e/spsp35_e.htm.

[5] Mandelson, "*Towards a New Map for World Trade*," Financial Times 15 (May 3, 2005).

[6] *See generally*, Esserman and House, "*The WTO on Trial – Global Law and Global Politics*," 82 Foreign Affairs 130 (No. 1, January – February 2003). Congress is currently reviewing the U.S. participation in the WTO as part of its previously authorized ten-year review.

[7] The U.S. has been addressing the issue of "overreaching" during these negotiations.

[8] U.S. Trade Representative "*Snapshot of WTO Cases Involving the United States*." (January 14, 2005). http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/asset_upload_file287_5696.pdf. *See also*, "*Dispute Settlement Update*." (January 14, 2005). http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/asset_upload_file881_5697.pdf

[9] World Trade Organization (Secretariat), "*Update of WTO Dispute Settlement Cases*."(October 14, 2004) (WT/DS/OV22). http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm. *See also*, "*Overview of the State of Play of WTO Disputes*." WT/DSB/37/Add 1 (December 3, 2004) (Addendum to *DSB Annual Report for 2004*) (covers January 1, 1995 to October 31, 2004). *See also*, *Appellate Body Annual Report for 2004* (2005) (WT/AB/3) and its various statistical annexes. http://www.wto.org/english/tratop_e/dispu_e/wt_ab3_e.doc

[10] Malawer, "*The U.S. and the WTO: Lessons Learned for Trade Litigation and Global Governance*," 51 Virginia Lawyer 12 (No. 9, April 2003). For an earlier of this current article, *see* Malawer, "*World Trade Organization After 10 Years: Litigation and Consultation*," 232 New York Law Journal 4 (No. 110) (December 18, 2005).

[11] Brazil & EU v. U.S. (WT/DS2/9) (AB) (May 20, 1996).

[12] Antigua & Barbuda v. U.S. (WT/DS285/R) (Panel, November 10, 2004).

[13] U.S. v. EU. (WT/DS291) (filed 1993 and pending).

[14] EU v. U.S. (WT/DS317) (WT/DS316) (filed October 6, 2004)) (currently in bilateral negotiations outside of WTO framework).

with observations concerning the importance of WTO litigation to fostering better global governance in this era of global trade and worldwide economic integration.

Background.

The dispute resolution procedure is fairly simple. The *Dispute Settlement Understanding (DSU)*,[15] one of the family of integrated agreements negotiated and concluded by countries during the Uruguay Round of trade negotiation in 1994, provides that states with a trade dispute may pursue a process of consultation, review by a panel and, if necessary, an appeal to the Appellate Body (AB). A decision is finalized when the Dispute Settlement Body (DSB), comprised of the entire membership of the WTO, adopts the report of the panel or the AB (if an appeal occurs).

As enunciated in article three of the *Dispute Settlement Understanding,* the aims of the dispute resolution system are to provide security and predictability to the multilateral system. It also attempts to provide prompt settlements as well positive solutions and the withdrawal of offending measures. Trade sanctions and retaliation are the last resort. With its launch in 1995, the system accomplished three historical achievements: compulsory jurisdiction, binding decisions, and sanctions. Unlike many domestic legal systems providing for disjointed proceedings to decide the merits of a case and enforcement of the court's judgment, the WTO system retains competence to supervise the implementation of its decisions and to render additional determinations concerning compliance and sanctions ("post-judgment procedures"). This authority is a regular and permanent feature. Unlike that in the United States and other legal systems the substantive determinations and enforcement proceedings are not disjointed but are one continuous process.

Article 19 of the DSU requires parties to bring an offending measure into conformity with the WTO agreement deemed applicable. The WTO does not override a domestic law, but requires the losing party to change the offending measure or eventually face sanctions. Thus, a state could continue to pay (in the form of higher tariffs on its exports) if it refuses to change the offending practice or law – although some legal scholars consider this improper. For example, the EU continues to have sanctions imposed upon it during its long process of dealing with the United States' concerns about its restrictions on import of beef given hormone treatments (*the Beef Hormone Case).* The EU recently decided to challenge the continued imposition of sanctions in a new WTO proceeding. This unusual approach was actually promoted by the United States in negotiating the WTO agreements so as not to offend those in the United States concerned with the sanctity of United States legislation and judicial sovereignty. The United States did not want the WTO to invalidate and overturn domestic legislation, executive action or judicial decisions.

Article 21 of the DSU provides for surveillance of implementation. Recognizing the necessity for prompt compliance, parties must inform the WTO of their intentions to comply. Most importantly, an arbitration procedure is built into this process to determine a reasonable period for implementation if the parties cannot agree. And once compliance is accomplished, the WTO can determine whether the action is consistent with the decisions. (The EU recently announced it is filing a new action to determine if the 2004 corporate tax law, just signed by President Bush, really lifts the offending export subsidies that the WTO ruled as invalid in the *Foreign Sales Corporation Case*[16]).

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[15] **"Understanding on Rules & Procedures Governing Settlement of Disputes." (Annex 2 of WTO Agreement). http://www.wto.org/english/docs_e/legal_e/28-dsu.doc**

[16] **EU v. U.S. (WT/DS108/RW) (AB January 14, 2002).**

Article 22 of the DSU provides for the multilateral authorization of sanctions by the WTO, specifically by the DSB. Winning states must return to the WTO and request authorization, if implementation does not occur within a reasonable period. Unilateral decisions are prohibited. Most often this trade sanction is an authorization to impose tariff surcharges on imports from the offending country, technically known as a withdrawal or suspension of concessions. These tariff surcharges are being aimed at imports determined by the winning party. However, an arbitrator may decide the size or amount of sanctions. The genius of this system is that the imposition of sanctions would normally be targeted against selected imports to cause the maximum domestic political pressure within the targeted state and, thus, hopefully, the removal of the offending actions. (For example, the EU planned to target the orange growers in Florida to persuade the Bush administration to lift steel safeguard measures after the WTO ruled the measures to be invalid in 2003.)

U.S. Experience within the Dispute Resolution System (1995 – 2004).

When terms of the dispute resolution system were negotiated during the Uruguay Round, many in the United States were concerned with how it would affect actions brought against the United States. Likewise, many countries were concerned with whether the United States would use the system against them and if the United States would ever comply with decisions against it.

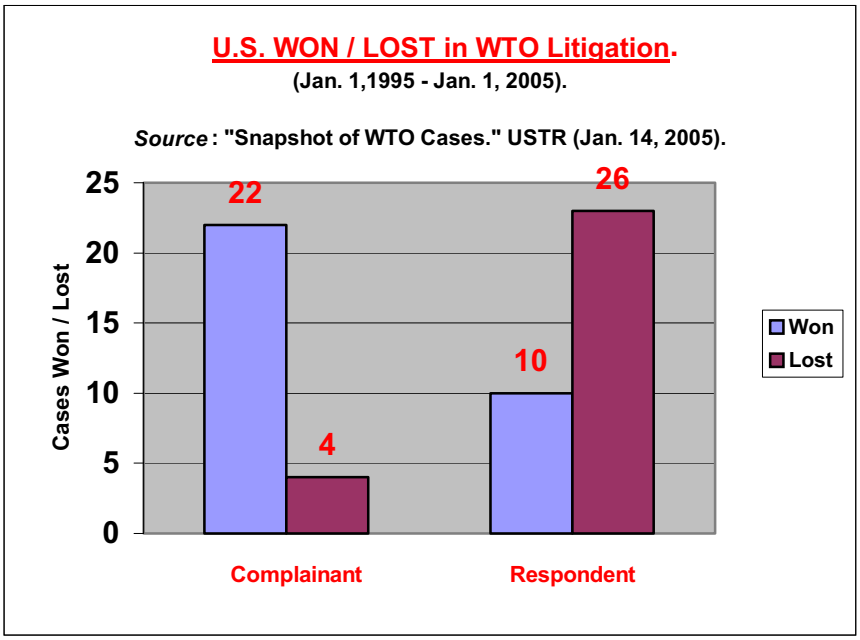
The United States has been involved a broad range of cases as the complaining party and responding party. For example, these cases have involved gasoline refining, fisheries, agricultural subsidies, steel import restrictions, telecommunications and corporate income taxation. Most recent cases have involved E-commerce (gambling), cotton subsidies and geographical indicators for food products. Newer and pending ones involve genetically-modified organisms, textile quotas and outsourcing of information technology services. These issues are far removed from the traditional trade matters involving tariffs and quotas on goods and commodities.

With ten years of experience, we can now assess the experience of the United States more fully. (For a chart of cases the U.S. was a party to see addendum.)

The USTR's most recent data released on January 14, 2005, offers the following highlights for the ten-year period (January 1, 1995 – January 1, 2005) under the dispute resolution system:

- **The United States has gone through the full litigation process as a complainant 26 times. It won 22 cases and lost 4 cases.[17]**
- **The United States served as a respondent in 36 cases that went through the full litigation process including compliance procedures. It lost 26 cases and won 10. (Two decisions are still in the appellate stage.)**

[17] USTR data doesn't include the recent U.S. win concerning geographical indicators against the EU in December 2004. (This is not indicated in the statistics in this article.) The final report was issued on March 15, 2005 (WT/DS174/R) at http://www.wto.org/english/tratop_e/dispu_e/174r_e.doc



The statistics indicate that that the United States is an extremely active as a complainant and respondent. In cases it initiated as a litigant, the United States won most of the cases. In cases filed against it, the United States won about one-third. Not a bad record. This record is consistent with my evaluation for nearly the same period, published previously.[18]

But litigation is not the primary purpose of the dispute resolution system. The primary purpose is to resolve trade disputes, which involves the other part of the system – the required pre-consultation stage. Here the numbers are quite instructive. The following is the USTR data for when the United States was the complainant:

- **The United States filed 75 complaints -- meaning only 26 went through the litigation process. Therefore, more than half of the cases filed (49) were resolved at the consultation stage or are inactive.**
- **Exactly 22 of the cases addressed in the consultation stage were resolved in favor of the United States. Thus, almost half in consultation were resolved favorably to the United States. For example, the claim by the United States against China concerning its taxation of foreign produced integrated circuits was recently settled favorably to the United States.[19] This dispute had the potential of being the first litigated disputed between China and the United States in the WTO. The consultation cases settled favorably join the large number of cases the United States won after going through the full litigation process. (Since the consultation process is confidential, conducted in a traditional diplomatic context, and parties often do not disclose the outcomes, it remains unclear what happened to the balance. Probably most cases were dropped, and some remain pending.)**

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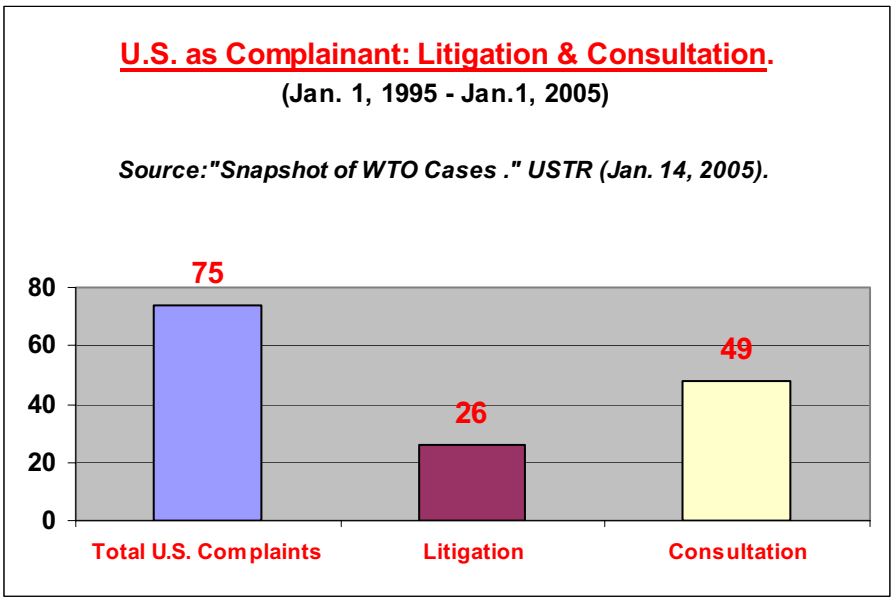
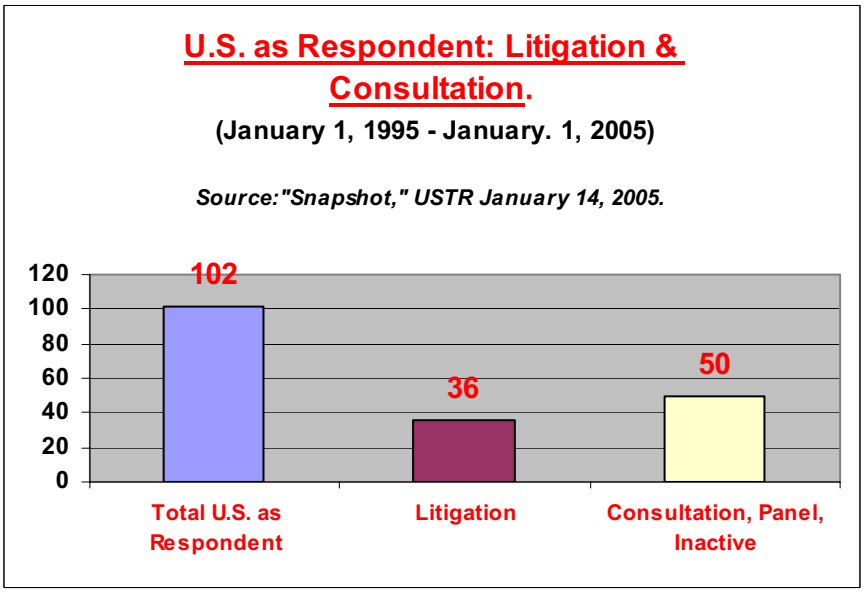
[18] Malawer, "*The U.S. and the WTO: Lessons Learned for Trade Litigation and Global Governance*," 51 Virginia Lawyer 12 (No. 9, April 2003) (excluded *compliance procedures* generally).

[19] U.S. v. China. (WT/DS309) (July 14, 2004 settlement notified).



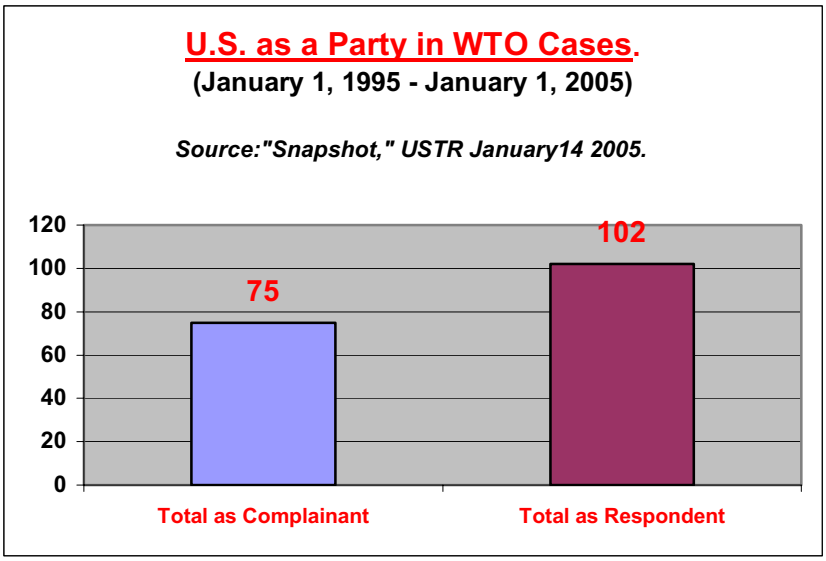
The USTR data further discloses the following when the United States was the respondent:

- **The United States was a respondent in 102 cases, with less than one-third (36) requiring the whole litigation process. (8 cases are still in the panel process.) A total of 50 cases never made it out of consultations – or are inactive or in the panel process. The United States was served in more cases (102) than it brought (75). So much for the concern that other countries would not try to hold the United States accountable.**



These last two numbers are the most enlightening. The United States filed 75 complaints; yet more than 102 complaints were filed against it. This trend clearly demonstrates that the trading community is not hesitant to enforce its WTO obligations against the most economically powerful member of the

trading system. The recent panel decision this November against the United States concerning restrictions on Internet gambling, brought by Antigua and Barbuda, demonstrates that the smallest WTO members will bring actions to enforce WTO obligations against the United States.[20] How things have changed in ten years, from where developed and developing countries doubted the usefulness of the dispute resolution system in bringing actions against the United States to where they file more actions against United States filed than were filed against them.



The United States filed an action this October against the EU concerning subsidies provided Airbus. The EU immediately filed an action claiming invalid the United States and the State of Washington's subsidies to Boeing. In addition, the EU filed a new proceeding questioning the sufficiency of the recent removal of export subsidies by the United States. President Bush had recently signed new tax legislation designed to satisfy the WTO's decision in the *Foreign Sales Corporation Case* that declared various United States tax subsidies in violation of its WTO obligations. The United States has claimed that such EU actions are an unfortunate linkage of trade cases and in bad faith. WTO litigation seems to have gotten nastier, especially in transatlantic relations. But litigation is never viewed as a friendly act. Global trade litigation is beginning to look more like any mature system where parties become aggressively adversarial. But it is better to argue in court and have the issues settled in that forum then to have them unsettled.

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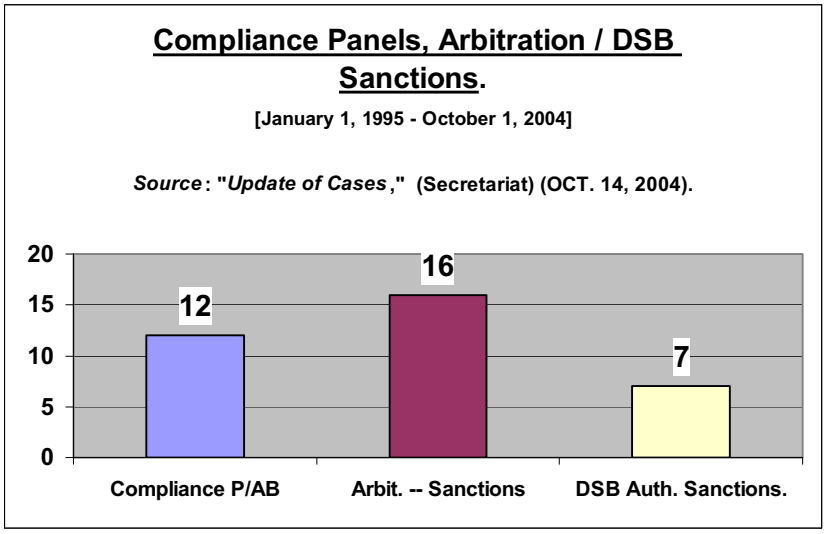
[20] **The Appellate Body upheld the only a very limited portion of the panel on April 7, 2005. Antigua and Barbuda v. U.S. (WT/DS285/AB/R). While finding some violation by the U.S. under the GATS the AB found that U.S. and state restrictions on Internet gambling were within the "*public morals exception*." "*U.S. Limits on Internet Gambling are Backed*," New York Times C:14 (April 8, 2005). This case raises the crucial issue of the *federal-state issue* in international agreements and the WTO agreements in particular. State laws and practices are subject to the WTO disciplines. However, the federal government may not made able to change them. The United States itself may be found to violate its international obligations because of the inconsistent state laws. Portman, "*Trade Agreements and States*." (Press Release, USTR April 14, 2005). In early 2005 this issue has became even more important since states (such as Maryland and New Jersey) were in the process of enacting restrictions on outsourcing of information technology and other services to India and elsewhere.**

Use of the Dispute Resolution System by the Trading Community.

WTO statistics, released on October 14, 2004, indicate that 315 complaints have been filed in just under ten years since the inception of the dispute resolution system. The complaints resulted in 82 panel or Appellate Body decisions, meaning 233 cases were resolved, pending or considered inactive. As a result, we can infer that many cases are resolved outside of the strict litigation process and its harsh glare. Yet it is difficult to fully prove this conclusion, since the consultation process is a diplomatic one and extremely confidential. Little record exists on which to determine the motives of states in not pursuing litigation, resolving cases or dropping cases at the consultation stage.

The same WTO statistical release indicates that arbitration was used in 12 compliance procedures to determine consistency of conforming actions and in another 16 instances to determine the amount of sanctions. However, the DSB actually authorized sanctions in only 7 cases -- in ten years. (Sanctions were authorized in an additional case, the *Byrd Case against the United States*, after this statistical release and sanctions are being imposed.[21]) Sanctions were authorized against the EU in *The Banana Case*[22] and in *The Beef-Hormone Case*[23], and against both Canada[24] and Brazil[25] in their mutual actions regarding aircraft subsides. (However, neither Canada nor Brazil has imposed such sanctions.) In *The Banana Case* the sanctions were lifted, but Latin American countries have now gone back to the WTO under special provisions of the Doha declarations.[26] The sanctions in the beef case remain and the EU has filed a new case to remove them.[27]



In only two cases have sanctions been authorized against the United States -- in the *Foreign Sales / ETI case* and in the *Byrd Amendment Case,*[28] which involved payments for collected antidumping and countervailing duties to industry. In late 2004, the United States enacted legislation ("*American Jobs Creation Act*) in order to comply with the WTO decision in the *Foreign Sales Case*. No legislation has

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[21] "*EU to Impose Sanctions on Certain U.S. Products.*" Wall Street Journal (April 1, 2005).
[22] U.S. v. EU. (WT/DS27/49) (WT/DS27/59).
[23] U.S. v. EU. (WT/DS28/AB/R) (WT/DS48/AB/R) (AB January 16, 1998).
[24] Brazil v. Canada. (WT/DS46/10).
[25] Canada v. Brazil. (WT/DS70/6).
[26] *"Banana Producers go to WTO Over EU Dispute."* Financial Times (March 31, 2005).
[27] WTO News Items (February 17, 2005).
[28] EU v. U.S. (WT/DS217/Arb/EEC) (Arb. August 31, 2004).

yet been enacted to comply with the *Byrd Amendment Case*. The EU and Canada have recently imposed sanctions on the U.S. for its failure to repeal the Byrd Amendment.[29] However, the United States also in late 2004 enacted" the "*Trade Corrections Act*" to comply with the WTO decision concerning the *1916 Antidumping Act Case*.[30]

A deadline for avoiding sanctions in the *Cuban Rum Case*[31], where the United States refuses to recognize certain Cuban trademarks as being illegally expropriated, expires shortly is causing concern in the Congress. This adds to Congressional angst over threatened sanctions by Canada in its lumber disputes with the United States.[32] Of course, Congress is already unhappy with the administration's recent refusal to bring an action against China because of its currency regulations that are viewed as restricting United States exports and encouraging greater Chinese exports to the United States.[33] Congress is also concerned about the administration's failure to bring an action contesting China's labor practices as well as stopping the current surge of textile imports from China as a result of lifting its textile quotas on January 1, 2005.[34]

Greater analysis of the recently released case data by the WTO discloses that of the total number of cases filed, developed countries filed about two-thirds (192) while developing countries filed about one-third (123), including several that were filed jointly. Considering that most trade is between developed countries, this almost 2:1 ratio seems fairly balanced. It is interesting to note that developed countries filed 120 actions against other developed countries and 75 against developing countries, representing – a similar 2:1 ratio. Developing countries filed 66 actions against developed countries and 48 against other developing countries. This record is not surprising since much trade occurs between developing countries and they also maintain significant trade barriers. Developing countries have become very aggressive in utilizing the dispute resolution system. In 2004 Brazil won two historical agricultural cases -- one against the United States concerning its cotton subsidies[35] and one against the EU relating to its sugar subsidies[36].

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[29] "*Duties to Rise on Some Items from U.S.*" New York Times (April 1, 2005).

[30] EU & Japan v. U.S. (WT/DS136, 162) (AB August 28, 2000).

[31] EU v. U.S. (WT/DS176/AB/R) (AB January 2, 2002).

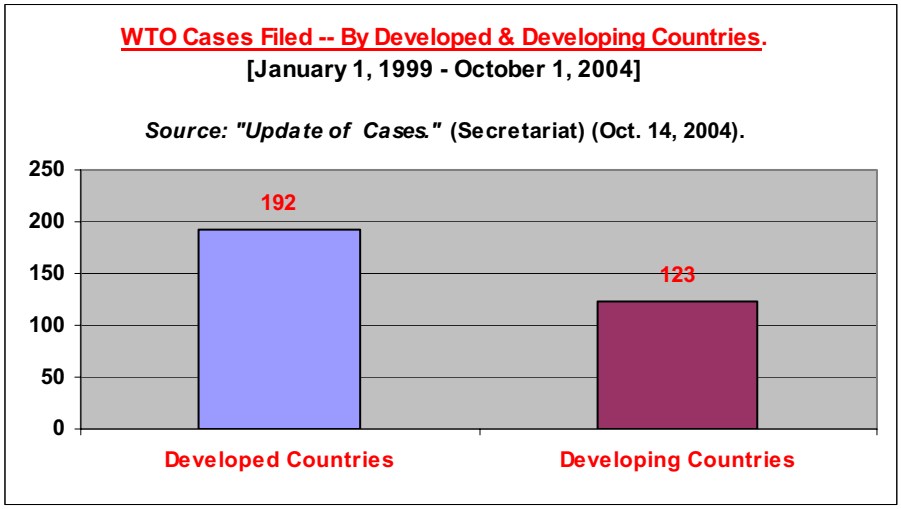
[32] The recent loss by the U.S. in an action brought by Korea concerning countervailing duties on DRAM chips further adds to this congressional concern. Korea v. U.S. (DS296) (Panel February 21, 2005).

[33] "*Senate Slams China Currency Policy*," Wall Street Journal A2 (April 7, 2005).

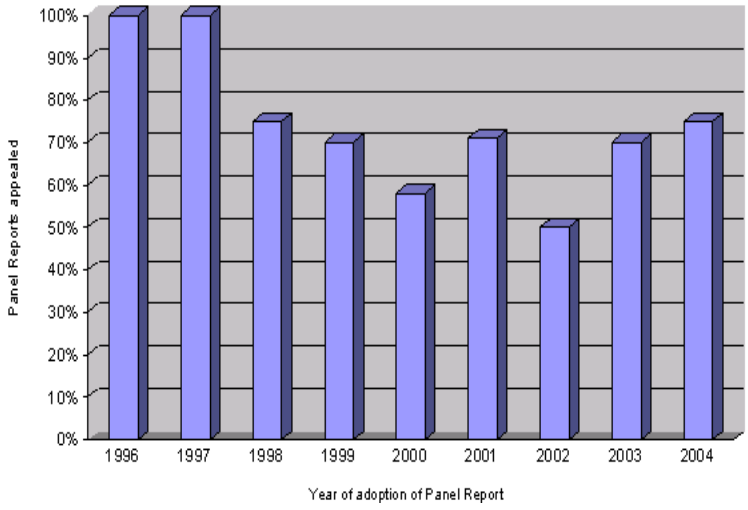
[34] The U.S. has started the process of applying safeguard measures as provided for in the China Accession agreement. "*U.S. Begins Steps to Limit Import Surge From China*," New York Times (April 5, 2005).

[35] Brazil v. U.S. (Panel WT/DS267/R) (September 8, 2004). The Appellate Body upheld the panel report with minor modification in early 2005. WTO/DS/267/AB/R (March 3, 2005). In response to this decision a U.S. representative stated, "Negotiation, not litigation, is the most effective way to address distortions in global agriculture," "*WTO Backs Ruling on U.S. Cotton Programs*," Washington Post E3:1 (March 4, 2005).

[36] Brazil v. EU (Panel WT/DS266/R) (October 15, 2004). The Appellate Body fully upheld the panel report and even found that the panel erred by relying incorrectly on the notion of "judicial economy" in not deciding additional issues. WTO/DS265/AB/R (April 28, 2005).



Statistics recently released by the Appellate Body examines the ten-year history of appealing panel reports and offers additional valuable insight.[37] The early years (1996 and 1997) saw an appeal rate of 100 percent. By 2004, the appeal rate dropped to 75 percent. (In 2002, the appeal rate was at 50 percent.)



This data indicates that parties are becoming more accepting of the panel decisions, perhaps indicating a greater acceptance of substantive trade rules, once they are more fully defined, and a greater acceptance of the legitimacy of the dispute resolution system. The data also indicated that the United States, the EU, Japan, India, Mexico and New Zealand appeared the most often in the appeals process.[38]

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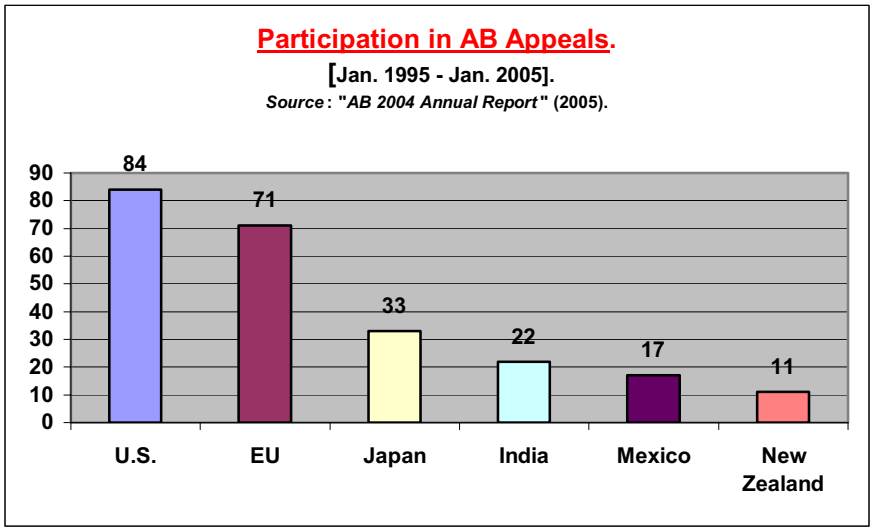
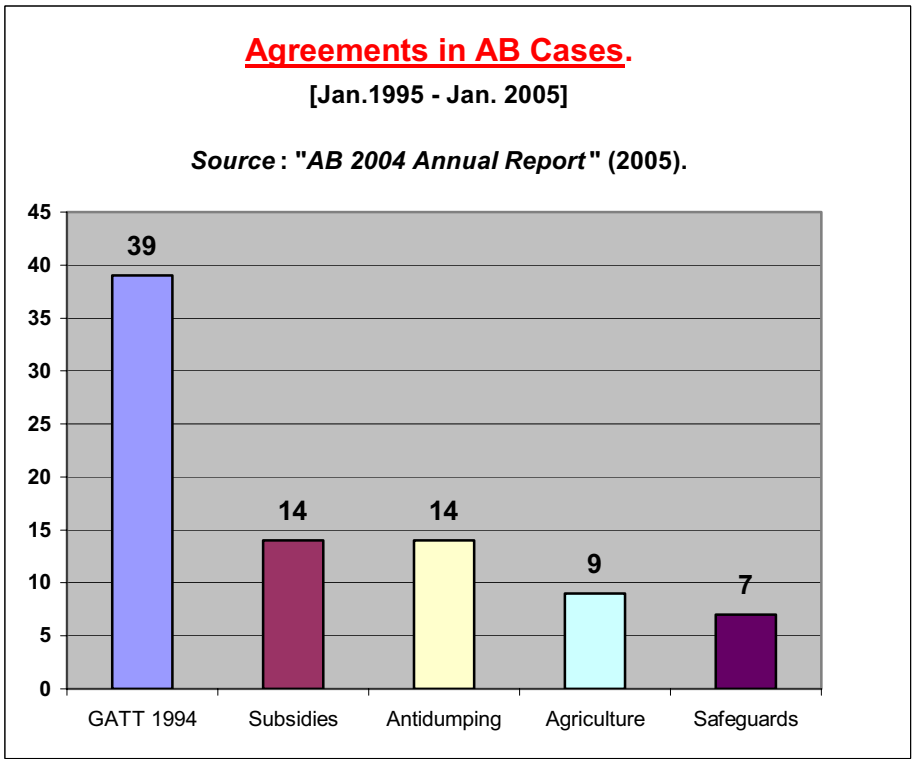
[37] "*AB Statistics*" in the *AB Annual Report 2004* (January 25, 2005) (WT/AB/3) also published online by the Appellate Body (2005) at http://www.wto.org/english/tratop_e/dispu_e/stats_e.htm.

[38] Id.



An assessment of the appeals and agreements relied upon in them, as indicated in the recent annual report of the DSB, disclosed that were primarily relied upon were those relating to goods, subsidies, antidumping and safeguards.[39]



[39] Id.

Observations & Suggestions:

When the dispute resolution system commenced on January 1, 1995, it was a historically innovative idea with a number of skeptics in the United States and throughout the global trading system. Ten years later, many of the concerns expressed in the preceding ten years have largely disappeared. The system has matured into an effective means of resolving trade disputes among a wide range of parties over ever-increasing types of issues. However, some concerns remain, especially in the United States Congress as the United States continues to face existing sanctions and threatened new ones. Those concerns, as well as lingering ones from other states using the system, should be alleviated in light of the following, which is based on the experience and data collected about the dispute resolution system:

- **Many countries from the developed world and the developing world use the system.**
- **Cases deal with a wide spectrum of issues from traditional trade matters (such as dumping and subsidies) to newer ones (involving Internet gambling, intellectual property rights, telecommunication and science-based trade actions).**
- **Few cases cause serious implementation problems.**
- **Even fewer cases lead to sanctions, and in those cases that lead to sanctions parties attempt to comply with decisions and at times do not even ask for or implement sanctions.**
- **The United States employs the system more than any other state and it wins most of these cases.**
- **Many cases are brought against the United States, and it wins a significant numbers. Moreover, its winning has increased.**
- **Litigation plays a large role in the United States' wins, as do consultations. In fact, more cases are resolved successfully at that stage, thus eliminating the need to go through the full litigation process.**
- **But to fully understand the system, we must learn more about the conduct and resolution of cases within the consultation process.**

What happens at consultations unfortunately remains unclear. The consultations are crucial to resolving disputes, but unlike litigation consultation outcomes are rarely made public – only if there is a mutually agreed solution under Article 3(6). It is most important to discover and to assess the full data concerning consultations. Only when this information is made public can a more accurate picture of the effectiveness of the WTO's dispute resolution system be ascertained. Unlike the cases that go through the full litigation process, which are eventually fully reported and disclosed, the results of consultation proceedings are much more difficult to unearth since they are often shrouded in diplomatic secrecy and only disclosed by parties in their discretion. Yet, a further assessment of the number of litigation cases with the larger number of consultation proceedings is essential.

An ongoing tension exists between the traditional diplomatic aspects of trade negotiations and the newer legalization of trade dispute resolution. In the area of trade dispute resolution, it is in the interest of all parties to extend the rule-based system. This extension can occur by strengthening the consultation process and increasing its transparency, at least toward favorable conclusions.

It is important to emphasize that the dispute resolution system does not only settle cases between the immediate parties, but it further develops rules for the entire system. States change their practices in response to a binding decision; all other states benefit directly from that change. Other states might change their own rules to avoid violating WTO disciplines if they could accurately determine what is resolved in consultations. As a result, both the United States and the global trading systems ability to

further resolve conflicts would grow. At a minimum, all consultations leading to resolutions must be made public so they can be used by all parties and benefit every state taking part in the system.

Some states view linking trade disputes as an abuse of the system. For example, the EU contends that the filing of the Airbus case by the United States was caused by the United States' loss in the *Foreign Sales Corporation Case*. The EU argues that cases should be decided on their own merits and should not to be filed merely to gain leverage in another case. Likewise, the United States contends the recent EU case seeking review of the 2004 corporate tax legislation enacted by the United States to comply with the earlier FSC/ETI decision was an improper linking of cases. However, such linkages between trade cases, as well as trade cases and non-trade issues (for example, related foreign policy concerns), should not be viewed necessarily as an abuse of the system. In early January 2005, after filing initial pleadings, the EU and the United States decided to forego litigation in the Airbus-Boeing dispute and resort to international commercial diplomacy outside of the WTO framework.

Time periods governing the litigation process within the WTO are short. Raising related issues within this context can result in a prompt resolution. Domestic litigation strategy has always included linkages between various issues involving private parties. Given the premise that resolving outstanding trade issues is the objective of the WTO, broadening the ability of states to resolve inter-related issues is an important goal whether they be trade or non-trade related (such as possible concerns over competition regimes and environmental matters). This approach expands rather than restricts the scope of dispute resolution in the trade arena and closely related matters of international relations generally.

States should also have a wide discretion whether to file cases. This discretion is a hallmark of any mature legal system. For example, the United States refused in November to file a WTO complaint concerning China's currency regulation. On the other hand, taking a questionable action and then defending a "losing case" sometimes has a certain merit. While some might view it as an abuse of the system, it serves a greater purpose: it allows the losing state to show domestic interest groups a good-faith attempt to defend its position in advance of modifying it to conform to WTO disciplines. Thus, using the WTO as cover in order to make necessary domestic changes. To a certain extent this can be said of President Bush's use of safeguard measures on steel in 2002-2004 and his quick compliance with an adverse decision[40].

Conclusion.

A close examination of the WTO's record for dispute resolution should allay the fears expressed since its inception. The system's wide usage and acceptance, when implementation was required and in the few cases where sanctions were imposed, show it effectively addresses the most critical issues of international relations today. The system supports a rapidly globalizing system with great promises for resolving disputes concerning a growing range of global trade issues far beyond those that were known just ten years ago.[41] The United States should strengthen the global dispute resolution system to further its own interest in fostering a rule-based trading system with the intent of expanding such an approach as trade incorporates new issues.

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[40] EU v. U.S. (WT/DS212). (AB January 8, 2003).

[41] "The record of compliance has encouraged countries to become ever bolder in the disputes they refer to the WTO, reaching further down into politically sensitive issues of domestic taxation, regulatory and environmental issues." *See also*, "*Tough Decisions Ahead on World Trade Rules*," Financial Times (December 31, 2004). However, the future og globalization if far for ensured. Ferguson, "*Sinking Globalization.*" Foreign Affairs (March / April 2005).

Since post-World War Two, trade has involved the shipping of goods and commodities between countries. The vision of lowering cargo into the hulls of ships is a fairly accurate characterization of early post-war trade. At that time issues of trade law primarily involved tariffs, quotas, dumping and export subsidies. How limited these issues seem today. Global trade over the last sixty years has evolved quickly from containerization to bits and bytes over the Internet. Global trade today has moved from trade in goods to trade in services, such as financial services, information technology and telecommunications.

Newer issues of law have arisen concerning non-tariff barriers (such as market access restrictions and commercial bribery) and a host of newer ones traditionally not considered related to trade law at all such as intellectual property rights, currency restrictions, direct investment, environmental, labor, corporate governance and antitrust. As technology has rapidly developed, new areas of trade relations have evolved, such as E-commerce and Internet trade. Each of these raises unique and novel questions in a multi-jurisdictional trading environment.

Global trade is the arena for entrepreneurial enterprises of the 21st century to strike out and to generate wealth for themselves and the global economy. Global trade has "transformational power" essential for economic growth, development of civil society, and peaceful international relations.[42] Global trade serves as the principal engine of global change when there is a leveled playing field.[43] The WTO serves as the enhancer and enabler of global trade and as multiplier agent for the entrepreneurial and commercial drive of individuals and companies globally. The WTO dispute resolution system provides that mechanism for the global system. This system is a critical aspect of foreign affairs and international relations today.

The challenge is now for the United States and the global system to further develop rules and institutions to manage the expansion of global trade and to provide better global governance while recognizing the one principle that should guide their efforts: A stronger dispute resolution system is clearly in everyone's best interest. A stronger global institution is necessary to better manage economic globalization. The great success of the dispute resolution system reaffirms the earlier American vision. This success reaffirms the traditional reliance of American diplomacy of actively engaging in global institutions. Only through visionary leadership by the United States can the global community successfully confront the critical issues posed by economic globalization. Greater trade today is the foe to greater disorder and a friend to greater prosperity.

> **"There is no doubt that this jurisprudence will have an effect on general international law broader than the borderlines of the WTO system …. It is self evident that the better informed are diplomats, government officials and legislators on the fundamentals of international dispute settlement the better."**
> **……. The Future of the WTO. 51, 81 (WTO Consultative Board, 2005).**

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[42] **" Overview," in the 2005 Trade Policy Agenda / 2004 Annual Report of the USTR 19-20 (2005) at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Trade_Policy_Agenda/asset_upload_file454_7319.pdf.**

[43] **"*When you have to make things with your hands and then trade … it inevitably broadens imagination and increases tolerance and trust*." T. Friedman, The World is Flat – A Brief History of the Twenty-First Century 462 (2005).**

Important Summaries and Statistical Studies of WTO Cases.	
"*Snapshot of WTO Cases Involving the United States*." (January 14, 2005) (by USTR).	**http://www.ustr.gov/assets/Trade_Agreements/Monitoring_ Enforcement/Dispute_Settlement/WTO/asset_upload_file287_5696.pdf**
"*Dispute Settlement Update*." (January 14, 2005) (by USTR).	**http://www.ustr.gov/assets/Trade_Agreements/Monitoring_ Enforcement/Dispute_Settlement/asset_upload_file881_5697.pdf**
"*Update of WTO Dispute Settlement Cases*."(October 14, 2004) (by the Secretariat).	**http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm**
"*Overview of the State of Play of WTO Disputes*." WT/DSB/37/Add 1 (December 3, 2004) (Addendum to *DSB Annual Report for 2004).*	**http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#dsb**
"*Appellate Body Statistics*." In AB Annual Report (2004) (Jan. 2005)	**http://www.wto.org/english/tratop_e/dispu_e/wt_ab3_e.doc**
"*Chapter VI -- The WTO Dispute Resolution System*," Future of the WTO – Addressing Institutional Changes in the New Millennium. (2005) (WTO report).	**http://www.wto.org/english/thewto_e/10anniv_e/10anniv_e.htm#future**

U.S. -- Won / Loss in WTO / DSU (January 1, 1995 – January 1, 2005)

Case	Body / Date	Subject	Pl. Won	Pl. Loss	Def. Won	Def. Loss
Won as Complainant [Country - Issue]						
Japan - Liquor Taxes	AB 1996	Agriculture	x			x
Canada - Periodical Imports	AB 1997	Entertainment	x			x
EU - Banana Imports	AB 1997	Agriculture	x			x
…. Compliance Procedure			x			x
EU - Beef (Hormones)	AB 1998	Agriculture	x			x
India - Patent (Drug & Agriculture)	AB 1998	Pharmaceuticals	x			x
Argentina - Textiles Tax	AB 1998	Textiles	x			x
Indonesia - Automobile	AB 1998	Manufacturing	x			x
Korea - Liquor Taxes	AB 1999	Agriculture	x			x
Japan - Agriculture (Testing)	AB 1999	Agriculture	x			x
Canada - Dairy Sector	AB 1999	Agriculture	x			x
…. Compliance Procedure			x			x
Australia - Auto Leather	Panel 1999	Manufacturing	x			x
…. Compliance Procedure			x			x
India - Import Licensing (Textiles)	AB 1999	Textiles	x			x
Mexico - A/D (Corn Syrup)	Panel 2000	Agriculture	x			x
…. Compliance Procedure			x			x
Canada - Patent Law	AB 2000	Intellectual Prop.	x			x
Korea - Beef Imports	Panel 2000	Agriculture	x			x
India -- Auto Sector	AB 2002	Manufacturing	x			x
Japan - Apples	AB 2003	Agriculture	x			x
Mexico - Telecom	Panel 2004	Telecommunications	x			x
Loss as Complainant [Country - Issue]						

EC - Computer Classification	**AB 1998**	**Customs / High Tech**	**x**	**x**			
Japan - Film Imports	**Panel 1998**	**Film**	**x**	**x**			
Korea -- Airport Procurement	**Panel 2000**	**Gov't Procurement**	**x**	**x**			
Canada - Wheat	**AB 2004**	**Agriculture**	**x**	**x**			
Won as Respondent [Country - Issue]							
EC - Section 301 ("Retaliation")	**Panel 2000**	**Trade Law**			**x**	**x**	
India - Shrimp Turtle (Compliance)					**x**	**x**	
Canada - Subsidies (Exports SAA)	**Panel 2001**	**Subsidies**			**x**	**x**	
India - Steel	**Panel 2002**	**Steel**			**x**	**x**	
EU - German Steel (CVD)	**AB 2002**	**Steel**			**x**	**x**	
Canada - 129[c]1 of URAA	**Panel 2002**	**Trade Law**			**x**	**x**	
India - Textiles (Rules of Origin)	**Panel 2003**	**Textiles**			**x**	**x**	
Japan - Sunset Review (A/D)	**AB 2003**	**Steel**			**x**	**x**	
Canada - Lumber (Final)(CVD)	**AB 2004**	**Lumber**			**x**	**x**	
Canada – Lumber (Final) (A/D)	**AB 2004**	**Lumber**			**x**	**x**	
Loss as Respondent [Country - Issue]							
Venezuela) - Gasoline	**AB 1996**	**Oil / Gasoline**			**x**		**x**
Costa Rica - Textiles (Cotton)	**AB 1997**	**Textiles**			**x**		**x**
India - Textiles (Wool Shirts)	**AB 1997**	**Textiles**			**x**		**x**
India - Shrimp / Turtle (Fisheries)	**AB 1998**	**Environment**			**x**		**x**
Korea - Semiconductors (DRAMS)	**Panel 1999**	**Computer Chips**			**x**		**x**
EU - U.K. Steel	**AB 2000**	**Steel**			**x**		**x**
EC - Sec. 110[5] Copyright Act (Music)	**AB 2000**	**Entertainment**			**x**		**x**
Japan - 1916 A/D Act.	**AB 2000**	**Trade Law**			**x**		**x**
EU - Bonding Requirements (Customs)	**AB 2001**	**Trade Law**			**x**		**x**
EC - Wheat Glutten (Safeguards)	**AB 2001**	**Agriculture**			**x**		**x**
Korea - Stainless Steel	**Panel 2001**	**Steel**			**x**		**x**
New Zealand - Lamb Meat	**AB 2001**	**Agriculture**			**x**		**x**
Japan - Steel	**AB 2001**	**Steel**			**x**		**x**
Pakistan - Cotton Yarn (Safeguards)	**AB 2001**	**Textiles**			**x**		**x**
EC - Section 211 of 1998 Trade Act.	**AB 2002**	**Trade Law**			**x**		**x**
EU - Foreign Sales Corp. (CVD)	**AB 2002**	**Tax & Trade Law**			**x**		**x**
…. Compliance Procedure					**x**		**x**
Korea - Lind Pipe (Safeguard)	**AB 2002**	**Steel**			**x**		**x**
Canada - Lumber (Preliminary)	**Panel 2002**	**Steel**			**x**		**x**
EU - Steel (CVD)	**AB 2003**	**Steel**			**x**		**x**
Australia / EC Offset Act, 2000 ("Byrd")	**AB 2003**	**Trade Law**			**x**		**x**
EU - Steel (Safeguards) ("Bush" Tariffs)	**AB 2003**	**Steel**			**x**		**x**
Canada - Softwood Lumber (Injury)	**AB 2004**	**Lumber**			**x**		**x**
Argentina – A/D	**AB 2004**	**Steel**			**x**		**x**
Brazil – Subsidies (cotton)	**Panel 2004 (appealed)**	**Agriculture**			**x**		**x**

Antigua & Barbuda (E-Gambling)	**Panel 2004 (appealed)**	**Entertainment**	**x**	**x**

***Includes compliance procedures.**
Source: ***"USTR Snapshot …" (2005) and "WTO Update" (2004).***

GLOBAL GOVERNANCE OF E-COMMERCE & INTERNET TRADE.

by Stuart S. Malawer

http://www.vsb.org/publications/valawyer/june_july01/malawer.pdf

INTRODUCTION

We are still in the early stages in meeting the challenges to traditional territorially based political and legal systems posed by inherently borderless communications and Internet technologies. The challenge confronting the global trading system is to develop an international structure that supports growth of global electronic commerce for all. This critical effort involves creating a structure or regime that precludes dysfunctional international, national or regional actions that would create new trade barriers or keep old ones in place. Robert Zoellick, the new United States Trade Representative (USTR), recently stated:

> **"*To promote an effective international economic system, we should also strive for creativity in governance. In the modern, wired world, government will become increasingly ineffective if it fails to keep up. …This logic of governance should extend to the rules of our trading system. To enable businesses, economies, and societies to change to meet the challenges of new circumstances, our trading rules should be flexible enough to respect different national approaches while consistently challenging actions that discriminate against others and thwart openness with protectionist barriers."* (Speech, "*The United States, Europe, and the World Trading System,"* (April 15, 2001).**

This article reviews recent developments and highlights concerning global governance of e-commerce and Internet trade. In addition to identifying and examining recent actions of the United States and major global institutions, this article concludes that there is now a growing awareness that meaningful global action is required. Some preliminary actions have been taken, but much work remains. Several suggestions also will be made to ensure that the global structure that emerges fully supports sustaining dynamic growth of e-commerce and Internet trade. This global structure needs to protect and to build upon the entrepreneurial and innovative foundation of the Internet.

In particular, this article summarizes the recent actions and developments, from 1998 to early 2001, taken by the United States, the European Union, and major international institutions concerning global governance of e-commerce and Internet trade. It begins with a look at the United States and the European Union, and then addresses developments at the World Trade Organization (WTO), the

World Intellectual Property Organization (WIPO), the International Telecommunications Union (ITU), the Organization for Economic Cooperation and Development (OECD), and the U.N. Commission for Trade and Development (UNCTAD).

UNITED STATES

In January 2001, the Clinton Administration released the third annual report on e-commerce entitled "*Leadership for the New Millennium, Delivering on Digital Progress and Prosperity*." While earlier reports focused on more general issues involving e-commerce and trade, this report explored the domestic and digital divide. In releasing the report former President Clinton recognized that the information technology sector was responsible for almost one-third of recent U.S. economic growth. Furthermore, the IT sector was responsible for increasing U.S. productivity and global competitiveness. The second annual report, "*Towards Digital Equality*" (1999), enumerated major policy challenges confronting the administration. These challenges included:

- **Establishing meaningful consumer protection;**
- **Promoting broadband deployment;**
- **Engaging developing countries in e-commerce; and**
- **Recognizing that small and medium-sized enterprises are crucial to our continued economic success.**

The United States, in continuing its diplomatic effort, concluded a number of *bilateral agreements or Joint Statements* with individual countries concerning global e-commerce. This new and innovative approach attempts to further establish a common agreement with trading partners on basic U.S. policy positions and principles concerning the evolving global governance and development of the Internet. Agreements have been concluded with Chile (2000), Columbia (2000), the Philippines (2000), the European Union (2000, 1997), the United Kingdom (1999), Egypt (1999), Australia (1998), France (1998), Ireland (1998), Japan (1998), Netherlands (1997), and Jordan. As provided in the *U.S.-U.K. Joint Statement,* the provisions typically proclaim *general principles* that are the cornerstone of U.S. policy on global e-commerce. For example:

- **The private sector should lead in the development of electronic commerce and in establishing business practices.**
- **Governments should ensure that business enjoys a clear, consistent and predictable legal environment to enable it to do so, while avoiding unnecessary regulations or restrictions on electronic commerce.**
- **Governments should encourage the private sector to meet public interest goals through codes of conduct, model contracts, guidelines, and enforcement mechanisms developed by the private sector.**
- **Government actions, when needed, should be transparent, minimal, non-discriminatory, and predictable to the private sector.**
- **Cooperation among all countries, from all regions of the world and all levels of development, will assist in the construction of a seamless environment for electronic commerce.**

As in the *U.S. - U.K. Joint Statement*, they often identify *specific issues* including: tariffs; taxes; electronic authentication / electronic signatures; privacy; open access; information security; electronic payments; intellectual property rights; and consumer protection.
The United States issued a *series of important annual reports* concerning United States and global trade. The annual report on telecommunications is of particular importance, since

telecommunications provides infrastructure for e-commerce transactions. The USTR performs an annual review of foreign compliance with telecommunications trade agreements under Section 1377 of the 1988 trade act. Robert Zoelick has stated:

> **"*Telecommunications trade agreements, particularly in the World Trade Organizaton [Basic Telecommunications Agreement of 1998], have been a driving force in opening up world markets to high-technology trade and investment. These agreements have sparked increased competition and dramatic growth in global networks …. Vigorous monitoring and enforcement of these trade agreements is critical ….*" (Press Release, April 2, 2001).**

- **Note: Internet Corporation for Assigned Names and Numbers (ICANN).**

In attempting, in part, to formulate a governing structure for the Internet the United States created a non-governmental structure. The U.S. government created the *Internet Corporation for Assigned Names and Numbers (ICANN),* a non-profit, private sector corporation. ICANN has a diverse international representation involving government, private sector, and consumer interests. ICANN was established to assume responsibility for IP (Internet Protocol) space allocation and domain name system management, among other responsibilities. Recently, it authorized new top-level domain names (.biz and .info). ICANN is dedicated to preserving operational stability of the Internet by providing a formal structure for the inclusion of domestic and global interests as the technical coordinating body for the Internet. While conflict has surrounded the substantive decisions made and its organizational structure, ICANN's privatized approach is unique and somewhat successful. ICANN's creation provides a hint of what direction the future governance of the Internet and e-commerce may take, one involving more private and government coordination.

Practitioner's Research Note: U.S. Trade Law & Policy.

Two annual reports of the USTR on global trade and the United States are of great usefulness: "*2001 National Trade Estimate Report on Foreign Trade Barriers*" (USTR, 2001) and "*2001 Trade Policy Agenda & 2000 Annual Report of the President of the United States on the Trade Agreements Program*" (USTR, 2001). In addition, the joint publication on trade law, "*Overview & Compilation of U.S. Trade Statutes*" (GPO 1997), by the House Ways and Means Committee and the Senate Finance Committee is invaluable. It provides an outstanding compilation of U.S. laws relating to U.S. trade.

EUROPEAN UNION (EU)

***The U.S.-EU Statement on Data Privacy* was issued last year (May 31, 2000). This agreement continues the often-bitter dialogue concerning *the safe harbor privacy arrangement.* That agreement relates to U.S. firms complying with requirements of the *European Directive on Data Protection* for transfers of data from the EU to a third country (for example, the United States). While the safe harbor arrangement is to become effective this summer, only a few large American firms have agreed to its terms. This remains an important issue in U.S. – EU relations.**

One of the most important bilateral statements on global e-commerce concluded by the United States is one with the European Union, "*Building Consumer Confidence in E-Commerce and the Role of Alternative Dispute Resolution*" (December 2000). Building on the *U.S.-EU Joint Statement on Electronic Commerce,* issued in December 1997, the U.S. and the EU focused concern more on the

issue of the consumer. Specifically, it addressed developing self-regulatory codes of conduct and alternative means of dispute resolution to increase consumer confidence in e-commerce. This agreement relied on the work of the Organization for Economic Cooperation and Development (OECD) and its consumer guidelines issued in December 1999.

Several pieces of EU legislation relating to *jurisdiction* have raised concerns with the United States over Internet litigation. Most recently, *EC Regulation (No. 44/2001)*, dated Dec. 22, 2000, which governs jurisdiction and enforcement of judgments, raises significant concerns. While not an international action between the United States and the EU, this and other directives have a direct impact on the way the Internet develops and on U.S. firms. For the United States these actions indicate a somewhat less cooperative effort that has the potential of raising barriers to greater electronic trade.

The European Union has addressed e-commerce in a series of major reports over the last few years. For example, the EU issued the *Bangemann Report of 1994* and the *Bangemann Charter* in 1998. Each report discussed the global information society and the needs to strengthen international coordination. In 1997, the EU issued a report, entitled *"European Initiative in E-Commerce,"* which discussed some very basic and general topics including the e-commerce revolution, access to e-commerce (the telecommunications liberalization), and creating favorable regulatory and business environments.

WORLD TRADE ORGANIZATION (WTO).

"*The Declaration of Global E-Commerce*," issued in 1998, is the most important item to come from the WTO. This ministerial declaration proclaimed a need for the establishment of a work program and a moratorium on new Internet restrictions. Subsequently, in 1998, a work program was established. The Council on Services was requested to examine the treatment of e-commerce under the GATS especially as to modes of supply. The Council on Goods was to examine e-commerce relating to GATT 1994, especially as to market access and valuation. The Council on Intellectual Property was to examine the intellectual property issues relating to e-commerce. In fact, various progress reports of the councils have been submitted recently to the General Council. The United States was particularly pleased by the strong support that the General Council gave to key principles of e-commerce in December 2000. However, the WTO is only now moving forward with its efforts concerning e-commerce and the Internet.

The initial effort by the WTO to start to understand the benefits and challenges concerning the use of the Internet for commercial purposes appeared its 1998 special study, "*Electronic Commerce and the World Trade Organization*." Various policy issues were identified including: the legal and regulatory framework for Internet transactions; security and privacy; taxation; access to the Internet; intellectual property questions; and regulation of content.

The main issues confronting the WTO are defining the types of e-commerce and Internet transactions that fall within its different trade agreements; choosing which agreements are applicable and determining what modifications or changes must be implemented. The key question facing the WTO is this: Should a specific trade agreement related to e-commerce be completed or should the existing ones be made to work? (The latter sentiment, favored by the United States, is known as "technology neutrality.") Many states support the use of the WTO to deal with trade issues generally because of its binding dispute resolution system.
It should be noted that the *International Trade Center*, a joint subsidiary organ of the WTO and the U.N. (UNCTAD), recently has been engaged in promoting e-commerce as part of its mandate to

provide technical cooperation and trade promotion for developing countries. While not a policy organ, it has become more a more important player in cooperating with the WTO and representing the interests of less developed countries.

WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO).

Last year, the WIPO published *Primer on Electronic Commerce and Intellectual Property* (2000). This report assessed the important issues of e-commerce and intellectual property rights (copyright, trademark and patents); further, it described the challenges facing developing countries. In 1999, in another early effort, Dr. Kamil Idris, the Director-General of WIPO, suggested the adoption of the "*WIPO Digital Agenda,*" which was subsequently approved by the U.N. General Assembly. The main points were the following:

- **The importance of broadening the participation of developing countries in e-commerce.**
- **The need to adjust the international legislative framework to foster e-commerce. In particular, adapting broadcasters' rights to the digital era and fostering international protection of databases.**
- **The implementation and further development of rules concerning domain names (*The Report on Domain Name Process*) and the resolution of conflicts between these names and intellectual property rights.**
- **The development of international rules concerning Online Service Providers (OSP).**
- **The adjustment of the international framework for serving the public interest in the global economy.**

In 1999, WIPO finalized its first report on issues relating to Internet domain names and intellectual property rights (namely trademarks) and dispute resolution. The report was made available to the *Internet Corporation of Assigned Names and Numbers* (ICANN). A system was established and WIPO now assists in arbitrating domain name disputes under rules adopted by ICANN, based upon the recommendations made by WIPO in its report. *The WIPO Arbitration and Mediation Center* is a hugely successful system that assists in the resolution of domain name disputes. However, a number of issues were not discussed or addressed in the 1999 report, such as, tradenames and geographical indications. A new series of consultations are being held and a second report is expected by late 2001. The center is currently working to develop a set of guidelines specifically tailored to meet the needs of the application service (ASP) industry. It is also conducting an assessment of "keyword" disputes.

ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD)

In December 2000, the OECD released *"Guidelines for Consumer Protection in the Context of E-Commerce,"* which sets out the core characteristics of effective consumer protection for online business-to-business transactions. In 1998, the OECD held a conference in Ottawa called *"A Borderless World – the Potential for Global E-Commerce,"* which set the tone of its subsequent activities. The OECD agreed to move forward on studying the taxation of electronic commerce and is expected to publish a progress report in 2001. The earlier report, "*The Economic and Social Impacts of Electronic Commerce,*" released in 1998, began the OECD's efforts on e-commerce. It was prepared as background for the Ottawa Conference. More recent conferences have been held in 1999 on e-commerce and in 2001 on emerging markets and e-commerce. The OECD conducts a huge amount of research on numerous topics relating to e-commerce, information society and telecommunications. The OECD's aim, in part, is to produce agreements that can be accepted by trading countries.

INTERNATIONAL TELECOMMUNICATIONS UNION (ITU)

The ITU is the organization that coordinates global telecom networks and services. It is composed of governments and private sector members. In 1998 the ITU launched the "*Electronic Commerce - Developing Country Project*" (EC-DC) to assist developing countries in establishing the necessary infrastructure and pooling of resources to foster e-business transactions. In cooperation with the World Trade Center network's global infrastructure, this EC-DC effort is aimed at bridging the international digital divide and helping less developed countries to significantly enhance their communications and economic development. The ITU is active in the development of standards for electronic commerce and wireless communications. Recently, the ITU decided to proceed with the preparation of a "World Summit on Information Society" (WSIS), to be held in 2003. The activities of the ITU are essential in providing the infrastructure for global e-commerce.

U.N. COMMISSION FOR TRADE AND DEVELOPMENT (UNCTAD)

UNCTAD adopted an important resolution in January 2001 concerning the least developed countries (LCDs) and e-commerce. It recognizes that the LDC's have constraints keeping them from participating in e-commerce. It suggests several international policies to address this situation. The UNCTAD effort to address the international digital divide with a focus on the least developed countries is belated. Last year, UNCTAD published an important study entitled, "*Electronic Commerce and Development*" (2000). This report puts forward an important message that economic development must come through the participation of private sector interests in the LDC's, but the LDC's need to attract them by taking appropriate public policy actions.

- **Note: Other International or Regional Institutions.**

Other international and regional institutions are active in various aspects of e-commerce and trade. For example, the *United Nations Commission on International Trade Law* (UNCITRAL) produced a model law, "*The UNCITRAL Model Law on Electronic Commerce*," in 1996, with revisions in 1998. This model law is intended for adoption by developing countries in the interest of harmonizing national law in order to promote economic development. Its UNCITRAL's Working Group on Electronic Commerce is continuing its work. *Asia-Pacific Economic Cooperation* (APEC) established a working group of experts in 1999. In March 2001, APEC issued *"A BLUEPRINT FOR ACTION ON ELECTRONIC COMMERCE."* The Hague Conference on Private International Law, an intergovernmental organization whose purpose is to work for the progressive unification of the rules of private international law, is continuing its negotiations concerning adoption of "*The Convention on Jurisdiction and Foreign Judgments."* These negotiations *c*over important issues relating to litigating Internet transactions in foreign jurisdictions.

- **Note: Research & Reference Note.**

On my web site (http://www.US-TradeLaw.com) for my class "*U.S. Law & Global Trade,"* at George Mason University, there are a series of PowerPoint Presentations on various international institutions and global e-commerce. These presentations are by officials from these institutions. They may be found under "Global E-Commerce / PowerPoints" at http://www.us-tradelaw.com/assignme.htm.

CONCLUSIONS

In my last article for the *Virginia Lawyer (*June / July 1999), entitled *"Internet Commerce and Trade Policy,"* I offered several observations:

- **The WTO should be the focus of global efforts to develop favorable trade law concerning e-commerce and Internet trade;**
- **The U.S. has general acceptance for its policy of less regulation is best;**
- **The international legal and institutional framework confronting Internet trade today needs to adapt quickly to ensure a market-driven approach and global growth.**

In light of the recent developments in global trade relations noted above, I offer the following additional observations:

- **The WTO should continue to be the focus of U.S. actions in fostering favorable trade laws concerning electronic commerce. However, the WTO's actions, since 1998, have been very minimal. There is still disagreement over which trade agreement(s) should be applicable to particular e-commerce transactions or if an entirely new one needs to be formulated.**
- **There seems to be a growing acceptance globally of the U.S. view that less regulation is best. (Witness the newer activities of U.S. bilateral agreements relating to e-commerce with our trading partners and the newer activities of UNCTAD and the ITU concerning bridging the "international digital divide.")**
- **The international legal and institutional framework relating to the Internet needs to adapt quickly. Advances in global e-commerce are continuing greatly while the legal-political structure is still groping for direction and coherence. (Witness the growing dispute between the United States and the EU dealing with litigating consumer actions over Internet transactions and the continuing debate over privacy of data.) If there is a significant delay in fashioning a global approach (which may very well be some form of greater coordination of regional and national legislation), then the threat of dysfunctional national and sub-national legislation may come to pass and negatively impact the development of global e-commerce.**

Pascal Lamy, the EU Commissioner for Trade, stated recently:

> ***"Trade governance is but one aspect of global governance and the WTO is but one of the global actors. But as a relatively (and I underline relatively) strong and well functioning player, the WTO is often perceived as a broader governance tool, one that should take on board other issues, and become a central global governance machine. … It is not the right response to all global concerns. Globalization requires improved governance also in a range of other policy areas."*** **(Speech, "*Trade Policy and Governance in the Global Economy*," April 10, 2001).**

But in the area of e-commerce and trade, the World Trade Organization is the obvious leader. The World Trade Organization's crucial mandate is to manage trade disputes and develop new trade rules. The Internet is having an historical impact on global trade. Such an impact will be even more dramatic in the future. The World Trade Organization must take the lead in addressing the trade issues relating to Internet trade. The WTO needs to be creative. However, parallel efforts and coordination with other institutions are required. The efforts of WIPO concerning intellectual property and the ITU concerning telecommunication infrastructure are obviously of great

importance, but must be fully coordinated with the WTO. It is up to the leaders of the trading nations to further the initial actions springing up. A network of entrepreneurs commercially developed the Internet. Creating a viable international institutional and legal structure to govern its activities and to protect and foster it will only further ensure its success and that of global e-commerce. This will be good for global trade, economic development -- and peaceful relations.

E-COMMERCE SITES of INTERNATIONAL INSTITUTIONS	
U.S. Government (e-commerce site)	**http://www.ecommerce.gov/**
…. Bilateral Statements	**http://www.ecommerce.gov/joint_statements.htm**
… U.S.T.R (E-commerce Site)	**http://www.ustr.gov/sectors/e-commerce.shtml**
… U.S.T.R. (International Sites)	**http://www.ecommerce.gov/internat.htm**
… U.S.T.R. (Telecommunications)	**http://www.ustr.gov/sectors/industry/telecom.shtml**
… U.S.T.R. (U.S. Government Sites)	**http://www.ecommerce.gov/governme.htm**
Asia-Pacific Economic Cooperation (APEC)	**http://www.apecsec.org.sg/**
European Union	**http://europa.eu.int/ISPO/ecommerce/**
… Link to International Initiatives	**http://europa.eu.int/ISPO/ecommerce/multilateral/organisations.html**
Hague Convention on Private International Law	**http://www.hcch.net/**
… E-Commerce	**http://www.hcch.net/e/workprog/e-comm.html**
International Trade Center (WTO / UNCTAD)	**http://www.intracen.org**
Internet Corporation for Assigned Names and Numbers (ICANN)	**http://www.ICANN.org**
International Telecommunications Union (ITU)	**http://www.itu.int/ECDC/otherlinks.htm**
Organization for Economic Cooperation & Development (OECD)	**http://www.oecd.org/dsti/sti/it/ec/**
… E-Commerce	**http://www.oecd.org/dsti/sti/it/ec/index.htm**
UN Commission on International Trade Law (UNCITRAL)	**http://www.uncitral.org/**
UN Conference on Trade & Development (UNCTAD)	**http://www.unctad.org/ecommerce/**
World Trade Organization (WTO)	**http://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm**
World Intellectual Property Organization (WIPO)	**http://ecommerce.wipo.int/**
ADDITIONAL TRADE SITES	
"Overview & Compilation of U.S. Trade Statutes." (GPO, 1997).	**http://www.gpo.ucop.edu/catalog/blue_book.html**
"WIPO Primer on Electronic Commerce & Intellectual Property." (2000)	**http://ecommerce.wipo.int/primer/index.html**
"2001 Trade Barriers Report." (2001, USTR)	**http://www.ustr.gov/html/2001_contents.html**
"2001 Trade Policy Agenda Report." (2001, USTR)	**http://ustr.gov/reports/2001.html**
"Global Business Dialogue for E-Commerce."	**http://www.gbd.org**
…. Trade	**http://gbd.org/ie/2000/trade.html**
"International Trade Relations."	**http://www.InternationalTradeRelations.com**
"Legal Aspects of International Trade."	**http://www.ita.doc.gov/legal/**
"U.S. Law & Global Trade."	**http://www.US-TradeLaw.com**
"World Trade Online."	**http://www.insidetrade.com/**

TRADE & TAX: Is the U.S. the Enron of Trade?

By STUART S. MALAWER

http://www.global-trade-law.com/Daily%20Record%20(March%2023,%202002)%20(FSC.Enron%20article).htm

Since early this year we have witnessed daily revelations of manipulation of accounting standards by major U.S. corporations in the technology, telecommunications and financial sectors. For example, off-the-books and often offshore entities have been used to hide debt and conduct capacity swaps, thus allowing firms to book millions in profits without any money ever changing hands. These actions have resulted in contested gains and substantial payouts for executives and board members.

However, at the same time, and unbeknownst to much of the American public, the World Trade Organization recently reaffirmed an earlier set of decisions concerning the Foreign Sales Corp. and its replacement legislation. These decisions declared invalid the continuing manipulation of corporate income tax laws by the United States in violation of our global trade obligations. These U.S. actions have resulted in billions of dollars of tax savings for the largest U.S. firms.

The United States now faces its largest trade sanctions ever — in excess of $4 billion — to offset the export subsidies deemed illegal by the World Trade Organization. The WTO is about to set the final amount of sanctions later this spring. This trade dispute has immense implications for U.S. corporations and U.S. trade policy.

Specifically, this situation calls into question the fairness of U.S. corporate taxation of global export transactions. Moreover, it raises the general issue of the fairness of U.S. foreign income taxation in this era of global trade — fairness to both U.S. firms and foreign competition.

Setting aside issues of questionable executive ethics and corporate governance in Enron and related cases, the central issue raised is the manipulation of accounting standards by corporations, which have been promulgated by the private sector.

The Foreign Sales Corporation/Export Tax decisions essentially declare that the United States manipulated its tax provisions to unfairly enrich the largest U.S. corporations. Specifically, the contention is that the United States designed its corporate income tax law to benefit its largest multinationals — causing billions of dollars of damage to foreign firms in contravention of U.S. legal obligations under various key WTO agreements.
The United States is accused of violating the Subsidies Code and the cardinal principle of the GATT, known as the "National Treatment Principle," which prohibits favoring domestic products over foreign imports, and the prohibition against export subsidies.

The United States today still refuses to bring its legislation into conformity with the decisions of the trade tribunal in Geneva. Recently, President Bush had contested even the size of possible damages.

Are the trade actions of the United States in any way comparable to the ever-expanding corporate accounting debacle in the U.S. financial markets? Probably not, but maybe. Enronitis involves the use of off-the-books and often offshore entities to avoid disclosing debt and inflating income.

In the case of U.S. export subsidy legislation, off-the-books and offshore entities are utilized to avoid reporting income. Are the tax-trade actions of the United States concerning export subsidies ultimately self-defeating by deprecating the legal rules of the global trading system? The United States has long championed this system, especially its dispute-resolution mechanism.

Background.

The United States adheres to a worldwide taxation system where it taxes the corporate income of a U.S. corporation regardless of whether it is earned inside or outside of the United States. Our trading partners do not have a worldwide taxation system.

In the United States a foreign tax credit is available to corporations to avoid double taxation on income earned abroad. Likewise, the United States taxes the domestic income of foreign corporations in the United States. But it does not tax the foreign-source income of such corporations, unless it is effectively connected with business within the United States.

The United States has periodically altered its tax legislation to maintain its illegal export subsidy, while consistently lambasting other nations for their use of tax and revenue legislation to avoid their WTO obligations.

In the 1980s and 1990s, the United States provided "tax deferral" for foreign sales corporations (FSC). This legislation allowed U.S. firms to establish offshore entities in foreign tax havens and to funnel their exports through them.

If done properly, there would be no income tax on their foreign sales transactions — in reality the exports from the U.S. manufacturer. These essentially paper transactions allowed parent corporations, such as Microsoft, Boeing and IBM, to escape taxation on these transactions. The legislation was intended by the Congress to promote U.S. exports and thus U.S. manufacturing.

In the mid-1970s, the older GATT declared the Domestic International Sales Corp. (DISC) an illegal export subsidy. To circumvent this condemnation, the United States repealed the DISC legislation and enacted the FSC legislation to provide similar assistance to U.S. firms.

Under the DISC legislation the sales subsidiary was required to be a domestic corporation. The subsequent FSC legislation attempted to meet the GATT's objection by allowing the sales corporation to move offshore.

Initially the European Union challenged the FSC. In 2000, the WTO Panel and Appellate Body reports, adopted by the Dispute Settlement Body, agreed with the European Union and declared the FSC legislation in contravention of U.S. trade obligations concerning export subsidies.

In late 2000, to meet the objections of the WTO, Congress replaced its FSC legislation with new legislation. The heart of this legislation was the "Extraterritorial Income Exclusion," which allows specific transaction-by-transaction allowance tax avoidance. Thus, it eliminates the necessity of using off-the-books and offshore entities.

The ETI legislation tries to keep in place a system that has been consistently under attack by our trading partners. It removes the FSC, but declares that on a transaction-by-transaction basis a U.S. firm may exempt certain types of extraterritorial income that qualifies as foreign trade income (QFTI) — namely income from exports.

The European Union considered this new legislation invalid, and it resubmitted the case to the original panel. A new report issued last year declared that the new legislation was still not sufficient.

The Appellate Body reviewed the report earlier this year and also declared that the legislation was not in conformity with the trade obligations of the United States. It said that the legislation provided an illegal export subsidy; that it was not justified as a means of avoiding double taxation; and that it violated the national treatment principle.

Global trade law & policy issues.

First, a general observation: Should the WTO get involved in issues of taxation? Would not it be better for the WTO to just stick to trade?

The answer to the latter question is a sound "no." But let me explain. It is true that the WTO should not have much to say about taxation. The WTO is the premier trade institution in the world. However, governments have historically used tax provisions for many business and economic reasons.

And when a government uses the tax code to promote a trade policy, then the WTO certainly has competence to review those domestic rules in the context of the global trade obligations accepted by member states.

Second, let me offer a specific conclusion: The FSC/ETI cases represent a genuine trade dispute between the U.S. and the EU, which the WTO is suited to resolve. This dispute over taxation and export subsidies has been seen as part of a larger dispute, linked to other cases and issues.

But limiting our analysis to this case, unlinking it from other trade disputes, it is clear the United States is wrong. Export subsidies are wrong. The use of tax laws to effectuate them is a longstanding and clearly understood phenomenon.

Our trading partners have spoken out on this peculiar American effort since the 1970s. Let's give it up. If we want to improve the integrity of the global trade system, we should not make spurious and transparently unsupportable claims.

Third, I would like to offer a broader conclusion. What has landed the United States in trouble is that we rely on a worldwide corporate tax system; no other major trading country does so. A worldwide taxation system puts U.S. firms at a disadvantage and adds needless complications in a hyper-competitive environment.

Why not consider eliminating this system or at least taxation of foreign income? The Bush administration should fight for this important policy.

Implementing this policy would increase the competitiveness of U.S. firms, help rationalize corporate structure for conducting international transactions, simplify transnational corporate strategies in a multi-jurisdictional marketplace, and immensely reduce the problems concerning U.S. double taxation of foreign income and foreign tax credits.

Let's fight for this policy — not with our allies and friends. Export subsidies are counterproductive. They foster inefficiency in domestic industries and result in unnecessary trade disputes. We should accept the WTO decisions and resolve this issue now.

INTERNET COMMERCE & TRADE POLICY.

by Stuart S. Malawer

http://www.vsb.org/images/feature2.pdf

"Recent advances in three areas -- computer technology, telecommunications technology, and software and information technology -- are changing lives in ways scarcely imagined less than two decades ago …. There were only some 4.5 million Internet users in 1991, and estimates suggest that there will be as many as 300 million or more by the turn of the century."

***……..Electronic Commerce and the Role of the World Trade Organization* 1 (1998)**

INTRODUCTION.

Global trade institutions are only beginning now to address the dramatic challenges of Internet trade and electronic commerce. The framing of these policy issues and contending principles by multilateral, bilateral and regional organizations is only now in its infancy. With inconsistent national legislation posing an obvious threat to such commerce, the goal of developing global trade law and global governance for Internet commerce has become more crucial. Suitable laws and structures are needed if the private sector and governments are to ensure market-driven Internet trade as an engine of global commerce.

The debate over the rules of the "*New Economy"* is shaking long established notions of economics, business and finance. New paradigms and models of business and trade transactions are emerging. In early 1999, seventeen Internet, media and telecommunications companies joined forces to launch a new initiative, through the *Global Business Dialogue,* designed to tackle a myriad of issues transnationally. Members of this global coalition include American, Japanese, German and French firms. Its mandate is to lobby globally against intrusive regulation of electronic commerce and the Internet.

A growing awareness exists among corporate executives and policy makers that along with new business and economic paradigms a cutting-edge notion of trade regulation is emerging -- one that ought to be accepted and crystallized as a new principle of global trade law and then implemented in specific sectors and agreements. The new rule should state that inconsistent national regulation of E-commerce, on either a closed computer network or on the open architecture of the Internet, is a non-tariff barrier. As such, it violates the disciplines of the World Trade Organization (WTO), especially those concerning trade in services as contained in the General Agreements on Services (GATS).

An examination of domestic and international developments also discloses a growing consensus, fragile as it is, as to major policy choices that favors primarily self-regulation and reliance upon market forces. Yet, significant skepticism remains with nations that have traditionally favored a regulatory approach and are leery of U.S. dominance. This emerging consensus is critical, but it only describes the latest stage of Internet development. This stage involves, as the Internet matures from primarily a medium for communications to a commercial marketplace, a shift of concern from matters of technology and economics to law and regulation -- the battleground for the future of Internet transactions.

The Internet is a global matrix of interconnected computer networks using an Internet Protocol (TCP/IP) to communicate with each other. While significant electronic commerce activities take place over proprietary or other networks, most analysts consider them with the Internet when discussing legal and political issues. This article assesses the most recent developments relating to global governance of Internet trade and commerce, which involves business-to-business and business-to-consumer transactions. In particular, it identifies the issues and principles involved as they are being considered by the United States and a range of international institutions with a primary focus on the European Union and the WTO. There is a dire need to resolve these critical issues at the earliest possible moment, before inconsistent and dysfunctional policies and regulations are enacted. It concludes with general observations and specific suggestions concerning developing appropriate global law and approaches to global governance.

U.S. DEVELOPMENTS.

In July 1997, the Clinton Administration released the report entitled *"A Framework for Global Electronic Commerce."*[1] In addressing the administration's views on Internet commerce, the report proposed five general policy principles:

- **The private sector should lead.**
- **Governments should avoid undue restrictions on electronic commerce**
- **Where government involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and *simple legal environment* for commerce.**
- **Governments should recognize the unique qualities of the Internet.**
- **Electronic Commerce over the Internet should be *facilitated on a global basis*.**

In essence, the report argued that Internet trade should not face unnecessary government regulation and that Internet governance should be approached from a global perspective. It recognized that a legal environment needs to be constructed to ensure private sector activity.

The report highlighted the following nine issue areas involving financial, legal and market-access:

- **Customs and Taxation**
- **Electronic Payment Systems**
- **Uniform Commercial Code for Electronic Commerce**
- **Intellectual Property Protection**
- **Privacy**
- **Security**
- **Telecommunication Infrastructure and Information Technology**
- **Content**

- **Technical Standards**

The report contends that these general issues should be addressed by international agreements with the intent to preserve the Internet as a non-regulated medium.

In November 1998, the Clinton Administration released the *"First Annual Report of the U.S. Government Working Group on Electronic Commerce."* [1] This report reviews various actions implementing the principles and policies enunciated in the *Framework Report.* It concludes:

> **"The U.S. Government will continue to pursue the creation of a market-driven policy architecture for this new digital economy that will allow it to flourish while at the same time protecting citizens from potential negative side effects." [2]**

The report highlights the following actions last year:

- **The United States Trade Representative succeed in having the World Trade Organization (WTO) adopt a declaration committing member governments from not imposing custom duties on electronic commerce when information and services are delivered electronically.**
- **Two treaties negotiated with the World Intellectual Property Organization (WIPO) [3] were transmitted to the Senate, and the Congress implemented them by enacting the *Millennium Copyright Act,* in October 1998, which modified U.S. law to conform to the new treaties. The European Union (EU) has agreed to ratify these treaties in the near future.**
- ***The Internet Tax Freedom Act* was signed and went into effect on October 21, 1998. It places a three-year moratorium on local taxation of Internet transactions.**
- **The Administration has continued to work with various international institutions that are addressing specific aspects of Internet commerce. For example, it is working with the Organization for Economic Cooperation and Development (OECD) on the issue of Internet taxation and with the United Nations Commission on International Trade Law (UNCITRAL) on promoting the *Convention on Electronic Transactions.***

These policy options and actions of the White House are bolstered by the conclusion of the Department of Commerce's seminal report entitled, *The Emerging Digital Economy* (1998). [4] The report concluded:

> **"The pace of technological development and the borderless environment created by the Internet drives a new paradigm for government and private sector responsibilities. Creating the optimal conditions for the new digital economy to flourish requires a new, much less restrictive approach to the setting of rules."**

The report contends that when the public policy issues regarding electronic commerce are resolved, then the digital economy can further accelerate world economic growth.[5]

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[1] ***"First Annual Report of the U.S. Government Working Group on Electronic Commerce,"*** **(Dept. of Commerce, November 1998) at http://www.doc.gov/ecommerce/E-comm.pdf**

[2] ***Id.*** **at 30.**

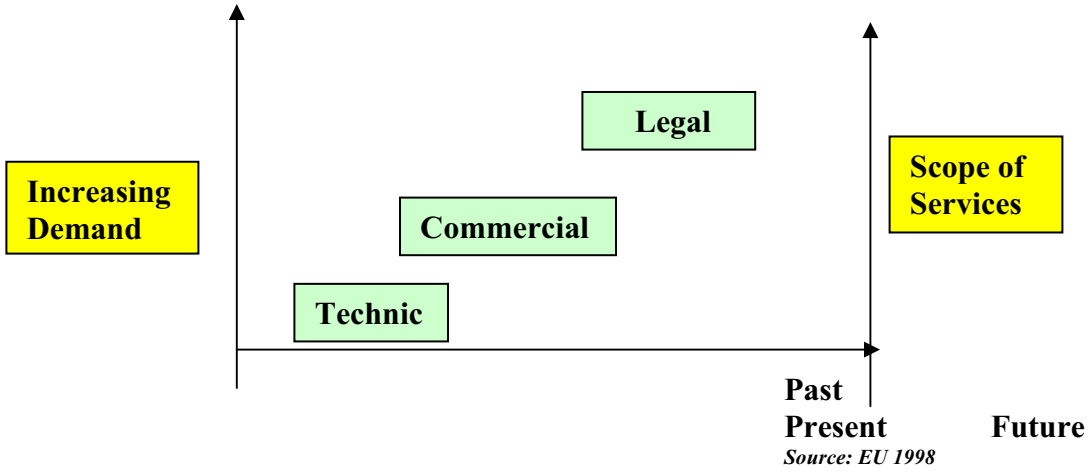
[3] **"*WTO Copyright Treaty," (1996)* at http://www.wipo.org/eng/diplconf/distrib/94dc.htm and "*WTO Performances and Phonograms Treaty*, " (1996) at http://www.wipo.org/eng/diplconf/distrib/95dc.htm**

[4] **"*The Emerging Digital Economy,"* (Dept. of Commerce, April 1998) http://www.ecommerce.gov/viewhtml.htm**

THE EUROPEAN UNION.

The European Union has been active in considering Internet commerce. Some of its proposals and actions have raised significant concerns in the United States. The European Union's most comprehensive document concerning Internet trade, released in 1998, came from the Directorate for telecommunications, Information Market and Exploitation of Research of the European Commission. Entitled "*The Need for Strengthened International Coordination,*" [6] it is informally referred to as the "*Bangemann Charter,*" after the head of the directorate issuing the report.

It acknowledges that there are numerous regulatory actions at national and regional levels that reveal divergent approaches. It states, "Ill-adapted or fragmented regulation, however, will hinder the development of the 'on-line' economy." It further states, "The wide range of activities possible can only be fully exploited if an international enabling framework emerges."



Source: EU 1998

The report makes the point that issues concerning the Internet have progressed from the technical (interconnection and interoperability) to the present commercial issues (market access and a competitive framework) as well as the future legal issues (jurisdiction, liability, taxation, copyright, authentication, encryption, data protection, content, consumer protection). Yet, the report notes, "The technical possibilities of open networks like the Internet are already beginning to put legal structures to the test in various fields of existing law."

While U.S. firms have opposed significant EU action, the *EU Data Protection Directive*, it is crucial to note this report acknowledges the problem of inconsistent national and regional legislation. The report concludes that "the global electronic marketplace requires an appropriate framework … It

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[5] Various other reports have begun to emerge addressing the economic and social impacts of information technology generally. For example, *"Fostering Research on the Economic and Social Impacts of Information Technology,"* (National Resource Council, 1998) at http://www.nap.edu/readingroom/records/030906032X.html and *"Economic and Social Significance of Information Technologies,"* in Social and Economic Indicators, 1998 (National Science Foundation, 1998).

[6] *"The Need for Strengthened International Cooperation,"* (Communication from the EU Commission Directorate on Telecommunications and Information Markets, 1998) at http://www.ispo.cec.be/eif/policy/com9850en.html

does not need to consist of detailed and harmonized rules on all relevant aspects." The report ends with a warning that "a global uncertainty surrounding different national and regional responses to these challenges will hamper the further development of the electronic marketplace." While this report frames the contending issues and principles admirably, the underlying tension between the United States and Europe remains -- that many European governments when they have the opportunity choose regulatory solutions rather than relying upon market forces.

The European Union, in early 1999, called for comprehensive consideration on all trade related aspects of electronic commerce by the World Trade Organization. [7] It suggested the codification of a set of basic principles. These would treat such specific issues as charges on electronic transmissions across borders, data protections systems (concerning privacy of individuals), and possible competition issues. It would leave to the World Intellectual Property Organization (WIPO), at this time, related intellectual property issues.

WORLD TRADE ORGANIZATION (WTO).

The WTO has only recently begun to consider Internet trade as a global trade issue. In March 1998, it released the Secretariat's study, "*Electronic Commerce and the Role of the WTO."* [8] The study was written to provide background information for the WTO members. It notes that WTO members have now only begun to explore how the WTO should deal with questions of electronic commerce. Among the policy issues identified are the legal and regulatory frameworks necessary for Internet transactions, security and privacy questions, taxation, access to the Internet, market access for suppliers over the Internet, trade facilitation, public procurement, intellectual property questions, and regulation of content. This study lays out the issues without prejudging the outcomes. "The aim is to set out in a systematic fashion the main issues that seem relevant to the interface between electronic commerce and the WTO." [9] It asserts that "Electronic commerce could be characterized as trade in goods, trade in services, or as something different from either of these." [10]

The WTO Ministerial Conference in May 1998 adopted the "*Declaration on Global Electronic Commerce,"* [11] which requested that the General Council establish a work program to examine all trade-related issues concerning global electronic commerce and to report to the Third Ministerial Conference in late 1999. [12] It also declared the continuation of the member states' current practice of not imposing custom duties on electronic transmissions. In September, the General Council mandated that reports were to be drafted by the Council for Trade in Services, the Council for Trade in Goods, and the Council for TRIPS (intellectual property). [13]

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[7] "*Electronic Commerce -- 1st Communication from the European Communities and their Member States,"* (DG1 March 1999) at http://europa.eu.int/comm/dg01/ecom2.htm

[8] Electronic Commerce and the Role of the WTO (WTO Special Studies 2, 1998) and *"WTO Press Release 96*," (March 13, 1998) at http://www.wto.org/wto/new/press96.htm

[9] *Id*. at 42.

[10] *Id*. at 50.

[11] "*Declaration on Global Electronic Commerce,"* (WTO, March 20, 1998) at http://www.ustr.gov/agreements/gec/gec_en.pdf

[12] The United States supported this request concerning "*Trade-Related Electronic Commerce*" (TREC). *"Organization of the WTO Work Program,"* (July 8, 1998) at http://www.ustr.gov/reports/shorts.pdf

For background on electronic commerce issues generally, the USTR office prepared a short statement. "*Electronic Commerce Issues,"* (June 29, 1998) at http://www.ustr.gov/reports/mtgcover.pdf

[13] "*WTO Electronic Commerce Work Program*, " (September 25, 1998) at http://www.ustr.gov/reports/gec_work.pdf

Of particular note is Director-General Renato Ruggiero's address, *"Building the Framework for a Global Electronic Marketplace,"* given in Berlin in September 1998. [14] He views electronic commerce as a crucial new way of buying and selling goods and services in either of two forms. First, the entire transaction is carried out electronically and the end product is delivered to the buyer in the form of digitized information flows. Trade of this kind is trade in services, such as a vast range of professional, advisory and financial services. This form of trade, he contends, is covered by the multilateral trade rules and specifically by the General Agreements on Trade in Services (GATS). Second, electronic commerce is a kind of distribution service; goods are paid for electronically, but are delivered in tangible form. This form of commerce has been utilized successfully in business-to-business transactions. Most recently, business-to-consumer transactions are taking off. Ruggiero also contends that distribution services are covered by the GATS.

However, it is extremely important to note that GATS is an incomplete system. It requires new negotiations to extend it to newer sectors and to schedule specific commitments, which allow exceptions to the *Most Favored Nation* principle. This extension is something that should be done in a forthcoming Millenium Round of trade negotiations, which President Clinton in the recent State of the Union address has promised to request at the forthcoming ministerial meeting of the WTO. The great significance of the GATS, as a part of the WTO, is that it provides binding and compulsory dispute settlement over trade disputes.

Rules concerning the physical infrastructure of the Internet, namely telecommunications services have been addressed by the *Basic Telecommunications Agreement.*[15] Telecommunication products have been addressed by the *Information Technology Agreement.* Both of these agreements were concluded under the auspices of the WTO and have recently entered into effect. The *Annex on Telecommunications* and the subsequent *Basic Telecommunications Agreement* guarantees access and use of public networks and services. The *Information Technology Agreement* reduces tariff barriers on a broad range of infrastructure products critical to electronic commerce. The new round of negotiations concerning ITA2 hopes to expand the scope of products included for tariff reduction and elimination.

Ruggiero's conclusion concerning Internet commerce and global trade regulation is particularly instructive:

> **"(B)uilding a framework for the electronic marketplace is really one part of the larger challenge of building a stronger foundation for our ever-more interdependent global economy. The reality of an increasingly borderless global economy means that the economic reach of nation-states is being challenged, and the ground rules of international relations are changing. Almost more than any development, it is pushing governments to work together, plan together, and pool their efforts as never before."**

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[14] **Ruggiero, *"Building the Framework for a Global Electronic Marketplace,"* (WTO, Speech given September 17, 1998) at http://www.wto.org/w to/speeches/berlin2.htm**

[15] **To limited extent Internet services provided in electronic form is covered by various members' schedules to this agreement concerning market access and national treatment commitments.**

REGIONAL AND INTERNATIONAL FORA.

Other regional and international institutions have begun to address various aspects of electronic commerce. Such institutions include the Organization for Economic Cooperation and Development (OECD) and Asia-Pacific Economic Cooperation (APEC).

In 1997, the OECD adopted *"Guidelines on Cryptography."* In October 1998, the OECD held a seminal conference in Ottawa on global electronic commerce [16] and issued a declaration opposing discriminatory taxation on Internet and electronic commerce. It subsequently issued a comprehensive report, in early 1999, addressing the economic and social impact of electronic commerce.[17] The report contends that "The force that drives e-commerce will require a re-examination of the framework for conducting business and a questioning both of the efficacy of government policies pertaining to commerce and of traditional commercial practices and procedures." [18] It boldly asserts that "The 'death of distance' that is intrinsic to information networking is probably the single most important economic force shaping society at the dawn of the 21st Century." [19]

In 1997, at its Vancouver Conference, [20] the leaders of APEC issued a declaration reiterating the importance of electronic commerce to trade and economic development and their commitment to foster its growth through support of the private sector.

The International Telecommunications Union [21] and the World Intellectual Property Organization [22] are concerned with infrastructure and intellectual property aspects of Internet trade. [23] The WIPO holds significant promise of providing dispute settlement when domain names are disputed. A final report was released in April 1999 on the domain name process. It incisively states, "Intellectual property has become a central element in economic and cultural policy in a world in which the source of wealth is increasingly intellectual … capital and in which markets are distributed across the globe."[24] The International Bureau of WIPO and the Secretariat of the International Telecommunications Union (ITU) are coordinating efforts and proposals, among others, concerning dispute resolution procedures relating to domain names under the WIPO Arbitration and Mediation Center.[25]

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[16] The conference was entitled *"A Borderless World and Global Electronic Commerce"* at http://www.oecd.org/dsti/sti/it/ec/

[17] *"The Economic and Social Impact of Electronic Commerce: Preliminary Findings and Research Agenda,"* (OECD, 1999) at http://www.oecd.org/subject/e_commerce/summary.htm . "Electronic commerce over the Internet is a new way of conducting business. Though only three years old, it has the potential to radically alter economic activities and the social environment." *Id.* at 9.

[18] *Id.* at 11.

[19] *Id* at 143.

[20] "*APEC Leaders' Declaration,"* (Vancouver Conference, November 25, 1997) at http://www.ecommerce.gov/apec.htm

[21] "*Telecommunications in the Era of Global Electronic Commerce,"* (Speech by Pekka Tarjanne, Secretary-General of the International Telecommunication Union, March 20, 1996) at http://www.itu.int/plweb-cgi/fastweb?getdoc+view1+itudoc+4625+1++electronic%20commerce

[22] A conference sponsored by WIPO on electronic commerce and intellectual property will take place in Geneva in September 1999 at http://ecommerce.wipo.int/index-eng.html

[23] In 1996 WIPO concluded the new treaties concerning copyright and performances / phonograhms. These agreements build, in part, on the WTO *Trade Related Intellectual Property Rights Agreement* (TRIPS). A WIPO conference on Electronic Commerce and intellectual property rights will take place in Geneva on September 1999.

[24] "*Final Report of the WIPO Internet Domain Name Process,*" (April 30, 1999) at http://wipo2.wipo.int/process/eng/processhome.html

[25] *See generally*, the "*Memorandum of Understanding on the Generic Top-Level Domain Space of the Internet Domain System*, signed in Geneva on May 1, 1997, at http://www.gtld-mou.org/docs/faq.html#1.0

The United Nations Commission on International Trade Law (UNCITRAL) has drafted significant international agreements addressing electronic contracts. For example, it recently completed the *"1996 Model Law on Electronic Commerce,"* which provides a model of legislation that can be adopted by nations in an effort to harmonize national treatment of specific issues of electronic commerce. [26] In addition, a number of bilateral negotiations, during 1997 and 1998, have proven fruitful. Those have involved the United States and Japan, France and the EU (through the Transatlantic Economic Partnership). For example, both the United States and Japan agreed, in May 1998, that the private sector should take the lead in developing electronic commerce and that both governments should avoid imposition of unnecessary restrictions on it. [27] Nevertheless, it is the WTO, as the premier global trade organization with a binding dispute resolution system, that holds the greatest responsibility in promoting the development of new rules of law concerning Internet trade.

OBSERVATIONS & SUGGESTIONS .

The preceding review leads to several observations and suggestions concerning Internet trade and global law and governance. They include the following points:

- **A number of international institutions are now dealing with electronic commerce and Internet trade.**
- **The U.S. government, Internet and Internet-related companies should focus their attention on developing favorable global trade law on the WTO.**
- **The GATS (services agreement) relates most specifically to Internet trade.**
- **General acceptance now exists for the U.S. policy that less regulation is best and inconsistent national regulation is to be avoided.**
- **While there is no explicit trade rule that inconsistent and contradictory national legislation is a non-tariff barrier, the formulation of such an explicit rule for Internet transactions should be clearly enunciated as a provision of general applicability. (This raises the issue of an obligation to harmonize national regulation.[28])**
- **The need for global governance is obvious. However, it may be best to consider in addition to the WTO, a regime (private and / or public) to help coordinate a host of international institutions with responsibilities for Internet-related activities.**
- **The international legal and institutional framework confronting Internet trade today need to adapt quickly to ensure a market-driven approach and global growth.**

In conclusion, the inherently transnational nature of global computer networks and the Internet must lead to greater and more creative international cooperation. Existing mechanisms may be used, but as Internet trade enters a more legalistic era, newer rules need to be clearly enunciated. Those rules should follow and reflect market forces. Certainty and predictability are needed in Internet trade to ensure that it becomes a powerful force for transnational economic growth and global commerce.

A recent development in the United States concerning domain names is the establishment of *The Internet Corporation for Assigned Names and Numbers* (ICANN). This is the new non-profit corporation that was formed to take over responsibility for the IP address space allocation, protocol parameter assignment, domain name system management, and root server system management under authority of the U.S. Department of Commerce. http://www.icann.org/

[26] *"UNCITRAL Model Law on Electronic Commerce,"* (1996 as amended 1998) at http://www.un.or.at/uncitral/en-index.htm The Web site of the International Trade Law Branch of the United Nations Office of Legal Affairs is particularly informative at http://www.un.or.at/uncitral/en-index.htm

[27] "*U.S-Japan Joint Statement on Electronic Commerce (May 15, 1998),"* at http://www.ecommerce.gov/usjapan.htm

[28] *The International Institute for the Unification of Private Law* (UNIDROIT), with its headquarters in Rome, develops model national legislation. It ought to consider contract rules governing Internet commerce as part of its ongoing activities concerning transnational commercial contracts. Its Web site is http://www.unidroit.org/

Clear and more specific rules can only be good for democratizing a connected world. This is especially true since a new model of computing is evolving into what is being called "the post-PC era." Where there is a proliferation of information appliances linked by the Internet to server farms and software becomes more of a service business.[29]

> ***" Although primarily an economic phenomenon, electronic commerce forms part of a broader process of social change, characterized by the globalization of markets, the shift towards an economy based on knowledge and information, and the growing prominence of all forms of technology in everyday life."***

The Economic and Social Impact of Electronic Commerce
143 (OECD Report, 1999)

WEB SITES FOR INTERNET COMMERCE & TRADE POLICY

U.S. Government Electronic Commerce Policy	**http://www.ecommerce.gov**
U.S. Government Sites on Electronic Commerce	**http://www.ecommerce.gov/governme.htm**
"U.S. Government Working Group On Electronic Commerce" (First Annual Report, 1998)	**http://www.doc.gov/ecommerce/review.htm**
"Emerging Digital Economy (Dept. of Commerce 1998)	**http://www.ecommerce.gov/emerging.htm**
"EU Bangemann Charter" (1998)	**http://www.ispo.cec.be/eif/policy/com9850en.html**
"EU 1st Electronic Commerce Communication" (1999)	**http://www.europa.eu.int/comm/dg01/ecom2.htm**
International Sites on Electronic Commerce Policy	**http://www.ecommerce.gov/internat.htm**
International Telecommunications Union (ITU): Electronic Commerce & Developing Countries	**http://www.itu.int/ECDC/**
***OECD Report: " The Economic and Social Impacts of Electronic Commerce" (1998*)**	**http://www.oecd.org/subject/e_commerce/summary.htm**
USTR E-Commerce Links	**http://www.ustr.gov/reports/index.html**
World Intellectual Property Organization (WIPO): Electronic Commerce & Intellectual Property	**http://ecommerce.wipo.int/index-eng.html**
World Intellectual Property Organization (WIPO): Domain Name Memorandum (Dispute Resolution)	**http://www.gtld-mou.org/**
WTO Report: "Electronic Commerce and the Role of the WTO" (1998)	**http://www.wto.org/wto/new/press96.htm**
Final Report of the WIPO Internet Domain Name Process (1999)	**http://wipo2.wipo.int/process/eng/processhome.html**

[29] **Lohr & Markoff, "*Computing Centers Become the Keeper of Web's Future,"* NEW YORK TIMES at A1:2 (May 19, 1999).**

THE DIGITAL GLOBAL ECONOMY: *WTO Trade Agreements & Litigation.*

Stuart S. Malawer
http://www.global-trade-law.com/WTO%20(NYSBA).pdf

I. INTRODUCTION

Recently, three significant trade agreements involving information technology, international telecommunications and financial services were concluded within the framework of the World Trade Organization (WTO). These agreements, for the first time, aim at liberalizing trade in three of the most critical sectors driving the new digital global economy.[1] Likewise, the WTO considered or decided, in 1997 and 1998, several sensitive and high profile trade cases involving U.S. environmental regulation, Japanese domestic business environment, U.S. foreign trade sanctions, and EU computer tariffs.

This year is witnessing the first formal review by the WTO of its three-year old dispute settlement system. An assessment of the WTO cases indicates that the new compulsory system of adjudicating global trade disputes on a global level is being heavily used and has been a surprisingly successful operation. Countries are bringing their laws into conformity with the rulings of the WTO. New trade rules are being negotiated and contentious international cases are being heard, resolved or settled regardless of significant differences among the states' domestic legal, economic, political and regulatory systems as well as their vastly different national cultures. It is now clear that the WTO's

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1. **The term "*digital global economy* "is used here to describe the global economy as it has emerged since the 1980s and has further developed in the late 1990s. This is characterized by dramatic advances in information technologies and telecommunications that have allowed transnational corporations to increase their cross-border transactions to permit different aspects of the production process and global services to be located worldwide. It has witnessed the rapid increase in intrafirm transactions. Most recently, the increasing irrelevance of national borders is becoming painfully clear with the advent of the Internet and newer advances in digital technology and communication networks. See Ruggiero, "Charting the Trade Routes of the Future: Towards a Borderless Economy, (September 1997)at http://www.wto.org/wto/ speeches/ sanfran1.htm. See generally Moore, "The Rise of a New Corporate Form," 21 *Washington Quarterly* 167 (Winter 1998). "The biggest change in mindset that today's leaders can make is a shift from conceiving their businesses as hierarchical organizations to envisioning themselves as participants in a world of complex evolving systems." *Id.* Another characteristic of this new era is hypercompetition. "[H]ypercompetitors" who continuously generate new competitive advantages that destroy, make obsolete, or neutralize the industry's leader's advantages, leaving the industry in disequilibrium and disarray." D'Aveni, "Waking Up to the New Era of Hypercompetition," 21 *Washington Quarterly* 183 (Winter 1998). "The pace of technological development and the borderless environment created by the Internet drives a new paradigm for government and private sector responsibilities." L. Margherio, *The Emerging Digital Economy* 50 (U.S. Dept. of Commerce, 1998).**

dispute resolution system is the most important legal institution governing global trade. It serves as the "World Court" for settling diverse trade disputes. There is a growing body of law that has grown rapidly in the last three years.

Thus, despite different domestic systems and uncertain trade and financial relations, nations are agreeing to newer supranational and global rules to govern their trade and financial relations. They are consenting to these rules, in part, as a means of combating their worst fear -- that they might fall into a downward spiral of economic stagnation and deflation. Specifically, their hope is that greater openness and greater predictability in trade relations will foster both trade liberalization and national economic development. States are accepting increasingly supranational trade rules and adjudication that are not subject to unilateral veto -- often reluctantly and in the face of noisy domestic opposition -- in order to construct a body of global rules that they view as a precondition for competing in the global economy. This is occurring even as fundamental questions now are being raised concerning U.S.-style capitalism, globalization, and the need for a new global architecture to allow short-term controls to alleviate harsh societal consequences of unregulated outflows of international capital. This transition is in everybody's interests: nations, transnational corporations, the global trading and finance systems, and most importantly, consumers worldwide.

The following is an assessment of the seminal trade agreements and significant trade cases concluded within the WTO. Other recent developments impacting on international transactions are indicated, such as global electronic commerce, foreign direct investment, and commercial bribery. These developments further illustrate a trend toward greater multilateral efforts in creating more certainty in diverse yet crucial areas of international transactions. The conclusion contains observations concerning globalization generally as well as implications of the recent international transactional developments and multilateralism for law observance and democratization worldwide.

II. NEW TRADE AGREEMENTS

Three new trade agreements, recently completed under the auspices and within the framework of the World Trade Organization, address three critical pillars of the digital global economy: the Information Technology Agreement; the Basic Telecommunications Agreement; and the Financial Services Agreement. The intent of this "triple play of agreements" is to liberalize further and increase market access in these sectors driving the global economy as it enters the twenty-first century. They extend to these dynamic sectors the most fundamental WTO / GATT principles; namely, the concepts of most-favored-nation and national treatment.[2]

Information Technology Agreement

The *Information Technology Agreement* (ITA) was the first to be completed, in early 1997.[3] It dramatically reduces tariffs on a broad range of information technology and computer products, including computers, semiconductors, software, and telecommunication products. However, consumer electronic goods are not covered by the agreement. The ITA entered into force on 1 July 1997. The first tariff cuts have already taken place. Countries representing ninety-five percent of

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2. ***Basics – What is the World Trade Organization?*** **at http: //www. wto.org/wto/about/facts1.htm.**

3. ***Information Technology Agreement*****, at http://www.wto.org /goods/inftech.htm.**

world trade in information technology products will eliminate tariffs in most cases by the year 2000. This sector accounts for approximately $1 trillion dollars in global production and over $500 billion in international trade flows. World trade in office machines and telecom equipment in 1996 was about $626 billion, or 12.2% of world merchandise trade. The conceptualization of the ITA and subsequent negotiations occurred *after* the completion of the Uruguay Round, during the Asia Pacific Economic Cooperation meetings and the first WTO Ministerial Conference in Singapore in late 1996. ITA participants have agreed to complete new negotiations ("ITA 2") in order to expand product coverage and to speed tariff reductions.[4] However, these negotiations have recently been suspended in order to gain greater support for them.

Basic Telecommunications Agreement .

Subsequently, the *Basic Telecommunications Agreement* was completed.[5] It complemented the ITA by removing substantial restrictions on direct investment and ownership of basic telecommunication systems, such as local, long-distance, and international service. The Basic Telecommunication Agreement took effect on 5 February 1998. It provides for market access and allows U.S. firms to bypass state monopolies and build networks directly. Services covered by this agreement include voice telephony, telex, telegraph, facsimile, private leased circuit services, fixed and mobile satellite systems and services, cellular telephony, mobile data services, paging and personal communications systems. Most countries agreed to allow new rivals to connect with existing monopolies at "cost-based" prices.

Countries have submitted schedules of commitments concerning the telecom agreement. These schedules constitute part of the *General Agreement on Trade in Services* (GATS). They contain countries' commitments to market access. They cover not only cross-border supply of telecommunications, but also services provided through the establishment of foreign firms, including the ability to own and operate independent telecom network infrastructure. A large number of commitments for particular services are to be "phased in." The WTO panel process applies to all disputes.

Traditionally, telecommunications have been a state monopoly throughout Europe, Latin America and most of the world. The European Union is only now deregulating. A new paradigm for international telecommunications relations and governance is now emerging: away from bilateral agreements to multilateral arrangements.[6] The telecommunications agreement goes beyond trade and economics.[7] It makes access to information easier. To a great extent the agreement exports the

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4. ***U.S. Ready to Lead in "ITA II" Negotiations to Expand Sweeping Information Technology Trade Agreement,"* (27 January 1998) at http://www.ustr.gov/releases/ 1998/01/98-07.pdf. The U.S. International Trade Commission was asked by the USTR to provide advice on the proposed expansion of the ITA 1. *See ITC Launches Investigation on Proposed Expansion of the Information Technology Agreement*, (5 February 1998) at http:// www.usitc.gov/er/ER0205v1.htm. It recently completed its report, *Advice Concerning the Proposed Expansion of the Information Technology Agreement: Phase II* (Investigation No.332-390 (May 1998), at http://www. usitc.gov/wais/reports/arc/W3104.HTM.**

5. ***Basic Telecommunications Agreement*, http://www.wto.org/ press/press87.htm#Footnote1. See also *Informal Background Document*, (1997) at http://www.wto.org/ press/data3.htm.**

6. **Tarjanne, "The Role of Telecommunications in Globalization and Regional Integration," (Speech, October 1997) at http://www.itu.int/itudoc/osg /ptspeech/chron/1997/60003.doc.**

7. ***See generally The World Telecommunications Development 1996/97 -- Trade in Telecommunications*, (International Telecommunications Union) at http://www.itu.int/itudoc /itu-d/indicato/wtdr97_37057.html.**

regulatory principles that recently revolutionized the U.S. market. To facilitate implementation of this agreement within the United States, the Federal Communications Commission (FCC) recently approved new regulations allowing greater foreign ownership.[8] Already a U.S. firm, MCI, formally complained to the Office of the United States Trade Representative (USTR) and the FCC that the Mexican government is not honoring its new obligations.[9]

Financial Services Agreement.

In December 1997, the *Financial Services Agreement* was completed.[10] It is expected to take effect no later than 1 March 1999. When it becomes fully effective, it will allow financial firms market access and the right to direct ownership of firms in host states. This change applies to a range of financial services including banking, securities, insurance and financial data companies. Nations representing ninety-five percent of the global market for these services have agreed to bring financial services into the realm of international rules. Most importantly, the agreement opens local financial markets to foreign firms, thereby further easing international financial transactions as well as direct investment into traditionally closed domestic industries.

The completion of the Financial Services Agreement completes "the triple play of solid market opening arrangements" for 1997. These agreements cover sectors where the United States is the most competitive producer and provider in the world. The agreements come in sectors where the United States has at most minimal barriers and the other countries, often the fastest growing markets in the world, have significant entry barriers. This is particularly important in light of the United States trade deficit of nearly $114 billion for 1997, the highest in nearly a decade. In the wake of the Asian financial crisis, U.S. firms currently have a historic opportunity to acquire greatly devalued Asian assets via direct investment and mergers.[11] Consistent with the model of other WTO agreements, disputes under these three agreements will be subject to the already existing WTO dispute resolution system.

Even though this "triple play" of agreements was concluded after President Clinton's "fast track authority" lapsed at the end of the Uruguay Round of trade negotiations, these agreements are considered by the Administration as binding U.S. law under the "grandfather" provisions of the Uruguay Round implementing legislation and other statutory provisions. These agreements as a group indicate that both the substantive rules and jurisdiction of the WTO dispute settlement panels are being broadened beyond that which Congress specifically knew at the time of the conclusion of the Uruguay Round. In a sense Congress, under the formula of the implementation legislation, gave a license to expand the WTO's competence at the expense of future freedom of action of the United States. These agreements would have been otherwise subject to the requirement of the implementing legislative process, without the benefits of "Fast Track."

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8. "*USTR Barshefsky Applauds FCC Adoption of Rules to Expand Competition in U.S. Telecom Services Market,"* (27 November 1997) at http://www.ustr.gov/releases /1997/11/97-100.pdf.

9. Beachy, "A Little Border War Over Mexican-U.S. Phone Traffic," *New York Times* (11 April 1998).

10. *Financial Services (Results),* at http://www.wto.org /services/finance_background.htm. *See also Specific Commitments*, (1998) at http://www.wto.org /services /finsched.htm.

11. Lewis, "Going-Out-Of-Business Sale," *The New York Times Magazine* 35 (31 May 1998).

Taken together, these new agreements remove restrictions to global trade and increase certainty that when disputes arise they will be addressed by an emerging and -- so far -- a surprisingly effective adjudicatory system that will apply agreed upon rules to these cutting-edge sectors of the global economy. These agreements greatly favor the United States and its companies, since U.S. firms are global leaders in these sectors. These new agreements are intended to foster greater trade by U.S. firms and to assist national economies to benefit from greater liberalization by subjecting them to the rigors and benefits of free market trade under a rule-based global regime.

III. THE U.S. & WTO CASES

In the three years since its founding, in 1995, the new WTO dispute resolution system has been more widely utilized and more successful than most observers expected at its inception.[12] Some consider it to be the crowning achievement of the new WTO. Renato Ruggiero, the Director-General of the WTO has stated:

No review of the achievements of the WTO would be complete without mentioning the Dispute Settlement system, in many ways the central pillar of the multilateral system and the WTO's most individual contribution to the global economy.[13]

As of November 1998, the dispute resolution system (involving consultations and panel / AB decisions) has considered one hundred twelve distinct matters and one hundred forty-eight consultation requests. Developed countries have submitted one hundred seven requests relating to eighty-two matters. Developing countries have submitted twenty-nine requests relating to twenty-seven matters.[14] Fifteen cases have been completed by the panel - Appellate Body system. Twenty-eight cases have been settled or are inactive. Nineteen cases are active. A diverse group of states have utilized the system. Decisions are implemented and countries with vastly different cultures and legal systems continue to file newer cases.[15] It is estimated that forty percent of all filed cases are settled prior to a final panel report.

The United States has been the WTO's most aggressive and successful litigant. According to Ambassador Barshefsky, as of February 1998, the United States invoked the process in thirty-five cases, more than any other member did. As of November 1998, as a complainant the United States has prevailed in nine disputes before the WTO panel or Appellate Body and settled various other

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12. For a convenient list of all decided cases with hyperlinks, see the chart at http://www.wto.org/wto /about/dispute1.htm. For a very useful summary of all cases (Appellate Body and Panel) with hyperlinks that is updated frequently, see *Overview of the State-of-pay of WTO Disputes,* at http://www.wto.org/wto/ dispute/ bulletin.htm For a new general treatise on global trade law focusing on the WTO, see, R. Bhala & K. Kennedy, *World Trade Law* (1998).

13. Ruggiero, "The WTO's Most Individual Contribution," (17 April 1997) at http://www.wto.org/wto/about/ dispute1.htm.

14. Overview of the State-of-Play of WTO Disputes, (23 April 1998) at http://www.wto.org/wto/dispute/ bulletin.htm.

15. After the first two years of operation (1995-1997) the WTO analyzed case data and determined the leading complainants, respondents and agreements relied upon in the dispute settlement system. http://www.wto.org/ wto/focus/focus21.pdf.

disputes on favorable terms.[16] As a complainant it lost only twice. As a respondent it lost all four times.[17] Subjects addressed in these cases have included Canadian excise taxation, the EU's preferential treatment of agricultural imports, lax patent protection in India, the EU's ban on hormone-treated beef, Japan's domestic distributorship system, the U.S. ban on imports for environmental reasons, and the EU's tariffs on computer products.[18]

One of the most notable cases the United States has won was when the WTO upheld the U.S. complaint arguing that the Japanese tax on alcoholic beverages discriminated against imported alcohol in violation of the national treatment principle.[19] The United States has lost four cases as a respondent before the panels and Appellate Body involving textile restrictions, environmental regulations relating to gasoline, and import sanctions enforcing environmental legislation. Several recent matters are causing the United States significant domestic concern regarding political sovereignty. However, it can be argued persuasively that even in one of the most recent cases it lost (*Fuji-Kodak*[20] and *Shrimp Imports*) and the case that was suspended and now dropped (*Helms-Burton)* are beneficial to the United States and the global trading system. This is because the WTO acknowledges there are boundaries concerning the sovereignty and extraterritoriality issues and the U.S. realizes those boundaries may have moved -- somewhat. The United States has recently prevailed in a case involving the EU's ban on hormone-treated beef[21] (raising the issue of food safety and global trade)[22] and one concerning the EU's computer tariffs that affect billions of dollars of U.S. high-tech exports,[23] although recently reversed.[24] This tariff case was the largest case the United States ever brought to the WTO in terms of value of trade. Recently, the United States and the EU have filed

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16. *USTR Barshefsky Announces U.S. Victory in WTO Dispute on U.S. High Technology Exports*, (U.S.T.R. Press Release, 5 February 1998) at http://www.ustr.gov/releases/1998/02/98-11.pdf

17. See Appendix to this article: *"U.S. in Panel / Appellate Body Cases 1995 – 1998."* The three computer reclassification cases are counted here as one case.

18. *Id.*

19. *Japan Taxes on Alcoholic Beverages*, WT/DS8-11/AB/R (Appellate Body, October 1996) at http://www.wto.org/wto/dispute/distab.htm

20. *Japan Measures Affecting Consumer Photographic Film and Paper*, WT/DS44R (Panel, March 1998) at http://www.wto. org/wto/dispute/44r00.pdf.

21. *EC Measures Concerning Meat and Meat Products*, WT/DS26,48/AB/R (Appellate Body, January 1998) at http://www.wto.org/wto/dispute/hormab.pdf. Unfortunately, the EU continues to delay the implementation of the AB decision in the *Beef-Hormone Case* as well as in the *Banana Case. EC - Regime for the Importation of Bananas*, WT/DS27/15 (Arbitration 1998) at http://www.wto.org/wto/dispute/27-15.pdf

22. As a matter of U.S. law, President Clinton is proposing newer import controls on food imports that go to the issue of foreign food-safety systems. This would expand the authority of the FDA and the Agriculture Department. Burros, "President to Push For Food Safety," *New York Times* at A1:1 (4 July 1998).

23. *Custom Classification of Certain Computer Equipment,"* WT/D62, 67, 68/R (Appellate Body, February 1998) at http://www.wto.org/wto/dispute/comp.pdf.

24. "Trade Panel Backs Europe on Tariffs," *New York Times* at C4:6 (3 June 1998). For the USTR response *see*, "USTR Responds to WTO Report on U.S. High-Technology Exports," (5 June 1998) at http://www.ustr.gov/releases/1998/06/98-59.pdf.

cases contending that various aspects of their income tax systems amount to invalid export subsidies, and the United States has won two newer cases against Korea and Japan.[25]

In March 1998, the panel dismissed the U.S. claims in the case involving Fuji and Kodak. This is the *only* one of two cases the United States lost as a complainant. The thrust of the U.S. complaint was that there was government-sanctioned, anti-competitive behavior by Japanese firms that blocked Kodak from distributing its film to independent distributors in Japan.[26] The panel refused to declare that existing trade rules could reach deeply into the domestic business environment of a state. The panel also refused to declare those practices to be in violation of WTO rules. In light of continued domestic opposition to the WTO in the United States, it should be pointed out that this opinion could be read in such a manner as to lessen that opposition. The WTO refused to rely upon an expansive application of trade rules that traditionally do not apply to the way nations organize their own economies.

Subsequent to *Fuji-Kodak*, the United States as a respondent recently lost the *Shrimp-Turtle Case*.[27] The WTO panel determined that the U.S. import restrictions on shrimp harvested internationally, in violation of the safeguards in U.S. environmental legislation safeguarding an endangered species, violate its trade obligations under the WTO. Subsequently, the Appellate Body narrowed the panel decision by stating that it is the discriminatory application of that law, and not that law itself, which violates the WTO / GATT trade rules.

Another case of significant political interest involves the Helms - Burton legislation, which threatens to impose extraterritorial trade sanctions on foreign firms violating U.S. trade sanctions against Cuba and extends existing sections to include trafficking in nationalized property. The European Union brought this case against the United States and contended that the legislation violates both specific

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25. For example, "U.S. Trade Representative Charlene Barshefsky Reacts to European Attack on U.S. Tax Law," (U.S.T.R. Press Release, 2 July 1998) at http://www. ustr.gov/releases/1998/07/98-67.pdf. The U.S. prevailed in two recent cases, in the Fall 1998, concerning Korean taxes on alcohol *Korea - Tax on Alcoholic Beverages*, WT/DS75/R (Panel 1998) at http://www.wto.org/wto/dispute/75r01.doc and Japan's redundant testing of agricultural imports at *Japan - Measures Affecting Agricultural Products*, WT/Ds76/R (Panel 1998) at http://www.wto.org/wto/dispute/76r.doc

26. The issue of antitrust or competition policy as a trade issue is gaining momentum. *See Competition Policy, Economic Development and International Trade* (March 1998) at http://www.wto.org/wto/focus/focus27.pdf For a recent statement from the U.S. Department of Justice concerning its enforcement of U.S. law in the global and digital marketplace, *see* Klien, "Statement Before the House Judiciary Committee on November 5, 1997," at http://www.usdoj.gov/atr/testimony/1267.htm. Recent mergers or proposed mergers and alliances in diverse global industries illustrate the confluence and sometimes conflict between the competing antitrust regimes of the United States and that of the European Union. MCI / WorldCom in telecommunications (as to the Internet business of UUNET), the British Airways - American Airlines (concerning landing slots), and between the financial giants Travelers Group and Citicorp evidence the application of these regimes to the same transborder or transnational transaction. Keller & Wolfe, "Antitrust Review May Scuttle MCI Deal," *Wall Street Journal* at B6:3 (10 June 1998) and "EU Clears AMR / British Airways Alliance," *Wall Street Journal* at A3:1 (9 July 1998).

27. "USTR Barshefsky Responds to WTO Shrimp-Turtle Report," (USTR Press Release, 4 April 1998) at http://www.ustr. gov/releases/1998/04/98-40.pdf. For the recent Appellate Body decision *see United States - Prohibition of Shrimps and Certain Shrimp Products*, WT/DS58/AB/R (1998) at http://www.wto.org/wto/dispute/58abr.doc(modifying the Panel report).

provisions of the WTO and its basic objectives.[28] However, the parties suspended the work of the panel, pending a diplomatic settlement over the general issue of compensation for nationalized property. The EU has recently dropped the case, but has threatened to re-file if necessary.[29] The United States has continued to file even newer cases, such as the one against a number of European countries for providing an array of tax subsidies.[30]

The United States assertion of extraterritorial jurisdiction in a wide variety of areas, such as antitrust, export controls,[31] discovery rules, and trade sanctions,[32] have traditionally been opposed by most of her closest allies. The threatened application of new sanctions involving the use of nationalized property is no exception. Thus, even though the United States indicated its objection to WTO jurisdiction on the basis of national security grounds, it had tentatively settled the matter, thereby implicitly recognizing the possibility that an expansive assertion of national sovereignty and jurisdiction might have been found to violate the newer trade rules. Both parties are continuing diplomatic negotiations, hoping to find a diplomatic solution. However, the problem of unilateral sanctions by the United States persists even as it waives potential sanctions concerning proposed investment into Iran under the "D'Amato sanction legislation"[33] and imposes newer sanctions against India and Pakistan for their nuclear explosions.[34]

The European Union and Japan have requested a panel concerning Massachusetts legislation prohibiting state contracts with firms doing business with Burma (Myanmar).[35] This state action is

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28. ***Cuban Liberty and Democratic Solidarity Act*, WT/DS38 (Settled Panel, 1998) at http://www.wto.org/wto/dispute/bulletin.htm.**

29. **Sanger, "European End Suit Contesting Cuba Trade Act," *New York Times* at A1:1 (21 April 1998).**

30. **Barshefsky, "United States Launches WTO Cases Against European Income Tax Subsidies," (USTR Press Release, 6 May 1998) at http://www.ustr.gov/releases/1998/05/98-47.pdf.**

31. **The U.S. notion of "re-export controls" has often met with substantial resistance when applied extraterritorially. Indeed, U.S. industry has been often at odds with various administrations for export controls governing the transfer of computer (supercomputers and encryption software) and satellite technology. The most recent concern focuses on the Clinton Administration's transfer of satellite technology to China. This raises once again the long-standing tension between international competitiveness of U.S. firms and claims of national security and foreign policy. Gerth and Sanger, "How Chinese Won Rights to Launch Satellites for U.S," *New York Times* at A1:1 (17 May 1998). Perhaps, nothing more than the Clinton Administration's transfer of export authority from the State Department to the Commerce Department, in 1996, concerning encryption controls, highlights the historic change in American foreign policy from an emphasis on national security during the Cold War to the central importance of global commerce in this new digital era.**

32. **For sanctions generally, *see "*Economic Sanctions Reconsidered," (Institute for International Economics) at http://www.iie.com/execsum.htm. See also Haas, "Sanctions Almost Never Work," *Wall Street Journal* at 14:4 (19 June 1998).**

33. **Bennet, "To Clear Air with Europe, U.S. Waives Some Sanctions," *New York Times* at A6:3 (19 May 1998).**

34. **Greenberg and Phillips, "Sanctions' Gray Areas Worry U.S. Firms," *Wall Street Journal* at A2:2 (2 June 1998). The United States Congress, in late 1998, approved legislation *("The International Religious Freedom Act")* authorizing trade sanctions against states persecuting citizens for their religious beliefs. Schmitt, "Bill Punishing Nations Limiting Religious Beliefs Passes Senate," *New York Times* at A3:1 (10 October 1998).**

35. ***U.S. Measures Affecting Government Procurement*, WTDS88/1 (Pending Consultations) at http://www. wto.org/wto/dispute/bulletin.htm.**

viewed as a trade sanction in the extreme, more outrageous than sanctions threatened by the United States in Helms-Burton. This is because it is a trade sanction that a sub-national unit (a state within a federal system) threatens to impose and which the EU contends is impermissible under the Government Procurement Agreement. No doubt the United States would be hard put to defend its position before a panel. Indeed, many in the United States consider the Massachusetts legislation to be unconstitutional as an impermissible state action in the field of foreign affairs, which is the exclusive preserve of the federal government. A recent case has been filed by the National Foreign Trade Council contesting the constitutionality of the Massachusetts legislation.[36] Other states and local governments have continued with the threat of local sanctions. Recently, the City of New York had threatened sanctions to bar banks from Switzerland from the lucrative underwriting business.[37]

In 1996, Venezuela and Brazil brought a case against the United States concerning the validity of the gas regulations of the Environmental Protection Agency (EPA).[38] They contended that those environmental regulations discriminated against foreign refineries, since the regulations resulted in higher taxes being imposed on them when compared to domestic refineries. The U.S. regulations were found to violate the "*National Treatment Principle.*" Recently, the EPA changed its regulations to conform to that decision.

The brief but busy history of WTO litigation, and the most recent highly politicized cases involving the United States, indicate that the WTO panel system has been used most often by the United States. Some significant observations concerning WTO litigation can now be made: (i) the United States won almost all the cases it brought in the panel process (9-2); (ii) the United States lost all the cases in the panel process when it was the respondent (4); (iii) the Appellate Body has reversed only one panel decision, but often modifies them; (iv) the U.S. has complied with all decisions, while the EU has attempted to delay compliance. This review of WTO litigation indicates further that the WTO has recognized the limits of the newer trade rules even though they may be expanding. Excessive reach of the WTO rules and excessive application of national legislation were avoided. It should be emphasized that the United States recognized the integrity of this new system: no unilateral actions were taken by the United States and when required the United States brought its domestic law into conformity with the findings of the WTO panel. It is important to emphasize that it was only shortly after the loss in the *Kodak- Fuji* case that the United States, in February 1998, won its biggest victory, concerning the EU's tariff on computer imports. Of course, it was shortly thereafter that it was reversed and the United States lost a major environmental-trade case.

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36. *See* Slavin, "Foreign Policy at State Level Draws Lawsuit," *USA Today* at 2:7 (1 May 1998).

37. Sanger, "Swiss Banks Plan Restitution Fund for Nazis' Victims," *New York Times* at A1:6 (27 March 1998). *See generally* Johnston, "New York Officials to Impose Sanctions on Swiss Banks Sept. 1," *New York Times* at A3:1 (3 July 1998); and Greenberg, "States, Cities Increase Use of Trade Sanctions, Troubling Business Groups and U.S. Partners," *Wall Street Journal* at A20:2 (1 April 1998). As to the current review of sanctions by the Clinton Administration, *see* Lippman, "U.S. Rethinking Economic Sanctions," *Washington Post* at A6:1 (26 January 1998) (the "*Eizenstat review*").

38. *United States Standards for Reformulated and Conventional Gasoline*, WT/DS21/AB/R (Appellate Body, 1996) at http://www.wto.org/wto/dispute/gas1.htm.

IV. ON GOING NEGOTIATIONS & OTHER GLOBAL AGREEMENTS

Ongoing negotiations and other trade agreements have significant implications for developing the multilateral structure concerning global transactions. While some of this activity is outside the WTO, it complements the activities of the WTO in addressing crucial issues of global trade.

First, the United States and the European Union recently issued a joint statement on "global electronic commerce." The statement recognizes the following ideas: that such commerce is and should be market led; that government should provide a predictable legal framework; that industry self-regulation is important; and that taxes on global electronic commerce should be neutral.[39] The European Union fell into line with President Clinton's earlier proposal, "The Global Electronic Commerce Initiative."[40] It asserts the need to keep new government regulation and taxation to a minimum in cyberspace. The joint statement adopts the model of the computer industry instead of following the regulatory tradition of broadcast and telecommunications industries. The European Union abandoned its earlier "bit tax" approach. The WTO has only recently taken up this subject and has issued a major report.[41] At its recent Ministerial meeting, the WTO issued a declaration recognizing the importance of global electronic commerce as an important part of its future agenda.[42] (The jury is still out as to the larger implications of the Justice Department's recent antitrust case concerning Microsoft's bundling of *Internet Explorer* with *Window '95*,[43] and the similar actions

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39. ***United States and European Union Reach Agreement on Global Electronic Commerce*, (9 December 1997) at http://www.ustr.gov/releases/1997/12/97-103.pdf. *See generally* "WTO Hears US Proposal on Global Electronic Commerce," (February 1998) at http://www.wto.org/wto/ focus/focus27.pdf.**

40. **However, the European Union nations have strong privacy protection that came into force in October 1998, beyond which the U.S. law currently contemplates. Various proposals concerning privacy are currently under discussion by the FTC. Clausing, "Critics Contend U.S. Policy on the Internet has 2 Big Flaws," *New York Times* at D1:1 (15 June 1998). It should be noted that the taxation of Internet transactions is only one aspect of developing U.S. and global trade policy concerning the Internet. Other issues include privacy, export controls on encryption software and developing rules for authentication of electronic transactions. As to U.S. legal developments concerning the constitutionality of encryption controls and impact of European competition *see*, Wingfield, "Court Upholds Export Rules on Encryption," *Wall Street Journal* at B6:6 (7 July 1997) (clash of district courts concerning encryption rules and free speech) and Strassel, "U.S. Rules Boost Europe's Encryption," *Wall Street Journal* at B6:2 (7 July 1998) (U.S. export controls boosting Europe's competitiveness). Organizations other than the WTO have assumed important responsibilities in these issues. For example, as to the traditional private international law aspects of trade both the United Nations Commission on International Trade Law (UNCITRAL) and the International Chamber of Commerce (ICC) have developed model laws or guidelines concerning conduct of electronic commerce over the Internet. Within the United States, the National Conference of Commissioners on Uniform State Laws in conjunction with the American Law Institute is drafting a revision to the Uniform Commercial Code Section 2B governing electronic contracts. The OECD has recently issued guidelines for cryptography policy. Baker, "Decoding OECD Guidelines for Cryptography Policy," 31 *Int'l Law* 729 (Fall 1997).**

41. **For the recent 1998 WTO report and activities on global electronic commerce, *see* http://www.wto.org/wto/ focus/ focus28.pdf.**

42. ***Declaration on Global Electronic Commerce*, WT/MIN(98)/DEC/2 (20 May 1998) at http://www.wto.org/ anniv/ecom.htm.**

43. **Lohr, "Ruling on Microsoft Shows a Fault Line in Antitrust Theory," *New York Times* at A1:1 (25 June 1998) (assessing the recent majority and minority opinions in the split decision of the three-judge Circuit Court panel in favor of Microsoft by focusing on the integration of functions into the desktop operating system in terms of consumer benefits rather than potential harm to competition).**

threatened by foreign legal officials as to the future international regulatory environment, and U.S. policy concerning the Internet and global electronic commerce.)[44]

Second, under the auspices of the Organization for Economic Cooperation and Development (OECD) a "Multilateral Agreement on Investment" (MAI) is being negotiated.[45] While not yet concluded, it is hopeful that last-minute obstacles will be resolved. The MAI is intended to be a freestanding international treaty to provide a comprehensive framework for foreign direct investment. It provides rules concerning compensation for expropriation, precisely the issue underlying the Helms-Burton legislation. The agreement intends to provide a means for settling investment disputes between states and foreign investors. This agreement complements the work of both the WTO and the World Bank as well as U.S. practice in concluding bilateral investment treaties. The intention underlying this agreement is that with greater certainty in the rules relating to foreign investment, treatment of foreign investors, and settlement procedures, greater foreign investment will occur in a more predictable environment.

Third, one of the world's oldest problems is now being confronted by a multilateral agreement. The OECD has recently concluded the "Bribery Convention," which prohibits commercial bribery of foreign government officials by corporations looking to further their international business transactions.[46] Congress approved implementing legislation in October 1998. Most countries other than the United States have not had legislation prohibiting their companies from such foreign activity. For years, the United States asserted the extra- territorial application of its domestic legislation concerning corrupt practices. When it enters into force, and it is global economic arena. expected to do so by no later than 31 December 1998, the convention will provide greater certainty that commercial bribery of foreign government officials will be prohibited by many of the nations that are home to transnational corporations. Now that the effort has become multilateral, it is probable that conflict caused by unilateral actions or threatened unilateral actions by the United States will be reduced. That marks a success for the United States in the

V. GLOBALIZATION & CONCLUSIONS

Renato Ruggiero, director general of the WTO, recently spoke of globalization as a process driven by technological and economic realities.[47] He then asserted that in the long run globalization's historical impact would be decided by its ability to find answers to a range of global problems. That is, to develop a better means to govern the globalization process in a more integrative fashion.[48] One of those global problems is the establishment of universally accepted rules to govern international trade.

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44. ***See generally*** **Flaherty, "Microsoft Critics Eye Action Overseas,"** ***Legal Times*** **10:1 (23 March 1998).**

45. ***The Multilateral Agreement on Investment*** **(MAI), http: //www. oecd.org/publications/Pol_brief/9702_pol.htm.**

46. ***Ministers To Sign Bribery Convention*** **(December 1997) at http://www.oecd.org/news_and_events/release/nw97111a. htm.**

47. Ruggiero, "The Multilateral Trading System at 50: Meeting the Challenges of a Globalized Economy," http: //www.wto.org/wto/speeches/oslo.htm. For three recent works assessing globalization ***see*** **D. Yergin and J. Stanislaw,** ***The Commanding Heights*** **(1998); D. Rodrik,** ***Has Globalization Gone Too Far?*** **(Institute for International Economics, 1997); J. Mander and E. Goldsmith,** ***The Case Against the Global Economy*** **(1996).**

48. Ruggiero, note 47 ***supra*****, at http://www.ustr.gov/ releases/1998/07/98-67.pdf.**

However, other global problems exist that are not the primary concern of the WTO, such as labor,[49] environment and democratic change.

From the United States perspective, one of the most important global challenges is to develop international rules and institutions to promote democratic change globally. (The United States Congress should consider this when it next votes on granting "fast track authority" to the President.) The newer trade rules of the WTO, as evidenced by recent trade agreements and case decisions, are supportive of such democratic development. These trade rules are providing for a broader rule-based international trading system. It requires government's compliance with trade law both internationally and domestically. This evolving system helps to support further the development of a domestic legal and institutional framework necessary for sustained democratic growth.

As international rules concerning global trade, financial transactions and Internet commerce increase, societies that are not democratic will become painfully aware of the necessity of becoming more accommodating. Open and democratic institutions are a necessary condition for participation successfully in the global economy. In light of the sudden meltdown of their financial miracle, or as some contend the submerging of the emerging markets, the nations of East and Southeast Asia are now realizing this simple proposition.

Pressure is growing for even newer trade rules to address the more traditional issues of domestic economic and political institutions such as competition policy. It is in the interest of the United States and others within the global system that these rules be developed. They will not only further liberalize trade, but will assist in the free exercise of individual rights that underlie the existence of free markets and free trade. As one observer has noted:

[E]conomic globalization is feeding the rule-of-law imperative by putting pressure on governments to offer the stability that international investors demand [The] aim [is] the deeper goal of increasing government's compliance with law.[50]

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49. From the perspective of the United States, labor issues have generally concerned the working conditions of foreign labor as well as the movement of jobs from the United States. The recent General Motors strike in the spring and summer of 1998 once again highlights the continuing issue of the loss of American jobs because large American manufacturers exporting capital in their efforts to meet the demands of the global marketplace. Bradsher, "Subtext of the G.M. Strike Focuses on Global Strategy," *New York Times* at D3:1 (23 June 1998). This despite the clear employment benefits of foreign direct investment into the United States throughout the 1990s.

50. Carothers, "The Rule of Law Revival," Foreign Affairs 97, 98 (March-April 1998). The dramatic growth in importance of the WTO dispute resolution system has, in part, fueled the revival of interdisciplinary research between international law and international relations. Slaughter, Tulumello and Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 367, 370 (1998).

COMPLAINANTS

(Consultations / Panel Decisions)
1995 - 1997

United States	**34**
European Communities	**21**
Canada	**9**
Japan	**5**
Mexico	**5**
India	**5**
Thailand	**4**

Source: WTO 1997

RESPONDENTS

(Consultations / Panel Decisions)
1995 – 1997

European Communities	**21**
United States	**20**
Japan	**11**
Korea	**8**
India	**8**
Brazil	**7**

Source: WTO 1997

U.S. CASES IN THE WTO

(*Panel & Appellate Body Cases)*
1995 – 1998

U.S. in Panel / Appellate Body Cases
1995 - 1998

Case Name	*Subject*	*Pl.*	*Won*	*Lost*	*Def.*	*Won*	*Lost*
Reformul. Gas (U.S. restr.)	**Energy**				**x**		**x**
Japan Alcohol	**Agriculture**	**x**	**x**				
Brazil coconuts	**Agriculture**	**TP**					
Costa Rica Cotton (U.S. Restr.)	**Textile**				**x**		**x**
India wool (U.S. Restr.)	**Textile**				**x**		**x**
Canadian periodicals	**Entertainment**	**x**	**x**				

EC Banana Restr.	**agriculture**	**x**	**x**				
EC Hormone-Beef Restr.	**agriculture**	**x**	**x**				
India Patent Regime	**IPR**	**x**	**x**				
Argentina Textile Tax	**textile**	**x**	**x**				
EU Computer Classification	**high tech**	**x**		**x**			
Fuji-Kodak (Panel)	**film**	**x**		**x**			
Indonesian Auto (Panel)	**autos**	**x**	**x**				
U.S. Shrimp - Turtle (Panel)	**fisheries**				**x**		**x**
U.S. Record	***Won***	***Lost***					
U.S. as *Complainant*	**7**	**2**					
U.S. as *Respondent*	**0**	**4**					

Source: S. Malawer 1998

U.S. WON / LOST

(Panel / AB Decisions)

U.S.	Complainant	Respondent
Won	**9**	**0**
Lost	**2**	**4**

Source: S. Malawer 1998

AGREEMENTS CITED IN ALL DISPUTES

(1995 - 1997)

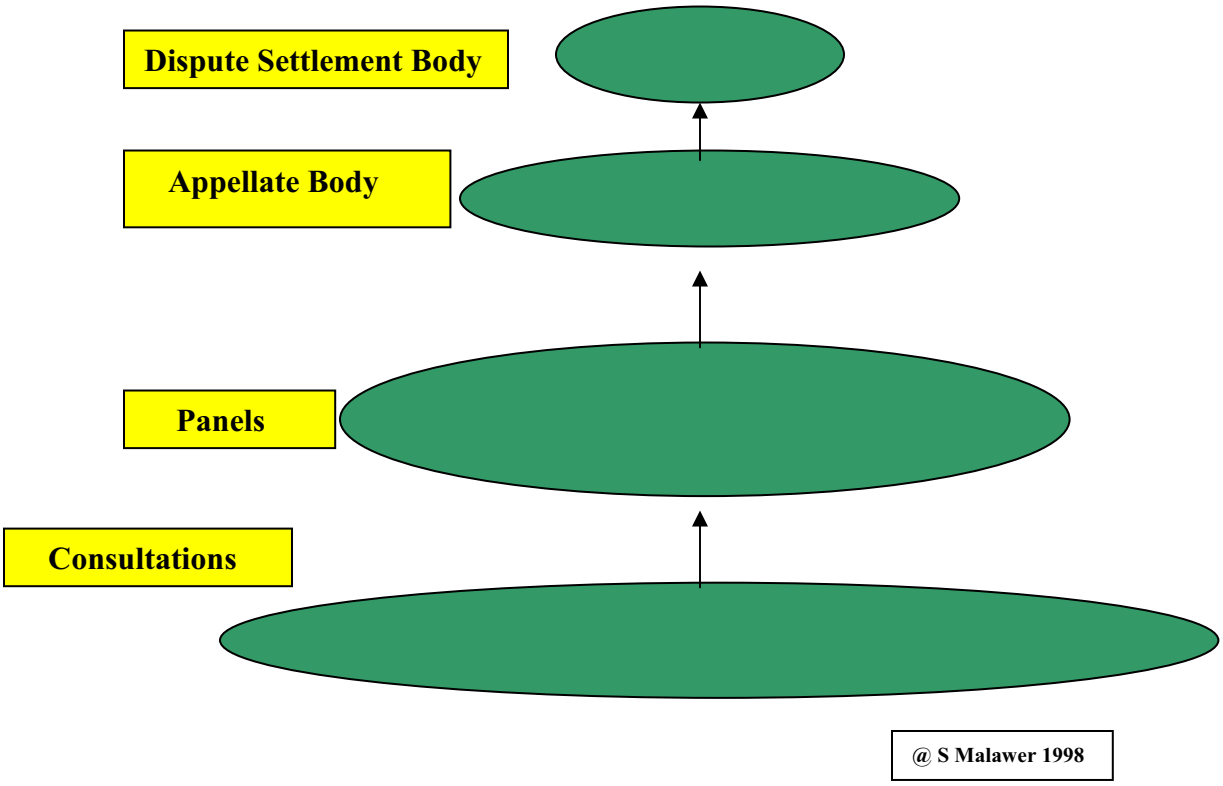
SPS / TBT	**20**
TRIPS	**10**
Agriculture	**9**
Textiles	**9**
TRIMS	**9**
GATS	**4**

GLOBAL TRADE WEBSITES

(*Government & Research)*

Office of the United States Trade Representative *(USTR)*	***http://www.ustr.gov***
World Trade Organization *(WTO)*	***http://www.wto.org***
U.S. International Trade Commission *(ITC)*	***http://www.usitc.gov***
International Law Monitor	***http://ra.irv.uit.no/trade_law/itlp/html***
International Trade & Investment (Commerce Dept. / Legal)	***http://www.ita.doc.gov/legal***
Institute for International Economics	***http://www.iie.com***
Berkeley Roundtable on the International Economy	***http://www.brie.berkeley.edu/brie***
George Mason University Global Trade Policy	***http://www.GlobalTradePolicy.com***

FLOW CHART OF LITIGATION



Genetically Modified Foods & Trade Disputes.

Stuart S. Malawer

http://www.global-trade-law.com/Malawer.WTO%20&%20GMO's%20(Legal%20Times)%20(Sept.%201,%202003).htm

Food fights are in poor taste among fraternity brothers or infant siblings. Among trading nations, they make even less sense. Before an unnecessary dispute over genetically modified foods spirals out of control, the United States should drop a World Trade Organization action recently initiated against the European Union.

Instead, the United States should negotiate its trade concerns in a diplomatic setting. Friendly transatlantic relations are more important now than ever before. Besides, the United States will probably lose this case.

The point of contention is this: Since 1998, the EU has observed a de facto moratorium on approvals to import biotech products — basically, agricultural and foodstuffs. In addition, the United States contends, several individual European states have banned the marketing and importation of biotech products (though some products have been approved).

In May, the United States filed a formal complaint with the WTO over the EU moratorium. A 60-day consultation period followed. In August, with no resolution in sight, the United States asked the WTO to establish a dispute settlement panel.

SAFETY STANDARDS

The United States argues that three EU actions violate WTO law: the suspension of consideration of applications and granting of approvals for biotech imports; the failure to consider specific enumerated products; and the individual national bans on marketing and importation of biotech products.

The United States relies on the Sanitary and Phytosanitary Agreement, one of the Uruguay Round of Multilateral Agreements. Article 2 provides that WTO members can take measures to protect human life or health, provided they have a basis in scientific principles and do not arbitrarily discriminate between members. Article 3 requires such measures to be based upon international standards, where those standards exist. It specifically cites the Codex Alimentarius Commission as an international organization responsible for developing acceptable standards. Article 5(1) requires a risk assessment that takes into account techniques developed by relevant international organizations. Article 5(7)

provides that when the scientific evidence is insufficient, members may apply restrictive measures provisionally.

The United States also argues that the EU moratorium is inconsistent with the Uruguay Round's Technical Barriers to Trade Agreement, which mainly concerns product labeling. Article 2(2) requires that technical regulations not create unnecessary obstacles to trade. Article 2(4) provides that states base such regulations on relevant international standards.

This legal structure governing the international food trade came into existence in 1995 along with the WTO. What makes it unusual is that international standards developed *outside* the WTO framework are explicitly incorporated into the WTO system to determine the legality of members' actions. Before the explosion of biotech research over the last decade — and before consumers and governments worldwide became apprehensive about genetically modified foods — there was little understanding of how these standards might affect international trade.

The incorporation of the Codex Commission into the Sanitary and Phytosanitary Agreement thrust an obscure body into the center of global trade disputes. The Rome-based commission was created in 1963 by two specialized United Nations agencies, the Food and Agricultural Organization and the World Health Organization. Before 1995, its standards were mainly voluntary food safety measures that states might take into account.

Now the Codex standards have become benchmarks against which national trade measures concerning food imports and labeling are assessed for compliance with WTO obligations. A national law unsupported by these standards may be deemed an illegal trade barrier.

Thus, the U.S. case against the EU depends primarily on whether regulations adopted by the EU are consistent with standards promulgated by the Codex Commission. Can the United States persuade a WTO panel that the EU's risk assessments did not conform with Codex standards and, thus, that there is no scientific evidence to support the measures of the EU or its member states — and that where the EU relies on the precautionary principle, there was scientific evidence that it overlooked?

A WEAKER CASE

Codex Commission actions since May have produced serious problems for the U.S. case. Recent actions by the European Parliament raise additional questions. The EU's July suit against 11 member states in the European Court of Justice makes significant complications for the U.S. proceedings in the WTO. Perhaps more importantly, issues of foreign policy and national security — namely, the U.S. desire to rebuild transatlantic ties in light of the war on terrorism and peace efforts in the Middle East and Iraq — call into question the wisdom of continuing this fight.

The United States argues that it simply wants the EU to apply a scientific, rules-based process to the review and approval of genetically modified food imports developed through agricultural biotechnology. The EU contends that a new regulatory framework that entered into force in 2002 does just that.

This summer, the European Parliament also approved legislation setting strict labeling and tracing requirements for food or feed made with genetically altered organisms. These laws are expected to receive final EU approval in the fall, prior to any WTO panel decision. They would permit genetically

modified foods to be imported if they comply with the new requirements — which would, very likely, render the U.S. action moot.

Further clouding matters is the Codex Commission's recent adoption of the first international guidelines for risk assessment studies of genetically modified foods. The guidelines require safety evaluations before food products are placed on the market. They also require that food products be traceable back to their origins. The U.S. Food and Drug Administration, by contrast, does not require a premarket safety assessment or an assessment of unintended consequences due to gene modification.

All these emerging standards appear to support stronger, not weaker, regulation of genetically modified foods. Thus, the EU's position seems more justifiable today than yesterday: It is relying on scientific evidence or, where there is not enough, it is taking precautions while seeking more information.

In July, the EU brought suit in the European Court of Justice against 11 member states contending that they (and implicitly not the EU) are maintaining illegal moratoriums against biotech foods. Although international law imposes liability on a country when a political subdivision violates an international obligation, this rule does not apply to the EU. It is merely a regional grouping, not liable for its members' actions. Thus the Court of Justice filing foreshadows a strong defense in any WTO action concerning EU responsibility for its members' biotech moratoriums.

ABUSE OF PROCESS

Add up the evidence, and it seems that the U.S. case is more about politics than science. It responds to the special pleas of agricultural firms, and it has been brought in anger (and as part of a defensive legal strategy) over recent U.S. losses in the WTO on other trade issues — anti-dumping duties, export tax subsidies, and steel tariffs. It evidences a growing U.S. tendency to rely upon power politics and unilateral intimidation at the expense of diplomatic and multilateral efforts.

But this approach is shortsighted. If there is anything truly multilateral in the world, it is trade relations. The United States was the primary architect of the WTO's dispute resolution system and is a most aggressive user today. Within the last few weeks alone, the United States has prevailed in actions brought by India (rules of origin and textile imports), by Japan (sunset review of anti-dumping duties), and against Japan (testing of agricultural imports). It is in the U.S. national interest not to abuse this system.

Litigation, especially in a losing case designed to appease unwarranted congressional angst, is not good public policy. While U.S. agricultural firms may have real grievances, they should not be settled by a WTO suit — at least not now. Negotiating labeling requirements with the EU makes a lot more sense: Agree to disclose the information, and let the buyer and market decide.

The United States must beware that litigation is never viewed as a friendly act. And these days the United States needs friends to face much graver problems of terrorism and peace. We need to make the world a safer place not for genetically modified organisms, but for all of us. In short, drop this food fight now and get on with building a safer international community.

DOMAIN NAMES & GLOBAL GOVERNANCE.

by Stuart S. Malawer
http://www.global-trade-law.com/Domain%20Names%20(Article.Dr.%20Malawer).htm

With domain names now selling for millions of dollars, like *"Business.com"* and *"Loans.com,"* an intense battle over their regulation is brewing. Trademark holders are aggressively claiming domain names with only the most remote similarity to their trademarks. On a second front, trademark holders are fighting each other over the same trademark. These battles are becoming fiercer by the day. Fueling these conflicts is a growing recognition of the critical importance of domain names for surviving the Internet revolution. As a result, the corporate battle over domain names has the potential of becoming a new-era trade dispute. The mishandling of these problems today may well lead to more serious global disputes tomorrow.

Domain names are human-friendly names mapped to Internet Protocols (IP). A domain name is the character string, sometimes called the "second-level domain," that appears before a top-level domain such as ".com." For example, "*OxfordTrade*," is the domain name in the Internet address "www.*OxfordTrade.*com". Domain names are the addresses for networked computers. They provide the addresses for websites. A domain name is a critical part of creating a comprehensive strategy for the Internet, which is necessary for the survival of most companies in today's hyper-competitive marketplace. It is a highly valuable, but intangible property right reflecting the central place of intellectual property in the global Internet revolution.

The value of domain names has skyrocketed as firms from the new economy and, belatedly, those from the old economy have recognized the critical importance of branding in cyberspace. This surprising development tracks the explosive growth of Internet usage, E-commerce and web hosting. However, foreign firms have been even slower to recognize the value of the Internet and its calling card, domain names. But this inattention is changing. As is often the case with new technology, the legal structure and rules for dealing with conflicts involving domain names are barely developed within the United States or in other countries, let alone on a global level.

Since dot.com (.com) is the most sought after global top-level domain and English is the primary language of both the Internet and global business, it is obvious why this part of cyberspace is becoming a fierce battleground. Only so many perceived good names are available in English. Estimates suggest that between now and 2003 dot.com domains will explode, growing four-fold, to more than 32 million. Firms from around the world want dot.com names. They want to expand their operations globally, often reorganizing to confront global competition and to expand into new markets. Recently, the fight over domain names has become nasty and global. Firms from Germany,

India, China and Japan, seeing how Internet use is exploding in these countries, are fighting over what domain names they will use to conduct their businesses globally. Japan recently complained about the influence of the United States government in setting the rules concerning domain name disputes.

This race for new domain names is becoming especially crowded as old-economy firms attempt to catch up and extend their trademarks for specific properties to Internet addresses. With an estimated 10 new domain names being registered every few minutes, the economic future of some companies may lie in the balance. Coupled with this battle pitting domain name holders and trademark holders (called either "cybersquatting" or "homesteading," depending what side of the fence you are on) against one another is the war between holders of the same trademarks, often from different countries.

Last October, after intensive deliberations, the Internet Corporation for Assigned Names and Numbers (ICAAN), the international corporation established to privatize the governance of domain names through the private sector's participation, adopted a set of policies and rules concerning arbitration of domain name disputes. These policies, the Uniform Domain Names Resolution Policy (UDRP), and additional procedural rules are incorporated into the online agreements that the domain name registrars (such as Network Solutions, Inc.) require each party to adhere to as part of the registration process for new domain names. The rules call for the appointment of either one or three arbitrators. (Whether registrants have sufficient notice of these rules is another issue. Consumer groups contend that sufficient notice is not given to registrants. Courts and legislatures are now dealing with this problem.)

In essence, the UDRP rules provide for arbitration of domain name disputes where the complaining party alleges that a domain name is "identical or confusingly similar" to a trademark existing at the time of registration. Arbitration takes place under the auspices of an approved third party, for example, the World Intellectual Property Organization (WIPO), located in Geneva, Switzerland. WIPO has enacted its own supplementary procedural rules. The ICANN rules provide for only one remedy, the transfer of the domain name. However, the arbitration is not the final word. Under the UDRP rules, filing a suit in a national court of competent jurisdiction will defeat the arbitration proceeding or award. Local litigation will have supremacy.

A few weeks after the ICAAN rules came into force, in late November, new Congressional legislation ("Anti-Cybersquatting Legislation") became effective. The legislation addressed the same issue of trademark infringement by domain name holders, using the same standard in establishing ownership of a registered domain name. However, the statute imposes civil penalties and authorizes the awarding of legal fees. The statute was a result of lobbying by many old economy firms that failed to register their desired domain names early on and were only able to play catch up by Congressional intervention. Critics of the legislation claim that this legislation may violate the First Amendment right of free speech, represent an unfair extension of trademark law to Internet addressing and restrict the valuable Internet business of name speculation and name arbitrage.

These parallel developments, the ICANN rules and the new federal legislation, simply do not help a foreign company that has a claim for a domain name held by a U.S. firm. Neither are they beneficial in protecting U.S. firms from law suits abroad or in terms of promoting global governance generally for this corner of the Internet.
A foreign firm may request arbitration under the ICAAN rules and utilize the services of WIPO. And if it wins? The losing party -- let's assume it is an American firm -- will most definitely bring suit in

the United States, as it is entitled. Thus, the time and effort the foreign firm spent in arbitration under the ICAAN (and WIPO) rules would have been wasted. The new U.S. legislation is now controlling the issue, and that legislation only protects U.S. trademarks, not foreign trademarks. Thus, foreign firms may find themselves at a huge disadvantage.

Congress' jumping the gun may have been an understandable response once it is realized that some very large U.S. firms, such as Morgan Stanley, were behind the curve in understanding the critical importance of the Internet and domain names. Congressional legislation has severely short-circuited the Internet industry as well as international efforts to fashion a mechanism to ensure equitable development worldwide of the Internet and the domain name system.

Though understandable, Congress' approach falls short. The better approach would be to strengthen the ICAAN rules. The rules should be improved by providing for exclusive and binding arbitration under WIPO, a permanent panel of arbitrators, explicit protection of foreign trademarks, and the avoidance of unilateral American legislation -- which may end up clashing with that of other nations. Indeed, other nations are developing their own rules concerning domain names, such as the U.K. and Germany, which apply tough remedies. It is highly likely that the U.K. would apply their rules to a dot.com dispute involving a U.S. trademark and two British firms or foreign firms it considers itself having jurisdiction over (for example, an American subsidiary). It is certainly possible that British courts could reach a decision contrary to one the U.S. courts might reach.

Forcing foreign firms to litigate their trademark claims involving dot.com names in U.S. courts does not inspire confidence that the Internet is a global (as opposed to an American controlled) medium or captive colony. This American approach to regulating the Internet, presumably because the servers of the registrars for the top-level domain names are located within the United States, will become less defensible as more and more people and firms throughout the world become connected to the Internet and engage in global commerce and trade. Once registered, the dot.com sites can be maintained on servers throughout the world. After all, the smallest and most local website can garner and place orders, and conduct transactions with others located in the most remote places in the world.

It is in the interest of American firms, especially those doing business overseas, to favor more of a global approach. A U.S. firm may find itself dragged into a foreign court to litigate its dot.com name under the rules of that foreign jurisdiction. Obviously, this approach could lead to messy and unsettled conflicts of law and multi-jurisdictional issues that have little chance of a prompt and satisfactory resolution. The best-case scenario from this situation is that many lawyers would be scurrying back to their old law school books to try to find obscure law they can attempt to apply it to new and novel questions concerning global commerce and Internet transactions.

The Internet is a global medium, inherently borderless but existing in a world where borders exist. Rules governing domain names should be mutually agreed upon internationally. In the long run this approach will be best for all.

SELECTED WTO AGREEMENTS.

SUMMARY OF AGREEMENTS.

http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#General (WTO 2006).

Introduction.

"The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations", signed by ministers in Marrakesh on 15 April 1994 is 550 pages long and contains legal texts which spell out the results of the negotiations since the Round was launched in Punta del Este, Uruguay, in September 1986. In addition to the texts of the agreements, the Final Act also contains texts of Ministerial Decisions and Declarations which further clarify certain provisions of some of the agreements.

The Final Act covers all the negotiating areas cited in the Punta del Este Declaration with two important exceptions. The first is the results of the "market access negotiations" in which individual countries have made binding commitments to reduce or eliminate specific tariffs and non-tariff barriers to merchandise trade. These concessions are recorded in national schedules that form an integral part of the Final Act. The second is the "initial commitments" on liberalization of trade in services. These commitments on liberalization are also recorded in national schedules.

Agreement Establishing the World Trade Organization.

The agreement establishing the World Trade Organization (WTO) calls for a single institutional framework encompassing the GATT, as modified by the Uruguay Round, all agreements and arrangements concluded under its auspices and the complete results of the Uruguay Round. Its structure is headed by a Ministerial Conference meeting at least once every two years. A General Council oversees the operation of the agreement and ministerial decisions on a regular basis. This General Council acts as a Dispute Settlement Body and a Trade Policy Review Mechanism, which concern themselves with the full range of trade issues covered by the WTO, and has also established subsidiary bodies such as a Goods Council, a Services Council and a TRIPs Council. The WTO framework ensures a "single undertaking approach" to the results of the Uruguay Round — thus, membership in the WTO entails accepting all the results of the Round without exception.

Uruguay Round Protocol GATT 1994.

The results of the market access negotiations in which participants have made commitments to eliminate or reduce tariff rates and non-tariff measures applicable to trade in goods are recorded in national schedules of concessions annexed to the Uruguay Round Protocol that forms an integral part of the Final Act.

Agreement on Agriculture.

The negotiations have resulted in four main portions of the Agreement; the Agreement on Agriculture itself; the concessions and commitments Members are to undertake on market access, domestic support and export subsidies; the Agreement on Sanitary and Phytosanitary Measures; and the Ministerial Decision concerning Least-Developed and Net Food-Importing Developing countries.

Overall, the results of the negotiations provide a framework for the long-term reform of agricultural trade and domestic policies over the years to come. It makes a decisive move towards the objective of increased market orientation in agricultural trade. The rules governing agricultural trade are strengthened which will lead to improved predictability and stability for importing and exporting countries alike.

The agricultural package also addresses many other issues of vital economic and political importance to many Members. These include provisions that encourage the use of less trade-distorting domestic support policies to maintain the rural economy, that allow actions to be taken to ease any adjustment burden, and also the introduction of tightly prescribed provisions that allow some flexibility in the implementation of commitments. Specific concerns of developing countries have been addressed including the concerns of net-food importing countries and least-developed countries.

Agreement on Sanitary and Phytosanitary Measures.

This agreement concerns the application of sanitary and phytosanitary measures — in other words food safety and animal and plant health regulations. The agreement recognises that governments have the right to take sanitary and phytosanitary measures but that they should be applied only to the extent necessary to protect human, animal or plant life or health and should not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail.

In order to harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members are encouraged to base their measures on international standards, guidelines and recommendations where they exist. However, Members may maintain or introduce measures which result in higher standards if there is scientific justification or as a consequence of consistent risk decisions based on an appropriate risk assessment. The Agreement spells out procedures and criteria for the assessment of risk and the determination of appropriate levels of sanitary or phytosanitary protection.

It is expected that Members would accept the sanitary and phytosanitary measures of others as equivalent if the exporting country demonstrates to the importing country that its measures achieve the importing country's appropriate level of health protection. The agreement includes provisions on control, inspection and approval procedures.
Agreement on Textiles and Clothing.

The object of this negotiation has been to secure the eventual integration of the textiles and clothing sector — where much of the trade is currently subject to bilateral quotas negotiated under the Multifibre Arrangement (MFA) — into the GATT on the basis of strengthened GATT rules and disciplines.

Integration of the sector into the GATT would take place as follows : first, on 1 January 1995; each party would integrate into the GATT products from the specific list in the Agreement which accounted for not less than 16 per cent of its total volume of imports in 1990. Integration means that trade in these products will be governed by the general rules of GATT.

At the beginning of Phase 2, on 1 January 1998, products which accounted for not less than 17 per cent of 1990 imports would be integrated. On 1 January 2002, products which accounted for not less than 18 per cent of 1990 imports would be integrated. All remaining products would be integrated at the end of the transition period on 1 January 2005. At each of the first three stages, products should be chosen from each of the following categories: tops and yarns, fabrics, made-up textile products, and clothing.

While the agreement focuses largely on the phasing-out of MFA restrictions, it also recognizes that some members maintain non-MFA restrictions not justified under a GATT provision. These would also be brought into conformity with GATT within one year of the entry into force of the Agreement or phased out progressively during a period not exceeding the duration of the Agreement (that is, by 2005).

Agreement on Technical Barriers to Trade.

This agreement will extend and clarify the Agreement on Technical Barriers to Trade reached in the Tokyo Round. It seeks to ensure that technical negotiations and standards, as well as testing and certification procedures, do not create unnecessary obstacles to trade. However, it recognizes that countries have the right to establish protection, at levels they consider appropriate, for example for human, animal or plant life or health or the environment, and should not be prevented from taking measures necessary to ensure those levels of protection are met. The agreement therefore encourages countries to use international standards where these are appropriate, but it does not require them to change their levels of protection as a result of standardization.

Agreement on Trade Related Aspects of Investment Measures.

The agreement recognizes that certain investment measures restrict and distort trade. It provides that no contracting party shall apply any TRIM inconsistent with Articles III (national treatment) and XI (prohibition of quantitative restrictions) of the GATT. To this end, an illustrative list of TRIMs agreed to be inconsistent with these articles is appended to the agreement. The list includes measures which require particular levels of local procurement by an enterprise ("local content requirements") or which restrict the volume or value of imports such an enterprise can purchase or use to an amount related to the level of products it exports ("trade balancing requirements").

The agreement requires mandatory notification of all non-conforming TRIMs and their elimination within two years for developed countries, within five years for developing countries and within seven years for least-developed countries. It establishes a Committee on TRIMs which will, among other things, monitor the implementation of these commitments. The agreement also provides for

consideration, at a later date, of whether it should be complemented with provisions on investment and competition policy more broadly.

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Agreement on Implementation of Article VI (Anti-dumping).

Article VI of the GATT provides for the right of contracting parties to apply anti-dumping measures, i.e. measures against imports of a product at an export price below its "normal value" (usually the price of the product in the domestic market of the exporting country) if such dumped imports cause injury to a domestic industry in the territory of the importing contracting party. More detailed rules governing the application of such measures are currently provided in an Anti-dumping Agreement concluded at the end of the Tokyo Round. Negotiations in the Uruguay Round have resulted in a revision of this Agreement which addresses many areas in which the current Agreement lacks precision and detail.

In particular, the revised Agreement provides for greater clarity and more detailed rules in relation to the method of determining that a product is dumped, the criteria to be taken into account in a determination that dumped imports cause injury to a domestic industry, the procedures to be followed in initiating and conducting anti-dumping investigations, and the implementation and duration of anti-dumping measures. In addition, the new agreement clarifies the role of dispute settlement panels in disputes relating to anti-dumping actions taken by domestic authorities.

On the methodology for determining that a product is exported at a dumped price, the new Agreement adds relatively specific provisions on such issues as criteria for allocating costs when the export price is compared with a "constructed" normal value and rules to ensure that a fair comparison is made between the export price and the normal value of a product so as not to arbitrarily create or inflate margins of dumping.

The agreement strengthens the requirement for the importing country to establish a clear causal relationship between dumped imports and injury to the domestic industry. The examination of the dumped imports on the industry concerned must include an evaluation of all relevant economic factors bearing on the state of the industry concerned. The agreement confirms the existing

interpretation of the term "domestic industry". Subject to a few exceptions, "domestic industry" refers to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

Clear-cut procedures have been established on how anti-dumping cases are to be initiated and how such investigations are to be conducted. Conditions for ensuring that all interested parties are given an opportunity to present evidence are set out. Provisions on the application of provisional measures, the use of price undertakings in anti-dumping cases, and on the duration of anti-dumping measures have been strengthened. Thus, a significant improvement over the existing Agreement consists of the addition of a new provision under which anti-dumping measures shall expire five years after the date of imposition, unless a determination is made that, in the event of termination of the measures, dumping and injury would be likely to continue or recur.

A new provision requires the immediate termination of an anti-dumping investigation in cases where the authorities determine that the margin of dumping is *de minimis* (which is defined as less than 2 per cent, expressed as a percentage of the export price of the product) or that the volume of dumped imports is negligible (generally when the volume of dumped imports from an individual country accounts for less than 3 per cent of the imports of the product in question into the importing country).

The agreement calls for prompt and detailed notification of all preliminary or final anti-dumping actions to a Committee on Anti-dumping Practices. The agreement will afford parties the opportunity of consulting on any matter relating to the operation of the agreement or the furtherance of its objectives, and to request the establishment of panels to examine disputes.

Agreement on Implementation of Article VII (Customs Valuation).

The Decision on Customs Valuation would give customs administrations the right to request further information of importers where they have reason to doubt the accuracy of the declared value of imported goods. If the administration maintains a reasonable doubt, despite any additional information, it may be deemed that the customs value of the imported goods cannot be determined on the basis of the declared value, and customs would need to establish the value taking into account the provisions of the Agreement. In addition, two accompanying texts further clarify certain of the Agreement's provisions relevant to developing countries and relating to minimum values and importations by sole agents, sole distributors and sole concessionaires.

Agreement on Preshipment Inspection.

Preshipment inspection (PSI) is the practice of employing specialized private companies to check shipment details — essentially price, quantity, quality — of goods ordered overseas. Used by governments of developing countries, the purpose is to safeguard national financial interests (prevention of capital flight and commercial fraud as well as customs duty evasion, for instance) and to compensate for inadequacies in administrative infrastructures.

The agreement recognizes that GATT principles and obligations apply to the activities of preshipment inspection agencies mandated by governments. The obligations placed on PSI-user governments include non-discrimination, transparency, protection of confidential business information, avoidance of unreasonable delay, the use of specific guidelines for conducting price verification and the avoidance of conflicts of interest by the PSI agencies.

The obligations of exporting contracting parties towards PSI users include non-discrimination in the application of domestic laws and regulations, prompt publication of such laws and regulations and the provision of technical assistance where requested.

The agreement establishes an independent review procedure — administered jointly by an organization representing PSI agencies and an organization representing exporters — to resolve disputes between an exporter and a PSI agency.

Agreement on Rules of Origin.

The agreement aims at long-term harmonization of rules of origin, other than rules of origin relating to the granting of tariff preferences, and to ensure that such rules do not themselves create unnecessary obstacles to trade.

The agreement sets up a harmonization programme, to be initiated as soon as possible after the completion of the Uruguay Round and to be completed within three years of initiation. It would be based upon a set of principles, including making rules of origin objective, understandable and predictable. The work would be conducted by a Committee on Rules of Origin (CRO) in the WTO and a technical committee (TCRO) under the auspices of the Customs Cooperation Council in Brussels.

Much work was done in the CRO and the TCRO and substantial progress has been achieved in the three years foreseen in the Agreement for the completion of the work. However, due to the complexity of the issues the HWP could not be finalized within the foreseen deadline. The CRO continued its work in 2000. In December 2000, the General Council Special Session agreed to set, as the new deadline for completion of the remainder of the work, the Fourth Session of the Ministerial Conference, or at the latest the end of 2001. The negotiating texts are contained in documents G/RO/41 and G/RO/45.

Until the completion of the harmonization programme, contracting parties would be expected to ensure that their rules of origin are transparent; that they do not have restricting, distorting or disruptive effects on international trade; that they are administered in a consistent, uniform, impartial and reasonable manner, and that they are based on a positive standard (in other words, they should state what does confer origin rather than what does not).

An annex to the agreement sets out a "common declaration" with respect to the operation of rules of origin on goods which qualify for preferential treatment.

Agreement on Import Licensing Procedures.

> **The revised agreement strengthens the disciplines on the users of import licensing systems — which, in any event, are much less widely used now than in the past — and increases transparency and predictability. For example, the agreement requires parties to publish sufficient information for traders to know the basis on which licences are granted. It contains strengthened rules for the notification of the institution of import licensing procedures or changes therein. It also offers guidance on the assessment of applications.**

With respect to automatic licensing procedures, the revised agreement sets out criteria under which they are assumed not to have trade restrictive effects. With respect to non-automatic licensing procedures, their administrative burden for importers and exporters should be limited to what is absolutely necessary to administer the measures to which they apply. The revised agreement also sets a maximum of 60 days for applications to be considered.

Agreement on Subsidies and Countervailing Measures.

The Agreement on Subsidies and Countervailing Measures is intended to build on the Agreement on Interpretation and Application of Articles VI, XVI and XXIII which was negotiated in the Tokyo Round.

Unlike its predecessor, the agreement contains a definition of subsidy and introduces the concept of a "specific" subsidy — for the most part, a subsidy available only to an enterprise or industry or group of enterprises or industries within the jurisdiction of the authority granting the subsidy. Only specific subsidies would be subject to the disciplines set out in the agreement.

The agreement establishes three categories of subsidies. First, it deems the following subsidies to be "prohibited": those contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance; and those contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods. Prohibited subsidies are subject to new dispute settlement procedures. The main features include an expedited timetable for action by the Dispute Settlement body, and if it is found that the subsidy is indeed prohibited, it must be immediately withdrawn. If this is not done within the specified time period, the complaining member is authorized to take countermeasures. (See the section on "Dispute Settlement" for details on the procedures).

The second category is "actionable" subsidies. The agreement stipulates that no member should cause, through the use of subsidies, adverse effects to the interests of other signatories, i.e. injury to domestic industry of another signatory, nullification or impairment of benefits accruing directly or indirectly to other signatories under the General Agreement (in particular the benefits of bound tariff concessions), and serious prejudice to the interests of another member. "Serious prejudice" shall be presumed to exist for certain subsidies including when the total *ad valorem* subsidization of a product exceeds 5 per cent. In such a situation, the burden of proof is on the subsidizing member to show that the subsidies in question do not cause serious prejudice to the complaining member. Members affected by actionable subsidies may refer the matter to the Dispute Settlement body. In the event that it is determined that such adverse effects exist, the subsidizing member must withdraw the subsidy or remove the adverse effects.

The third category involves non-actionable subsidies, which could either be non-specific subsidies, or specific subsidies involving assistance to industrial research and pre-competitive development activity, assistance to disadvantaged regions, or certain type of assistance for adapting existing facilities to new environmental requirements imposed by law and/or regulations. Where another member believes that an otherwise non-actionable subsidy is resulting in serious adverse effects to a domestic industry, it may seek a determination and recommendation on the matter.

One part of the agreement concerns the use of countervailing measures on subsidized imported goods. It sets out disciplines on the initiation of countervailing cases, investigations by national authorities and rules of evidence to ensure that all interested parties can present information and argument. Certain disciplines on the calculation of the amount of a subsidy are outlined as is the basis for the

determination of injury to the domestic industry. The agreement would require that all relevant economic factors be taken into account in assessing the state of the industry and that a causal link be established between the subsidized imports and the alleged injury. Countervailing investigations shall be terminated immediately in cases where the amount of a subsidy is *de minimis* (the subsidy is less than 1 per cent *ad valorem)* or where the volume of subsidized imports, actual or potential, or the injury is negligible. Except under exceptional circumstances, investigations shall be concluded within one year after their initiation and in no case more than 18 months. All countervailing duties have to be terminated within 5 years of their imposition unless the authorities determine on the basis of a review that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.

The agreement recognizes that subsidies may play an important role in economic development programmes of developing countries, and in the transformation of centrally-planned economies to market economies. Least-developed countries and developing countries that have less than $1,000 per capita GNP are thus exempted from disciplines on prohibited export subsidies, and have a time-bound exemption from other prohibited subsidies. For other developing countries, the export subsidy prohibition would take effect 8 years after the entry into force of the agreement establishing the WTO, and they have a time-bound (though fewer years than for poorer developing countries) exemption from the other prohibited subsidies. Countervailing investigation of a product originating from a developing-country member would be terminated if the overall level of subsidies does not exceed 2 per cent (and from certain developing countries 3 per cent) of the value of the product, or if the volume of the subsidized imports represents less than 4 per cent of the total imports for the like product in the importing signatory. For countries in the process of transformation from a centrally-planned into a market economy, prohibited subsidies shall be phased out within a period of seven years from the date of entry into force of the agreement.

In anticipation of the negotiation of special rules in the *civil aircraft* sector, under the subsidies agreement, civil aircraft products are not subject to the presumption that *ad valorem* subsidization in excess of 5 per cent causes serious prejudice to the interests of other Members. In addition, the Agreement provides that where repayment of financing in the civil aircraft sector is dependent on the level of sales of a product and sales fall below expectations, this does not in itself give rise to such presumption of serious prejudice.

Agreement on Safeguards.

Article XIX of the General Agreement allows a GATT member to take a "safeguard" action to protect a specific domestic industry from an unforeseen increase of imports of any product which is causing, or which is likely to cause, serious injury to the industry.

The agreement breaks major ground in establishing a prohibition against so-called "grey area" measures, and in setting a "sunset clause" on all safeguard actions. The agreement stipulates that a member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. Any such measure in effect at the time of entry into force of the agreement would be brought into conformity with this agreement, or would have to be phased out within four years after the entry into force of the agreement establishing the WTO. An exception could be made for one specific measure for each importing member, subject to mutual agreement with the directly concerned member, where the phase-out date would be 31 December 1999.

All existing safeguard measures taken under Article XIX of the General Agreement 1947 shall be terminated not later than eight years after the date on which they were first applied or five years after the date of entry into force of the agreement establishing the WTO, whichever comes later.

The agreement sets out requirements for safeguard investigation which include public notice for hearings and other appropriate means for interested parties to present evidence, including on whether a measure would be in the public interest. In the event of critical circumstances, a provisional safeguard measure may be imposed based upon a preliminary determination of serious injury. The duration of such a provisional measure would not exceed 200 days.

The agreement sets out the criteria for "serious injury" and the factors which must be considered in determining the impact of imports. The safeguard measure should be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Where quantitative restrictions are imposed, they normally should not reduce the quantities of imports below the annual average for the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury.

In principle, safeguard measures have to be applied irrespective of source. In cases in which a quota is allocated among supplying countries, the member applying restrictions may seek agreement with others. Members having a substantial interest in supplying the product concerned. Normally, allocation of shares would be on the basis of proportion of total quantity or value of the imported product over a previous representative period. However, it would be possible for the importing country to depart from this approach if it could demonstrate, in consultations under the auspices of the Safeguards Committee, that imports from certain contracting parties had increased disproportionately in relation to the total increase and that such a departure would be justified and equitable to all suppliers. The duration of the safeguard measure in this case cannot exceed four years.

The agreement lays down time limits for all safeguard measures. Generally, the duration of a measure should not exceed four years though this could be extended up to a maximum of eight years, subject to confirmation of continued necessity by the competent national authorities and if there is evidence that the industry is adjusting. Any measure imposed for a period greater than one year should be progressively liberalized during its lifetime. No safeguard measure could be applied again to a product that had been subject to such action for a period equal to the duration of the previous measure, subject to a non-application period of at least two years. A safeguard measure with a duration of 180 days or less may be applied again to the import of a product if at least one year had elapsed since the date of introduction of the measure on that product, and if such a measure had not been applied on the same product more than twice in the five-year period immediately preceding the date of introduction of the measure.

The agreement envisages consultations on compensation for safeguard measures. Where consultations are not successful, the affected members may withdraw equivalent concessions or other obligations under GATT 1994. However, such action is not allowed for the first three years of the safeguard measure if it conforms to the provisions of the agreement, and is taken as a result of an absolute increase in imports.

Safeguard measures would not be applicable to a product from a developing country member, if the share of the developing country member in the imports of the product concerned does not exceed 3 per cent, and that developing country members with less than 3 per cent import share collectively

account for no more than 9 per cent of total imports of the product concerned. A developing country member has the right to extend the period of application of a safeguard measure for a period of up to two years beyond the normal maximum. It can also apply a safeguard measure again to a product that had been subject to such an action after a period equal to half of the duration of the previous measure, subject to a non-application period of at least two years.

The agreement would establish a Safeguards Committee which would oversee the operation of its provisions and, in particular, be responsible for surveillance of its commitments.

General Agreement on Trade in Services.

The Services Agreement which forms part of the Final Act rests on three pillars. The first is a Framework Agreement containing basic obligations which apply to all member countries. The second concerns national schedules of commitments containing specific further national commitments which will be the subject of a continuing process of liberalization. The third is a number of annexes addressing the special situations of individual services sectors.

Part I of the basic agreement defines its scope — specifically, services supplied from the territory of one party to the territory of another; services supplied in the territory of one party to the consumers of any other (for example, tourism); services provided through the presence of service providing entities of one party in the territory of any other (for example, banking); and services provided by nationals of one party in the territory of any other (for example, construction projects or consultancies).

Part II sets out general obligations and disciplines. A basic most-favoured-nation (m.f.n.) obligation states that each party "shall accord immediately and unconditionally to services and service providers of any other Party, treatment no less favourable than that it accords to like services and service providers of any other country". However, it is recognized that m.f.n. treatment may not be possible for every service activity and, therefore, it is envisaged that parties may indicate specific m.f.n. exemptions. Conditions for such exemptions are included as an annex and provide for reviews after five years and a normal limitation of 10 years on their duration.

Transparency requirements include publication of all relevant laws and regulations. Provisions to facilitate the increased participation of developing countries in world services trade envisage negotiated commitments on access to technology, improvements in access to distribution channels and information networks and the liberalization of market access in sectors and modes of supply of export interest. The provisions covering economic integration are analogous to those in Article XXIV of GATT, requiring arrangements to have "substantial sectoral coverage" and to "provide for the absence or elimination of substantially all discrimination" between the parties.

Since domestic regulations, not border measures, provide the most significant influence on services trade, provisions spell out that all such measures of general application should be administered in a reasonable, objective and impartial manner. There would be a requirement that parties establish the means for prompt reviews of administrative decisions relating to the supply of services.

The agreement contains obligations with respect to recognition requirements (educational background, for instance) for the purpose of securing authorizations, lice85nses or certification in the services area. It encourages recognition requirements achieved through harmonization and internationally-agreed criteria. Further provisions state that parties are required to ensure that

monopolies and exclusive service providers do not abuse their positions. Restrictive business practices should be subject to consultations between parties with a view to their elimination.

While parties are normally obliged not to restrict international transfers and payments for current transactions relating to commitments under the agreement, there are provisions allowing limited restrictions in the event of balance-of-payments difficulties. However, where such restrictions are imposed they would be subject to conditions; including that they are non-discriminatory, that they avoid unnecessary commercial damage to other parties and that they are of a temporary nature.

The agreement contains both general exceptions and security exceptions provisions which are similar to Articles XX and XXI of the GATT. It also envisages negotiations with a view to the development of disciplines on trade-distorting subsidies in the services area.

Part III contains provisions on market access and national treatment which would not be general obligations but would be commitments made in national schedules. Thus, in the case of market access, each party "shall accord services and service providers of other Parties treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its schedule". The intention of the market-access provision is to progressively eliminate the following types of measures: limitations on numbers of service providers, on the total value of service transactions or on the total number of service operations or people employed. Equally, restrictions on the kind of legal entity or joint venture through which a service is provided or any foreign capital limitations relating to maximum levels of foreign participation are to be progressively eliminated.

The national-treatment provision contains the obligation to treat foreign service suppliers and domestic service suppliers in the same manner. However, it does provide the possibility of different treatment being accorded the service providers of other parties to that accorded to domestic service providers. However, in such cases the conditions of competition should not, as a result, be modified in favour of the domestic service providers.

Part IV of the agreement establishes the basis for progressive liberalization in the services area through successive rounds of negotiations and the development of national schedules. It also permits, after a period of three years, parties to withdraw or modify commitments made in their schedules. Where commitments are modified or withdrawn, negotiations should be undertaken with interested parties to agree on compensatory adjustments. Where agreement cannot be reached, compensation would be decided by arbitration.

Part V of the agreement contains institutional provisions, including consultation and dispute settlement and the establishment of a Council on Services. The responsibilities of the Council are set out in a Ministerial Decision.

The first of the annexes to the agreement concerns the movement of labour. It permits parties to negotiate specific commitments applying to the movement of people providing services under the agreement. It requires that people covered by a specific commitment shall be allowed to provide the service in accordance with the terms of the commitment. Nevertheless, the agreement would not apply to measures affecting employment, citizenship, residence or employment on a permanent basis. The annex on financial services (largely banking and insurance) lays down the right of parties, notwithstanding other provisions, to take prudential measures, including for the protection of investors, deposit holders and policy holders, and to ensure the integrity and stability of the financial system. However, a further understanding on financial services would allow those participants who

choose to do so to undertake commitments on financial services through a different method. With respect to market access, the understanding contains more detailed obligations on, among other things, monopoly rights, cross-border trade (certain insurance and reinsurance policy writing as well as financial data processing and transfer), the right to establish or expand a commercial presence, and the temporary entry of personnel. The provisions on national treatment refer explicitly to access to payments and clearing systems operated by public entities and to official funding and refinancing facilities. They also relate to membership of, or participation in, self-regulatory bodies, securities or futures exchanges and clearing agencies.

The annex on telecommunications relates to measures which affect access to and use of public telecommunications services and networks. In particular, it requires that such access be accorded to another party, on reasonable and non-discriminatory terms, to permit the supply of a service included in its schedule. Conditions attached to the use of public networks should be no more than is necessary to safeguard the public service responsibilities of their operators, to protect the technical integrity of the network and to ensure that foreign service suppliers do not supply services unless permitted to do so through a specific commitment. The annex also encourages technical cooperation to assist developing countries in the strengthening of their own domestic telecommunications sectors. The annex on air-transport services excludes from the agreement's coverage traffic rights (largely bilateral air-service agreements conferring landing rights) and directly related activities which might affect the negotiation of traffic rights. Nevertheless, the annex, in its current form, also states that the agreement should apply to aircraft repair and maintenance services, the marketing of air-transport services and computer-reservation services. The operation of the annex would be reviewed at least every five years.

In the final days of the services negotiations, three Decisions were taken — on Financial Services, Professional Services and the Movement of Natural Persons. The Decision on Financial Services confirmed that commitments in this sector would be implemented on an MFN basis, and permits Members to revise and finalize their schedules of commitments and their MFN exemptions six months after the entry into force of the Agreement. Contrary to some media reports, the audio-visual and maritime sectors have not been removed from the scope of the GATS.

Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods.

The agreement recognises that widely varying standards in the protection and enforcement of intellectual property rights and the lack of a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods have been a growing source of tension in international economic relations. Rules and disciplines were needed to cope with these tensions. To that end, the agreement addresses the applicability of basic GATT principles and those of relevant international intellectual property agreements; the provision of adequate intellectual property rights; the provision of effective enforcement measures for those rights; multilateral dispute settlement; and transitional arrangements.

Part I of the agreement sets out general provisions and basic principles, notably a national-treatment commitment under which the nationals of other parties must be given treatment no less favourable than that accorded to a party's own nationals with regard to the protection of intellectual property. It also contains a most-favoured-nation clause, a novelty in an international intellectual property agreement, under which any advantage a party gives to the nationals of another country must be

extended immediately and unconditionally to the nationals of all other parties, even if such treatment is more favourable than that which it gives to its own nationals.

Part II addresses each intellectual property right in succession. With respect to copyright, parties are required to comply with the substantive provisions of the Berne Convention for the protection of literary and artistic works, in its latest version (Paris 1971), though they will not be obliged to protect moral rights as stipulated in Article 6bis of that Convention. It ensures that computer programs will be protected as literary works under the Berne Convention and lays down on what basis data bases should be protected by copyright. Important additions to existing international rules in the area of copyright and related rights are the provisions on rental rights. The draft requires authors of computer programmes and producers of sound recordings to be given the right to authorize or prohibit the commercial rental of their works to the public. A similar exclusive right applies to films where commercial rental has led to widespread copying which is materially impairing the right of reproduction. The draft also requires performers to be given protection from unauthorized recording and broadcast of live performances (bootlegging). The protection for performers and producers of sound recordings would be for no less than 50 years. Broadcasting organizations would have control over the use that can be made of broadcast signals without their authorization. This right would last for at least 20 years.

With respect to trademarks and service marks, the agreement defines what types of signs must be eligible for protection as a trademark or service mark and what the minimum rights conferred on their owners must be. Marks that have become well-known in a particular country shall enjoy additional protection. In addition, the agreement lays down a number of obligations with regard to the use of trademarks and service marks, their term of protection, and their licensing or assignment. For example, requirements that foreign marks be used in conjunction with local marks would, as a general rule, be prohibited.

In respect of geographical indications, the agreement lays down that all parties must provide means to prevent the use of any indication which misleads the consumer as to the origin of goods, and any use which would constitute an act of unfair competition. A higher level of protection is provided for geographical indications for wines and spirits, which are protected even where there is no danger of the public's being misled as to the true origin. Exceptions are allowed for names that have already become generic terms, but any country using such an exception must be willing to negotiate with a view to protecting the geographical indications in question. Furthermore, provision is made for further negotiations to establish a multilateral system of notification and registration of geographical indications for wines.

Industrial designs are also protected under the agreement for a period of 10 years. Owners of protected designs would be able to prevent the manufacture, sale or importation of articles bearing or embodying a design which is a copy of the protected design.

As regards patents, there is a general obligation to comply with the substantive provisions of the Paris Convention (1967). In addition, the agreement requires that 20-year patent protection be available for all inventions, whether of products or processes, in almost all fields of technology. Inventions may be excluded from patentability if their commercial exploitation is prohibited for reasons of public order or morality; otherwise, the permitted exclusions are for diagnostic, therapeutic and surgical methods, and for plants and (other than microorganisms) animals and essentially biological processes for the production of plants or animals (other than microbiological processes). Plant varieties, however, must be protectable either by patents or by a *sui generis* system (such as the breeder's rights provided in a

UPOV Convention). Detailed conditions are laid down for compulsory licensing or governmental use of patents without the authorization of the patent owner. Rights conferred in respect of patents for processes must extend to the products directly obtained by the process; under certain conditions alleged infringers may be ordered by a court to prove that they have not used the patented process.

With respect to the protection of layout designs of integrated circuits, the agreement requires parties to provide protection on the basis of the Washington Treaty on Intellectual Property in Respect of Integrated Circuits which was opened for signature in May 1989, but with a number of additions: protection must be available for a minimum period of 10 years; the rights must extend to articles incorporating infringing layout designs; innocent infringers must be allowed to use or sell stock in hand or ordered before learning of the infringement against a suitable royalty: and compulsory licensing and government use is only allowed under a number of strict conditions.

Trade secrets and know-how which have commercial value must be protected against breach of confidence and other acts contrary to honest commercial practices. Test data submitted to governments in order to obtain marketing approval for pharmaceutical or agricultural chemicals must also be protected against unfair commercial use.

The final section in this part of the agreement concerns anti-competitive practices in contractual licences. It provides for consultations between governments where there is reason to believe that licensing practices or conditions pertaining to intellectual property rights constitute an abuse of these rights and have an adverse effect on competition. Remedies against such abuses must be consistent with the other provisions of the agreement.

Part III of the agreement sets out the obligations of member governments to provide procedures and remedies under their domestic law to ensure that intellectual property rights can be effectively enforced, by foreign right holders as well as by their own nationals. Procedures should permit effective action against infringement of intellectual property rights but should be fair and equitable, not unnecessarily complicated or costly, and should not entail unreasonable time-limits or unwarranted delays. They should allow for judicial review of final administrative decisions. There is no obligation to put in place a judicial system distinct from that for the enforcement of laws in general, nor to give priority to the enforcement of intellectual property rights in the allocation of resources or staff.

The civil and administrative procedures and remedies spelled out in the text include provisions on evidence of proof, injunctions, damages and other remedies which would include the right of judicial authorities to order the disposal or destruction of infringing goods. Judicial authorities must also have the authority to order prompt and effective provisional measures, in particular where any delay is likely to cause irreparable harm to the right holder, or where evidence is likely to be destroyed. Further provisions relate to measures to be taken at the border for the suspension by customs authorities of release, into domestic circulation, of counterfeit and pirated goods. Finally, parties should provide for criminal procedures and penalties at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies should include imprisonment and fines sufficient to act as a deterrent.

The agreement would establish a Council for Trade-Related Aspects of Intellectual Property Rights to monitor the operation of the agreement and governments' compliance with it. Dispute settlement would take place under the integrated GATT dispute-settlement procedures as revised in the Uruguay Round.

With respect to the implementation of the agreement, it envisages a one-year transition period for developed countries to bring their legislation and practices into conformity. Developing countries and countries in the process of transformation from a centrally-planned into a market economy would have a five-year transition period, and least-developed countries 11 years. Developing countries which do not at present provide product patent protection in an area of technology would have up to 10 years to introduce such protection. However, in the case of pharmaceutical and agricultural chemical products, they must accept the filing of patent applications from the beginning of the transitional period. Though the patent need not be granted until the end of this period, the novelty of the invention is preserved as of the date of filing the application. If authorization for the marketing of the relevant pharmaceutical or agricultural chemical is obtained during the transitional period, the developing country concerned must offer an exclusive marketing right for the product for five years, or until a product patent is granted, whichever is shorter.

Subject to certain exceptions, the general rule is that the obligations in the agreement would apply to existing intellectual property rights as well as to new ones.

Understanding on Rules and Procedures Governing the Settlement of Disputes.

The dispute settlement system of the GATT is generally considered to be one of the cornerstones of the multilateral trade order. The system has already been strengthened and streamlined as a result of reforms agreed following the Mid-Term Review Ministerial Meeting held in Montreal in December 1988. Disputes currently being dealt with by the Council are subject to these new rules, which include greater automaticity in decisions on the establishment, terms of reference and composition of panels, such that these decisions are no longer dependent upon the consent of the parties to a dispute. The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) will further strengthen the existing system significantly, extending the greater automaticity agreed in the Mid-Term Review to the adoption of the panels' and a new Appellate Body's findings. Moreover, the DSU will establish an integrated system permitting WTO Members to base their claims on any of the multilateral trade agreements included in the Annexes to the Agreement establishing the WTO. For this purpose, a Dispute Settlement Body (DSB) will exercise the authority of the General Council and the Councils and committees of the covered agreements.

The DSU emphasizes the importance of consultations in securing dispute resolution, requiring a Member to enter into consultations within 30 days of a request for consultations from another Member. If after 60 days from the request for consultations there is no settlement, the complaining party may request the establishment of a panel. Where consultations are denied, the complaining party may move directly to request a panel. The parties may voluntarily agree to follow alternative means of dispute settlement, including good offices, conciliation, mediation and arbitration.

Where a dispute is not settled through consultations, the DSU requires the establishment of a panel, at the latest, at the meeting of the DSB following that at which a request is made, unless the DSB decides by consensus against establishment. The DSU also sets out specific rules and deadlines for deciding the terms of reference and composition of panels. Standard terms of reference will apply unless the parties agree to special terms within 20 days of the panel's establishment. And where the parties do not agree on the composition of the panel within the same 20 days, this can be decided by the Director-General. Panels normally consist of three persons of appropriate background and experience from countries not party to the dispute. The Secretariat will maintain a list of experts satisfying the criteria.

Panel procedures are set out in detail in the DSU. It is envisaged that a panel will normally complete its work within six months or, in cases of urgency, within three months. Panel reports may be considered by the DSB for adoption 20 days after they are issued to Members. Within 60 days of their issuance, they will be adopted, unless the DSB decides by consensus not to adopt the report or one of the parties notifies the DSB of its intention to appeal.

The concept of appellate review is an important new feature of the DSU. An Appellate Body will be established, composed of seven members, three of whom will serve on any one case. An appeal will be limited to issues of law covered in the panel report and legal interpretations developed by the panel. Appellate proceedings shall not exceed 60 days from the date a party formally notifies its decision to appeal. The resulting report shall be adopted by the DSB and unconditionally accepted by the parties within 30 days following its issuance to Members, unless the DSB decides by consensus against its adoption.

Once the panel report or the Appellate Body report is adopted, the party concerned will have to notify its intentions with respect to implementation of adopted recommendations. If it is impracticable to comply immediately, the party concerned shall be given a reasonable period of time, the latter to be decided either by agreement of the parties and approval by the DSB within 45 days of adoption of the report or through arbitration within 90 days of adoption. In any event, the DSB will keep the implementation under regular surveillance until the issue is resolved.

Further provisions set out rules for compensation or the suspension of concessions in the event of non-implementation. Within a specified time-frame, parties can enter into negotiations to agree on mutually acceptable compensation. Where this has not been agreed, a party to the dispute may request authorization of the DSB to suspend concessions or other obligations to the other party concerned. The DSB will grant such authorization within 30 days of the expiry of the agreed time-frame for implementation. Disagreements over the proposed level of suspension may be referred to arbitration. In principle, concessions should be suspended in the same sector as that in issue in the panel case. If this is not practicable or effective, the suspension can be made in a different sector of the same agreement. In turn, if this is not effective or practicable and if the circumstances are serious enough, the suspension of concessions may be made under another agreement.

One of the central provisions of the DSU reaffirms that Members shall not themselves make determinations of violations or suspend concessions, but shall make use of the dispute settlement rules and procedures of the DSU.

The DSU contains a number of provisions taking into account the specific interests of the developing and the least-developed countries. It also provides some special rules for the resolution of disputes which do not involve a violation of obligations under a covered agreement but where a Member believes nevertheless that benefits are being nullified or impaired. Special decisions to be adopted by Ministers in 1994 foresee that the Montreal Dispute Settlement Rules which would otherwise have expired at the time of the April 1994 meeting are extended until the entry into force of the WTO. Another decision foresees that the new rules and procedures will be reviewed within four years after the entry into force of the WTO.

AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION.

http://www.wto.org/english/docs_e/legal_e/04-wto.doc

The *Parties* to this Agreement,

***Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,**

***Recognizing* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,**

***Being desirous* of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations,**

***Resolved*, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,**

***Determined* to preserve the basic principles and to further the objectives underlying this multilateral trading system,**

***Agree* as follows:**

Article I
Establishment of the Organization

The World Trade Organization (hereinafter referred to as "the WTO") is hereby established.
Article II

Scope of the WTO

1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

4. The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as "GATT 1994") is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified (hereinafter referred to as "GATT 1947").

Article III
Functions of the WTO

1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

2. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.

4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the "TPRM") provided for in Annex 3 to this Agreement.

5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

Article IV
Structure of the WTO

1. There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.

2. There shall be a General Council composed of representatives of all the Members, which shall meet as appropriate. In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council. The General Council shall also carry out the functions assigned to it by this Agreement. The General Council shall establish its rules of procedure and approve the rules of procedure for the Committees provided for in paragraph 7.

3. The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

4. The General Council shall convene as appropriate to discharge the responsibilities of the Trade Policy Review Body provided for in the TPRM. The Trade Policy Review Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

5. There shall be a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Council for TRIPS"), which shall operate under the general guidance of the General Council. The Council for Trade in Goods shall oversee the functioning of the Multilateral Trade Agreements in Annex 1A. The Council for Trade in Services shall oversee the functioning of the General Agreement on Trade in Services (hereinafter referred to as "GATS"). The Council for TRIPS shall oversee the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Agreement on TRIPS"). These Councils shall carry out the functions assigned to them by their respective agreements and by the General Council. They shall establish their respective rules of procedure subject to the approval of the General Council. Membership in these Councils shall be open to representatives of all Members. These Councils shall meet as necessary to carry out their functions.

6. The Council for Trade in Goods, the Council for Trade in Services and the Council for TRIPS shall establish subsidiary bodies as required. These subsidiary bodies shall establish their respective rules of procedure subject to the approval of their respective Councils.

7. The Ministerial Conference shall establish a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions and a Committee on Budget, Finance and Administration,

which shall carry out the functions assigned to them by this Agreement and by the Multilateral Trade Agreements, and any additional functions assigned to them by the General Council, and may establish such additional Committees with such functions as it may deem appropriate. As part of its functions, the Committee on Trade and Development shall periodically review the special provisions in the Multilateral Trade Agreements in favour of the least-developed country Members and report to the General Council for appropriate action. Membership in these Committees shall be open to representatives of all Members.

8. The bodies provided for under the Plurilateral Trade Agreements shall carry out the functions assigned to them under those Agreements and shall operate within the institutional framework of the WTO. These bodies shall keep the General Council informed of their activities on a regular basis.

Article V
Relations with Other Organizations

1. The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.

2. The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.

Article VI
The Secretariat

1. There shall be a Secretariat of the WTO (hereinafter referred to as "the Secretariat") headed by a Director-General.

2. The Ministerial Conference shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General.

3. The Director-General shall appoint the members of the staff of the Secretariat and determine their duties and conditions of service in accordance with regulations adopted by the Ministerial Conference.

4. The responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action which might adversely reflect on their position as international officials. The Members of the WTO shall respect the international character of the responsibilities of the Director-General and of the staff of the Secretariat and shall not seek to influence them in the discharge of their duties.

Article VII
Budget and Contributions

1. The Director-General shall present to the Committee on Budget, Finance and Administration the annual budget estimate and financial statement of the WTO. The Committee on Budget, Finance and Administration shall review the annual budget estimate and the financial statement presented by the

Director-General and make recommendations thereon to the General Council. The annual budget estimate shall be subject to approval by the General Council.

2. The Committee on Budget, Finance and Administration shall propose to the General Council financial regulations which shall include provisions setting out:

(a) the scale of contributions apportioning the expenses of the WTO among its Members; and
(b) the measures to be taken in respect of Members in arrears.

The financial regulations shall be based, as far as practicable, on the regulations and practices of GATT 1947.

3. The General Council shall adopt the financial regulations and the annual budget estimate by a two-thirds majority comprising more than half of the Members of the WTO.

4. Each Member shall promptly contribute to the WTO its share in the expenses of the WTO in accordance with the financial regulations adopted by the General Council.

Article VIII
Status of the WTO

1. The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions.

2. The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions.

3. The officials of the WTO and the representatives of the Members shall similarly be accorded by each of its Members such privileges and immunities as are necessary for the independent exercise of their functions in connection with the WTO.

4. The privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be similar to the privileges and immunities stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947.

5. The WTO may conclude a headquarters agreement.

Article IX
Decision-Making

1. The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.

2. The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

3. In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph.

(a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths4 of the Members.

(b) A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference.

4. A decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate. Any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates. In each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The Ministerial Conference, on the basis of the annual review, may extend, modify or terminate the waiver.

5. Decisions under a Plurilateral Trade Agreement, including any decisions on interpretations and waivers, shall be governed by the provisions of that Agreement.

Article X
***Amendment*s**

1. Any Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference. The Councils listed in paragraph 5 of Article IV may also submit to the Ministerial Conference proposals to amend the provisions of the corresponding Multilateral Trade Agreements in Annex 1 the functioning of which they oversee. Unless the Ministerial Conference decides on a longer period, for a period of 90 days after the proposal has been tabled formally at the Ministerial Conference any decision by the Ministerial Conference to submit the proposed amendment to the Members for acceptance shall be taken by consensus. Unless the provisions of paragraphs 2, 5 or 6 apply, that decision shall specify whether the provisions of paragraphs 3 or 4 shall apply. If

consensus is reached, the Ministerial Conference shall forthwith submit the proposed amendment to the Members for acceptance. If consensus is not reached at a meeting of the Ministerial Conference within the established period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance. Except as provided in paragraphs 2, 5 and 6, the provisions of paragraph 3 shall apply to the proposed amendment, unless the Ministerial Conference decides by a three-fourths majority of the Members that the provisions of paragraph 4 shall apply.

2. Amendments to the provisions of this Article and to the provisions of the following Articles shall take effect only upon acceptance by all Members:

Article IX of this Agreement;
Articles I and II of GATT 1994;
Article II:1 of GATS;
Article 4 of the Agreement on TRIPS.

3. Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

4. Amendments to provisions of this Agreement or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would not alter the rights and obligations of the Members, shall take effect for all Members upon acceptance by two thirds of the Members.

5. Except as provided in paragraph 2 above, amendments to Parts I, II and III of GATS and the respective annexes shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under the preceding provision is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference. Amendments to Parts IV, V and VI of GATS and the respective annexes shall take effect for all Members upon acceptance by two thirds of the Members.

6. Notwithstanding the other provisions of this Article, amendments to the Agreement on TRIPS meeting the requirements of paragraph 2 of Article 71 thereof may be adopted by the Ministerial Conference without further formal acceptance process.

7. Any Member accepting an amendment to this Agreement or to a Multilateral Trade Agreement in Annex 1 shall deposit an instrument of acceptance with the Director-General of the WTO within the period of acceptance specified by the Ministerial Conference.

8. Any Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference. Decisions to approve amendments to the Multilateral Trade Agreement in Annex 3 shall take effect for all Members upon approval by the Ministerial Conference.

9. The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4. The Ministerial Conference, upon the request of the Members parties to a Plurilateral Trade Agreement, may decide to delete that Agreement from Annex 4.

10. Amendments to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article XI
Original Membership

1. The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.

2. The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

Article XII
Accession

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.

2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.

3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article XIII
Non-Application of Multilateral Trade Agreements
between Particular Members

1. This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application.

2. Paragraph 1 may be invoked between original Members of the WTO which were contracting parties to GATT 1947 only where Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force for them of this Agreement.

3. Paragraph 1 shall apply between a Member and another Member which has acceded under Article XII only if the Member not consenting to the application has so notified the Ministerial Conference before the approval of the agreement on the terms of accession by the Ministerial Conference.

4. The Ministerial Conference may review the operation of this Article in particular cases at the request of any Member and make appropriate recommendations.

5. Non-application of a Plurilateral Trade Agreement between parties to that Agreement shall be governed by the provisions of that Agreement.

Article XIV
Acceptance, Entry into Force and Deposit

1. This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to GATT 1947, and the European Communities, which are eligible to become original Members of the WTO in accordance with Article XI of this Agreement. Such acceptance shall apply to this Agreement and the Multilateral Trade Agreements annexed hereto. This Agreement and the Multilateral Trade Agreements annexed hereto shall enter into force on the date determined by Ministers in accordance with paragraph 3 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations and shall remain open for acceptance for a period of two years following that date unless the Ministers decide otherwise. An acceptance following the entry into force of this Agreement shall enter into force on the 30th day following the date of such acceptance.

2. A Member which accepts this Agreement after its entry into force shall implement those concessions and obligations in the Multilateral Trade Agreements that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force.

3. Until the entry into force of this Agreement, the text of this Agreement and the Multilateral Trade Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. The Director-General shall promptly furnish a certified true copy of this Agreement and the Multilateral Trade Agreements, and a notification of each acceptance thereof, to each government and the European Communities having accepted this Agreement. This Agreement and the Multilateral Trade Agreements, and any amendments thereto, shall, upon the entry into force of this Agreement, be deposited with the Director-General of the WTO.

4. The acceptance and entry into force of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement. Such Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. Upon the entry into force of this Agreement, such Agreements shall be deposited with the Director-General of the WTO.

Article XV
Withdrawal

1. Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.

2. Withdrawal from a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article XVI
Miscellaneous Provisions

1. Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

2. To the extent practicable, the Secretariat of GATT 1947 shall become the Secretariat of the WTO, and the Director-General to the CONTRACTING PARTIES to GATT 1947, until such time as the Ministerial Conference has appointed a Director-General in accordance with paragraph 2 of Article VI of this Agreement, shall serve as Director-General of the WTO.

3. In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.

4. Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

5. No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

6. This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

DONE at Marrakesh this fifteenth day of April one thousand nine hundred and ninety-four, in a single copy, in the English, French and Spanish languages, each text being authentic.

UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES.

http://www.wto.org/english/docs_e/legal_e/28-dsu.doc

***Members* hereby *agree* as follows:**

Article 1
Coverage and Application

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

Article 2
Administration

1. The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

2. The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements.

3. The DSB shall meet as often as necessary to carry out its functions within the time-frames provided in this Understanding.

4. Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.

Article 3
General Provisions

1. Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

4. Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

5. All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

6. Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.

7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

8. In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

9. The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

10. It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

11. This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of the WTO Agreement. With respect to disputes for which the request for consultations was made under GATT 1947 or under any other predecessor agreement to the covered agreements before the date of entry into force of the WTO Agreement, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO Agreement shall continue to apply.

12. Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.

Article 4
Consultations

1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.

2. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.

3. If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.

4. All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

5. In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.

6. Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.

7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

8. In cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel.

9. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

10. During consultations Members should give special attention to the particular problems and interests of developing country Members.

11. Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements,

such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements.

Article 5
Good Offices, Conciliation and Mediation

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.

2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.

3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.

4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

6. The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

Article 6
Establishment of Panels

1. If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.
2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

Article 7
Terms of Reference of Panels

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

"To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

Article 8
Composition of Panels

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

3. Citizens of Members whose governments are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.

6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

7. If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

8. Members shall undertake, as a general rule, to permit their officials to serve as panelists.

9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

10. When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

11. Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Article 9

Procedures for Multiple Complainants

1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.

2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.

3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

Article 10
Third Parties

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

Article 11
Function of Panels

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

Article 12
Panel Procedures

1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.

2. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

3. After consulting the parties to the dispute, the panelists shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process, taking into account the provisions of paragraph 9 of Article 4, if relevant.

4. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.

5. Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.

6. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 3 and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time-

period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

7. Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

8. In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.

9. When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.

10. In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

11. Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

12. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.

Article 13
Right to Seek Information

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be

revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

Article 14
Confidentiality

1. Panel deliberations shall be confidential.

2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

3. Opinions expressed in the panel report by individual panelists shall be anonymous.

Article 15
Interim Review Stage

1. Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.

2. Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.

3. The findings of the final panel report shall include a discussion of the arguments made at the interim review stage. The interim review stage shall be conducted within the time-period set out in paragraph 8 of Article 12.

Article 16
Adoption of Panel Reports

1. In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members.

2. Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered.

3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.

4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

Article 17
Appellate Review
Standing Appellate Body

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

5. As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.

6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

7. The Appellate Body shall be provided with appropriate administrative and legal support as it requires.

8. The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the

General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Procedures for Appellate Review

9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

10. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

11. Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.

12. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.

13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

Adoption of Appellate Body Reports

14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

Article 18
Communications with the Panel or Appellate Body

1. There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

Article 19
Panel and Appellate Body Recommendations

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.
2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

Article 20
Time-frame for DSB Decisions

Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. Where either the panel or the Appellate Body has acted, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, to extend the time for providing its report, the additional time taken shall be added to the above periods.

Article 21
Surveillance of Implementation of Recommendations and Rulings

1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

2. Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

3. At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

(a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,
(b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,
(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months.

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall

inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

7. If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

8. If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

Article 22
Compensation and the Suspension of Concessions

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

(d) in applying the above principles, that party shall take into account:

- **(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;**
- **(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;**

(e) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefor in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies;

(f) for purposes of this paragraph, "sector" means:

- **(i) with respect to goods, all goods;**
- **(ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;**
- **(iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;**

(g) for purposes of this paragraph, "agreement" means:

- **(i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;**
- **(ii) with respect to services, the GATS;**
- **(iii) with respect to intellectual property rights, the Agreement on TRIPS.**

4. The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.

5. The DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director-General and shall be completed

within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

7. The arbitrator acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

9. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

Article 23
Strengthening of the Multilateral System

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:

- **(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;**
- **(b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and**

(c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

Article 24
Special Procedures Involving Least-Developed Country Members

1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

Article 25
Arbitration

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.

3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.

4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

Article 26
1. *Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994*

Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a

party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

(a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;
(b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment;
(c) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article 21, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute;
(d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.

2. *Complaints of the Type Described in Paragraph 1(c) of Article XXIII of GATT 1994*

Where the provisions of paragraph 1(c) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of paragraphs 1(a) and 1(b) of Article XXIII of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. The dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67) shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. The following shall also apply:

(a) the complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph;
(b) in cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall circulate a report to the DSB addressing any such matters and a separate report on matters falling under this paragraph.

Article 27
Responsibilities of the Secretariat

1. The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support.

2. While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

3. The Secretariat shall conduct special training courses for interested Members concerning these dispute settlement procedures and practices so as to enable Members' experts to be better informed in this regard.

another Member to the panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.

5. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.

6. All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.

7. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.

8. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

9. The parties to the dispute and any third party invited to present its views in accordance with Article 10 shall make available to the panel a written version of their oral statements.

10. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.

11. Any additional procedures specific to the panel.

12. Proposed timetable for panel work:

(a)	**Receipt of first written submissions of the parties:**	
	(1) complaining Party:	**_____3-6 weeks**
	(2) Party complained against:	**_____2-3 weeks**
(b)	**Date, time and place of first substantive meeting with the parties; third party session:**	**_____1-2 weeks**
(c)	**Receipt of written rebuttals of the parties:**	**_____2-3 weeks**
(d)	**Date, time and place of second substantive meeting with the parties:**	**_____1-2 weeks**
(e)	**Issuance of descriptive part of the report to the parties:**	**_____2-4 weeks**
(f)	**Receipt of comments by the parties on the descriptive part of the report:**	**_____2 weeks**
(g)	**Issuance of the interim report, including the findings and conclusions, to the parties:**	**_____2-4 weeks**
(h)	**Deadline for party to request review of part(s) of report:**	**_____1 week**
(i)	**Period of review by panel, including possible additional meeting with parties:**	**_____2 weeks**
(j)	**Issuance of final report to parties to dispute:**	**_____2 weeks**
(k)	**Circulation of the final report to the Members:**	**_____3 weeks**

The above calendar may be changed in the light of unforeseen developments. Additional meetings with the parties shall be scheduled if required.

WT/DSB/RC/1 (96-5267) 11 December 1996.

Rules of conduct for the understanding on rules and procedures governing the settlement of disputes.

http://www.wto.org/english/tratop_e/dispu_e/rc_e.htm

I. Preamble.

Members,

Recalling **that on 15 April 1994 in Marrakesh, Ministers welcomed the stronger and clearer legal framework they had adopted for the conduct of international trade, including a more effective and reliable dispute settlement mechanism;**

Recognizing **the importance of full adherence to the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and the principles for the management of disputes applied under Articles XXII and XXIII of GATT 1947, as further elaborated and modified by the DSU;**

Affirming **that the operation of the DSU would be strengthened by rules of conduct designed to maintain the integrity, impartiality and confidentiality of proceedings conducted under the DSU thereby enhancing confidence in the new dispute settlement mechanism;**
Hereby establish the following Rules of Conduct.

II. Governing Principle.

1. Each person covered by these Rules (as defined in paragraph 1 of Section IV below and hereinafter called "covered person") shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved. These Rules shall in no way modify the rights and obligations of Members under the DSU nor the rules and procedures therein.

III. Observance of the Governing Principle.

1. To ensure the observance of the Governing Principle of these Rules, each covered person is expected (1) to adhere strictly to the provisions of the DSU; (2) to disclose the existence or development of any interest, relationship or matter that that person could reasonably be expected to know and that is likely to affect, or give rise to justifiable doubts as to, that person's independence or impartiality; and (3) to take due care in the performance of their duties to fulfil these expectations, including through avoidance of any direct or indirect conflicts of interest in respect of the subject matter of the proceedings.

2. Pursuant to the Governing Principle, each covered person, shall be independent and impartial, and shall maintain confidentiality. Moreover, such persons shall consider only issues raised in, and necessary to fulfil their responsibilities within, the dispute settlement proceeding and shall not delegate this responsibility to any other person. Such person shall not incur any obligation or accept any benefit that would in anyway interfere with, or which could give rise to, justifiable doubts as to the proper performance of that person's dispute settlement duties.

IV. Scope.

These Rules shall apply, as specified in the text, to each person serving: (a) on a panel; (b) on the Standing Appellate Body; (c) as an arbitrator pursuant to the provisions mentioned in Annex "1a"; or (d) as an expert participating in the dispute settlement mechanism pursuant to the provisions mentioned in Annex "1b". These Rules shall also apply, as specified in this text and the relevant provisions of the Staff Regulations, to those members of the Secretariat called upon to assist the panel in accordance with Article 27.1 of the DSU or to assist in formal arbitration proceedings pursuant to Annex "1a"; to the Chairman of the Textiles Monitoring Body (hereinafter called "TMB") and other members of the TMB Secretariat called upon to assist the TMB in formulating recommendations, findings or observations pursuant to the WTO Agreement on Textiles and Clothing; and to Standing Appellate Body support staff called upon to provide the Standing Appellate Body with administrative or legal support in accordance with Article 17.7 of the DSU (hereinafter "Member of the Secretariat or Standing Appellate Body support staff"), reflecting their acceptance of established norms regulating the conduct of such persons as international civil servants and the Governing Principle of these Rules.

2. The application of these Rules shall not in any way impede the Secretariat's discharge of its responsibility to continue to respond to Members' requests for assistance and information.

3. These Rules shall apply to the members of the TMB to the extent prescribed in Section V.
V. Textiles Monitoring Body.

1. Members of the TMB shall discharge their functions on an *ad personam* basis, in accordance with the requirement of Article 8.1 of the Agreement on Textiles and Clothing, as further elaborated in the working procedures of the TMB, so as to preserve the integrity and impartiality of its proceedings.

VI. Self-Disclosure Requirements by Covered Persons.

1. (a) Each person requested to serve on a panel, on the Standing Appellate Body, as an arbitrator, or as an expert shall, at the time of the request, receive from the Secretariat these Rules, which include an Illustrative List (Annex 2) of examples of the matters subject to disclosure.

(b) Any member of the Secretariat described in paragraph IV:1, who may expect to be called upon to assist in a dispute, and Standing Appellate Body support staff, shall be familiar with these Rules.

2. As set out in paragraph VI:4 below, all covered persons described in paragraph VI.1(a) and VI.1(b) shall disclose any information that could reasonably be expected to be known to them at the time which, coming within the scope of the Governing Principle of these Rules, is likely to affect or give rise to justifiable doubts as to their independence or impartiality. These disclosures include the type of information described in the Illustrative List, if relevant.

3. These disclosure requirements shall not extend to the identification of matters whose relevance to the issues to be considered in the proceedings would be insignificant. They shall take into account the need to respect the personal privacy of those to whom these Rules apply and shall not be so

administratively burdensome as to make it impracticable for otherwise qualified persons to serve on panels, the Standing Appellate Body, or in other dispute settlement roles.

4. (a) All panelists, arbitrators and experts, prior to confirmation of their appointment, shall complete the form at Annex 3 of these Rules. Such information would be disclosed to the Chair of the Dispute Settlement Body ("DSB") for consideration by the parties to the dispute.

(b) (i) Persons serving on the Standing Appellate Body who, through rotation, are selected to hear the appeal of a particular panel case, shall review the factual portion of the Panel report and complete the form at Annex 3. Such information would be disclosed to the Standing Appellate Body for its consideration whether the member concerned should hear a particular appeal.

(ii) Standing Appellate Body support staff shall disclose any relevant matter to the Standing Appellate Body, for its consideration in deciding on the assignment of staff to assist in a particular appeal.

(c) When considered to assist in a dispute, members of the Secretariat shall disclose to the Director-General of the WTO the information required under paragraph VI:2 of these Rules and any other relevant information required under the Staff Regulations, including the information described in the footnote.

5. During a dispute, each covered person shall also disclose any new information relevant to paragraph VI:2 above at the earliest time they become aware of it.

6. The Chair of the DSB, the Secretariat, parties to the dispute, and other individuals involved in the dispute settlement mechanism shall maintain the confidentiality of any information revealed through this disclosure process, even after the panel process and its enforcement procedures, if any, are completed.

VII. Confidentiality.

1. Each covered person shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential. No covered person shall at any time use such information acquired during such deliberations and proceedings to gain personal advantage or advantage for others.

2. During the proceedings, no covered person shall engage in *ex parte* contacts concerning matters under consideration. Subject to paragraph VII:1, no covered person shall make any statements on such proceedings or the issues in dispute in which that person is participating, until the report of the panel or the Standing Appellate Body has been derestricted.

VIII. Procedures Concerning Subsequent Disclosure and Possible Material Violations.

1. Any party to a dispute, conducted pursuant to the WTO Agreement, who possesses or comes into possession of evidence of a material violation of the obligations of independence, impartiality or confidentiality or the avoidance of direct or indirect conflicts of interest by covered persons which may impair the integrity, impartiality or confidentiality of the dispute settlement mechanism, shall at the earliest possible time and on a confidential basis, submit such evidence to the Chair of the DSB,

the Director-General or the Standing Appellate Body, as appropriate according to the respective procedures detailed in paragraphs VIII:5 to VIII:17 below, in a written statement specifying the relevant facts and circumstances. Other Members who possess or come into possession of such evidence, may provide such evidence to the parties to the dispute in the interest of maintaining the integrity and impartiality of the dispute settlement mechanism.

2. When evidence as described in paragraph VIII:1 is based on an alleged failure of a covered person to disclose a relevant interest, relationship or matter, that failure to disclose, as such, shall not be a sufficient ground for disqualification unless there is also evidence of a material violation of the obligations of independence, impartiality, confidentiality or the avoidance of direct or indirect conflicts of interests and that the integrity, impartiality or confidentiality of the dispute settlement mechanism would be impaired thereby.

3. When such evidence is not provided at the earliest practicable time, the party submitting the evidence shall explain why it did not do so earlier and this explanation shall be taken into account in the procedures initiated in paragraph VIII:1.

4. Following the submission of such evidence to the Chair of the DSB, the Director-General of the WTO or the Standing Appellate Body, as specified below, the procedures outlined in paragraphs VIII:5 to VIII:17 below shall be completed within fifteen working days.

Panelists, Arbitrators, Experts

5. If the covered person who is the subject of the evidence is a panelist, an arbitrator or an expert, the party shall provide such evidence to the Chair of the DSB.

6. Upon receipt of the evidence referred to in paragraphs VIII:1 and VIII:2, the Chair of the DSB shall forthwith provide the evidence to the person who is the subject of such evidence, for consideration by the latter.

7. If, after having consulted with the person concerned, the matter is not resolved, the Chair of the DSB shall forthwith provide all the evidence, and any additional information from the person concerned, to the parties to the dispute. If the person concerned resigns, the Chair of the DSB shall inform the parties to the dispute and, as the case may be, the panelists, the arbitrator(s) or experts.

8. In all cases, the Chair of the DSB, in consultation with the Director-General and a sufficient number of Chairs of the relevant Council or Councils to provide an odd number, and after having provided a reasonable opportunity for the views of the person concerned and the parties to the dispute to be heard, would decide whether a material violation of these Rules as referred to in paragraphs VIII:1 and VIII:2 above has occurred. Where the parties agree that a material violation of these Rules has occurred, it would be expected that, consistent with maintaining the integrity of the dispute settlement mechanism, the disqualification of the person concerned would be confirmed.

9. The person who is the subject of the evidence shall continue to participate in the consideration of the dispute unless it is decided that a material violation of these Rules has occurred.

10. The Chair of the DSB shall thereafter take the necessary steps for the appointment of the person who is the subject of the evidence to be formally revoked, or excused from the dispute as the case may be, as of that time.

Secretariat

11. If the covered person who is the subject of the evidence is a member of the Secretariat, the party shall only provide the evidence to the Director-General of the WTO, who shall forthwith provide the evidence to the person who is the subject of such evidence and shall further inform the other party or parties to the dispute and the panel.

12. It shall be for the Director-General to take any appropriate action in accordance with the Staff Regulations.

13. The Director-General shall inform the parties to the dispute, the panel and the Chair of the DSB of his decision, together with relevant supporting information.
Standing Appellate Body

14. If the covered person who is the subject of the evidence is a member of the Standing Appellate Body or of the Standing Appellate Body support staff, the party shall provide the evidence to the other party to the dispute and the evidence shall thereafter be provided to the Standing Appellate Body.

15. Upon receipt of the evidence referred to in paragraphs VIII:1 and VIII:2 above, the Standing Appellate Body shall forthwith provide it to the person who is the subject of such evidence, for consideration by the latter.
16. It shall be for the Standing Appellate Body to take any appropriate action after having provided a reasonable opportunity for the views of the person concerned and the parties to the dispute to be heard.

17. The Standing Appellate Body shall inform the parties to the dispute and the Chair of the DSB of its decision, together with relevant supporting information.

18. Following completion of the procedures in paragraphs VIII:5 to VIII:17, if the appointment of a covered person, other than a member of the Standing Appellate Body, is revoked or that person is excused or resigns, the procedures specified in the DSU for initial appointment shall be followed for appointment of a replacement, but the time periods shall be half those specified in the DSU(4). The member of the Standing Appellate Body who, under that Body's rules, would next be selected through rotation to consider the dispute, would automatically be assigned to the appeal. The panel, members of the Standing Appellate Body hearing the appeal, or the arbitrator, as the case may be, may then decide after consulting with the parties to the dispute, on any necessary modifications to their working procedures or proposed timetable.

19. All covered persons and Members concerned shall resolve matters involving possible material violations of these Rules as expeditiously as possible so as not to delay the completion of proceedings, as provided in the DSU.

20. Except to the extent strictly necessary to carry out this decision, all information concerning possible or actual material violations of these Rules shall be kept confidential.

IX. Review.

These Rules of Conduct shall be reviewed within two years of their adoption and a decision shall be taken by the DSB as to whether to continue, modify or terminate these Rules.

ANNEX 1a

Arbitrators acting pursuant to the following provisions:

- **Articles 21.3(c); 22.6 and 22.7; 26.1(c) and 25 of the DSU;**
- **Article 8.5 of the Agreement on Subsidies and Countervailing Measures;**
- **Articles XXI.3 and XXII.3 of the General Agreement on Trade in Services.**

ANNEX 1b

Experts advising or providing information pursuant to the following provisions:

- **Article 13.1; 13.2 of the DSU;**
- **Article 4.5 of the Agreement on Subsidies and Countervailing Measures;**
- **Article 11.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures;**
- **Article 14.2; 14.3 of the Agreement on Technical Barriers to Trade.**

ANNEX 2

ILLUSTRATIVE LIST OF INFORMATION TO BE DISCLOSED

This list contains examples of information of the type that a person called upon to serve in a dispute should disclose pursuant to the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes.

Each covered person, as defined in Section IV:1 of these Rules of Conduct has a continuing duty to disclose the information described in Section VI:2 of these Rules which may include the following:

(a) financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question;
(b) professional interests (e.g. a past or present relationship with private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);
(c) other active interests (e.g. active participation in public interest groups or other organisations which may have a declared agenda relevant to the dispute in question);
(d) considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements);
(e) employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members).

ANNEX 3

Dispute Number: _____

WORLD TRADE ORGANIZATION
DISCLOSURE FORM

I have read the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and the Rules of Conduct for the DSU. I understand my continuing duty, while participating in the dispute settlement mechanism, and until such time as the Dispute Settlement Body (DSB) makes a decision on adoption of a report relating to the proceeding or notes its settlement, to disclose herewith and in future any information likely to affect my independence or impartiality, or which could give rise to justifiable doubts as to the integrity and impartiality of the dispute settlement mechanism; and to respect my obligations regarding the confidentiality of dispute settlement proceedings.
Signed: Dated:

Notes:

1. These working procedures, as adopted by the TMB on 26 July 1995 (G/TMB/R/1), currently include, inter *alia*, the following language in paragraph 1.4: "In discharging their functions in accordance with paragraph 1.1 above, the TMB members and alternates shall undertake not to solicit, accept or act upon instructions from governments, nor to be influenced by any other organisations or undue extraneous factors. They shall disclose to the Chairman any information that they may consider likely to impede their capacity to discharge their functions on an *ad personam* basis. Should serious doubts arise during the deliberations of the TMB regarding the ability of a TMB member to act on an *ad personam* basis, they shall be communicated to the Chairman. The Chairman shall deal with the particular matter as necessary".

2. **Pending adoption of the Staff Regulations, members of the Secretariat shall make disclosures to the Director-General in accordance with the following draft provision to be included in the Staff Regulations: "When paragraph VI:4(c) of the Rules of Conduct for the DSU is applicable, members of the Secretariat would disclose to the Director-General of the WTO the information required in paragraph VI:2 of those Rules, as well as any information regarding their participation in earlier formal consideration of the specific measure at issue in a dispute under any provisions of the WTO Agreement, including through formal legal advice under Article 27.2 of the DSU, as well as any involvement with the dispute as an official of a WTO Member government or otherwise professionally, before having joined the Secretariat. The Director-General shall consider any such disclosures in deciding on the assignment of members of the Secretariat to assist in a dispute. When the Director-General, in the light of his consideration, including of available Secretariat resources, decides that a potential conflict of interest is not sufficiently material to warrant non-assignment of a particular member of the Secretariat to assist in a dispute, the Director-General shall inform the panel of his decision and of the relevant supporting information."**

3. Pending adoption of the Staff Regulations, the Director-General would act in accordance with the following draft provision for the Staff Regulations: "If paragraph VIII:11 of the Rules of Conduct for the DSU governing the settlement of disputes is invoked, the Director-General shall consult with the person who is the subject of the evidence and the panel and shall, if necessary, take appropriate disciplinary action".

4. Appropriate adjustments would be made in the case of appointments pursuant to the Agreement on Subsidies and Countervailing Measures.

APPELLATE PROCEDURES.

http://www.wto.org/english/tratop_e/dispu_e/ab_procedures_e.htm

[Appeals are conducted according to the procedures established under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and the Working Procedures for Appellate Review (Working Procedures). The Working Procedures are drawn up by the Appellate Body in consultation with the Director-General of the WTO and the Chairman of the Dispute Settlement Body (DSB). They have been amended five times since 1995(1). The first two changes related to the term of office of the Chairman, and the next two amendments enhanced third party participation at the oral hearing. The most recent amendments were announced on 7 October 2004, in WTO document WT/AB/WP/W/9, which explains the process leading to the amendments, as well as their substance. Among other things, these amendments modify the required content of a Notice of Appeal, allow for a Notice of Other Appeal, and alter certain dates in the timetable for appeals. These amendments take effect for appeals initiated after 1 January 2005 and are incorporated in the consolidated version of the Working Procedures that was circulated to WTO Members on 4 January 2005.]

The appellate stage may follow the issuance of a report by a panel established pursuant to the DSU. Panel reports must be adopted by the DSB within 60 days of their circulation to WTO Members, unless a party decides to appeal. Parties to a dispute may appeal a panel report at any time before the panel report is adopted by the DSB. Third parties are not entitled to appeal a panel report. In accordance with Article 17.6 of the DSU, appeals are limited to issues of law covered in the panel report and legal interpretations developed by the panel.

An appeal is commenced upon written notification to the DSB and the simultaneous filing of a Notice of Appeal with the Appellate Body Secretariat. A party that files a Notice of Appeal is known as the "appellant". Rule 20 of the Working Procedures sets out what must be included in a Notice of Appeal.

Once the Notice of Appeal has been filed, the appellant has 7 days within which to file a written submission pursuant to Rule 21(1) of the Working Procedures. A party to the dispute that wishes to respond to the allegations raised by the appellant may file its own written submission under Rule 22 of the Working Procedures, within 25 days of the date that the Notice of Appeal was filed. A party that files a written submission pursuant to Rule 22 is known as an "appellee".

The Working Procedures recognize that some disputes may involve multiple appeals. Thus, under Rule 23 of the Working Procedures, a party to the dispute other than the original appellant may also appeal on the same grounds or on other alleged errors by filing a Notice of Other Appeal within 12 days of the filing of the Notice of Appeal. This party, known as an "other appellant", must file a written submission within 15 days of the filing of the Notice of Appeal by the original appellant. Parties wishing to respond to the allegations raised by the "other appellant" may file a written submission within 25 days of the filing of the Notice of Appeal.

Members that are third parties during the panel process may also file written submissions within 25 days of the date of filing of the Notice of Appeal, pursuant to Rule 24 of the Working Procedures. Although third parties wishing to attend and participate at appellate hearings are encouraged to file written submissions, those that do not may, nevertheless, notify the Appellate Body Secretariat, within the same 25-day period, of their intention to appear at the oral hearing. Third

parties that do not file a written submission or a notification within the 25-day period may nevertheless attend the oral hearing at the discretion of the the Appellate Body Division (comprising three Appellate Body Members) hearing the appeal. Third parties that file written submissions or appear at the oral hearing are known as "third participants".

An oral hearing is held for each appeal during which appellants, other appellants, appellees and third participants are given an opportunity to present oral arguments and to respond to questions put to them by the Appellate Body Division hearing the appeal. The hearing generally takes place within 35 to 45 days of the filing of the Notice of Appeal. Proceedings before the Appellate Body are confidential. Only WTO Members who are appellants, other appellants, appellees or third participants are entitled to attend oral hearings.

In accordance with Article 3.2 of the DSU, the Appellate Body relies on the customary rules of interpretation of public international law to clarify provisions of the WTO Agreements. Jurisdiction is compulsory for disputes brought under the covered agreements. Before finalizing the Appellate Body Report, the Appellate Body Division hearing the appeal exchanges views with the other four Appellate Body Members in accordance with Rule 4(3) of the Working Procedures.

The Appellate Body Report is circulated to WTO Members in the three official languages of the WTO (English, French, and Spanish) within 90 days of the date when the Notice of Appeal was filed, and it becomes public immediately upon circulation to Members. In its Report, the Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

Within 30 days of the circulation of an Appellate Body Report, the DSB will meet to adopt it, unless the DSB decides by consensus not to adopt that Report. An adopted Appellate Body Report, together with the adopted Panel Report, must be unconditionally accepted by the parties to the dispute.

Article 3.2 of the DSU states that the recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements. Article 21.1 of the DSU provides that prompt compliance with the recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all WTO Members. The DSB is responsible for maintaining surveillance of the implementation of its rulings and recommendations by WTO Members.

Timetable for appeals ….

	General Appeals	Prohibited Subsidies Appeals
	Day	Day
Notice of Appeal [3]	0	0
Appellant's Submission [4]	7	4
Notice of Other Appeal [5]	12	6
Other Appellant(s) Submission(s) [6]	15	7
Appellee(s) Submission(s) [7]	25	12
Third Participant(s) Submission(s) [8]	25	12
Third Participant(s) Notification(s) [9]	25	12
Oral Hearing [10]	35-45	17-23
Circulation of Appellate Report	60-90 [11]	30-60 [12]
DSB Meeting for Adoption	90-120 [13]	50-80 [14]

GENERAL AGREEMENT ON TARIFFS AND TRADE 1994.

http://www.wto.org/english/docs_e/legal_e/06-gatt.doc

1. The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of:

(a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement;

(b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:

- **(i) protocols and certifications relating to tariff concessions;**
- **(ii) protocols of accession (excluding the provisions (*a*) concerning provisional application and withdrawal of provisional application and (*b*) providing that Part II of GATT 1947 shall be applied provisionally to the fullest extent not inconsistent with legislation existing on the date of the Protocol);**
- **(iii) decisions on waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the WTO Agreement;**
- **(iv) other decisions of the CONTRACTING PARTIES to GATT 1947;**

(c) the Understandings set forth below:

- **(i) Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994;**
- **(ii) Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994;**
- **(iii) Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994;**
- **(iv) Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994;**
- **(v) Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994;**

(vi) Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994; and

(d) the Marrakesh Protocol to GATT 1994.

2. ***Explanatory Notes***

(a) The references to "contracting party" in the provisions of GATT 1994 shall be deemed to read "Member". The references to "less-developed contracting party" and "developed contracting party" shall be deemed to read "developing country Member" and "developed country Member". The references to "Executive Secretary" shall be deemed to read "Director-General of the WTO".

(b) The references to the CONTRACTING PARTIES acting jointly in Articles XV:1, XV:2, XV:8, XXXVIII and the Notes *Ad* Article XII and XVIII; and in the provisions on special exchange agreements in Articles XV:2, XV:3, XV:6, XV:7 and XV:9 of GATT 1994 shall be deemed to be references to the WTO. The other functions that the provisions of GATT 1994 assign to the CONTRACTING PARTIES acting jointly shall be allocated by the Ministerial Conference.

(c) (i) The text of GATT 1994 shall be authentic in English, French and Spanish.

(ii) The text of GATT 1994 in the French language shall be subject to the rectifications of terms indicated in Annex A to document MTN.TNC/41.

(iii) The authentic text of GATT 1994 in the Spanish language shall be the text in Volume IV of the Basic Instruments and Selected Documents series, subject to the rectifications of terms indicated in Annex B to document MTN.TNC/41.

3. (a) The provisions of Part II of GATT 1994 shall not apply to measures taken by a Member under specific mandatory legislation, enacted by that Member before it became a contracting party to GATT 1947, that prohibits the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters or the waters of an exclusive economic zone. This exemption applies to: (*a*) the continuation or prompt renewal of a non-conforming provision of such legislation; and (*b*) the amendment to a non-conforming provision of such legislation to the extent that the amendment does not decrease the conformity of the provision with Part II of GATT 1947. This exemption is limited to measures taken under legislation described above that is notified and specified prior to the date of entry into force of the WTO Agreement. If such legislation is subsequently modified to decrease its conformity with Part II of GATT 1994, it will no longer qualify for coverage under this paragraph.

(b) The Ministerial Conference shall review this exemption not later than five years after the date of entry into force of the WTO Agreement and thereafter every two years for as long as the exemption is in force for the purpose of examining whether the conditions which created the need for the exemption still prevail.

(c) A Member whose measures are covered by this exemption shall annually submit a detailed statistical notification consisting of a five-year moving average of actual and expected

deliveries of relevant vessels as well as additional information on the use, sale, lease or repair of relevant vessels covered by this exemption.

(d) A Member that considers that this exemption operates in such a manner as to justify a reciprocal and proportionate limitation on the use, sale, lease or repair of vessels constructed in the territory of the Member invoking the exemption shall be free to introduce such a limitation subject to prior notification to the Ministerial Conference.

(e) This exemption is without prejudice to solutions concerning specific aspects of the legislation covered by this exemption negotiated in sectoral agreements or in other fora.

AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994.

http://www.wto.org/english/docs_e/legal_e/19-adp.doc

Members **hereby** ***agree*** **as follows:**

PART I

Article 1
Principles

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiate and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

Article 2
Determination of Dumping

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting countr, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are

made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.

2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

- **(i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;**
- **(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;**
- **(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.**

2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the

authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

2.4.2 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. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

2.5 In the case where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

2.6 Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

2.7 This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.

Article 3
Determination of Injury

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3.3 Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

3.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent. In

making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:

(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
(ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
(iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

3.8 With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be considered and decided with special care.

Article 4
Definition of Domestic Industry

4.1 For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

(i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;
(ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such market sell all or almost all of their production of the product in question in that market, and *(b)* the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing

Member may levy the anti-dumping duties without limitation only if *(a)* the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and *(b)* such duties cannot be levied only on products of specific producers which supply the area in question.

4.3 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraph 1.

4.4 The provisions of paragraph 6 of Article 3 shall be applicable to this Article.

Article 5
Initiation and Subsequent Investigation

5.1 Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.

5.2 An application under paragraph 1 shall include evidence of *(a)* dumping, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and *(c)* a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

- **(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;**
- **(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;**
- **(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;**
- **(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.**

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

5.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.

5.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.

5.7 The evidence of both dumping and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation, and *(b)* thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

5.9 An anti-dumping proceeding shall not hinder the procedures of customs clearance.

5.10 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

Article 6
Evidence

6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.

6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

6.3 Oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2.

6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.

6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional

circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

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

6.9 The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.

6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

6.11 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;
(ii) the government of the exporting Member; and
(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.

6.13 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

6.14 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

Article 7
Provisional Measures

7.1 Provisional measures may be applied only if:

(i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;
(ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and
(iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

7.2 Provisional measures may take the form of a provisional duty or, preferably, a security - by cash deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

7.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

7.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

7.5 The relevant provisions of Article 9 shall be followed in the application of provisional measures.

Article 8
Price Undertakings

8.1 Proceedings may be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. It is desirable that the price increases be less than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry.

8.2 Price undertakings shall not be sought or accepted from exporters unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused by such dumping.

8.3 Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

8.4 If an undertaking is accepted, the investigation of dumping and injury shall nevertheless be completed if the exporter so desires or the authorities so decide. In such a case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of a price undertaking. In such cases, the authorities may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of dumping and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

8.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

8.6 Authorities of an importing Member may require any exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an

undertaking and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

Article 9
Imposition and Collection of Anti-Dumping Duties

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

9.2 When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made. Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.

9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of

any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.

9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

9.5 If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

Article 10
Retroactivity

10.1 Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article.

10.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

10.3 If the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. If the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

10.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.6 A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:

- **(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and**
- **(ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.**

10.7 The authorities may, after initiating an investigation, take such measures as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as provided for in paragraph 6, once they have sufficient evidence that the conditions set forth in that paragraph are satisfied.

10.8 No duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation.

Article 11
Duration and Review of Anti-Dumping Duties and Price Undertakings

11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to

request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.

11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

11.5 The provisions of this Article shall apply *mutatis mutandis* to price undertakings accepted under Article 8.

Article 12
Public Notice and Explanation of Determinations

12.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report, adequate information on the following:

- **(i) the name of the exporting country or countries and the product involved;**
- **(ii) the date of initiation of the investigation;**
- **(iii) the basis on which dumping is alleged in the application;**
- **(iv) a summary of the factors on which the allegation of injury is based;**
- **(v) the address to which representations by interested parties should be directed;**
- **(vi) the time-limits allowed to interested parties for making their views known.**

12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

- **(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;**
- **(ii) a description of the product which is sufficient for customs purposes;**
- **(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;**
- **(iv) considerations relevant to the injury determination as set out in Article 3;**
- **(v) the main reasons leading to the determination.**

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

12.2.3 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 8 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

12.3 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively.

Article 13
Judicial Review

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

Article 14

Anti-Dumping Action on Behalf of a Third Country

14.1 An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

14.2 Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

14.3 In considering such an application, the authorities of the importing country shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say, the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

14.4 The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the Council for Trade in Goods seeking its approval for such action shall rest with the importing country.

Article 15

Developing Country Members

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

PART II

Article 16
Committee on Anti-Dumping Practices

16.1 There is hereby established a Committee on Anti-Dumping Practices (referred to in this Agreement as the "Committee") composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

16.2 The Committee may set up subsidiary bodies as appropriate.

16.3 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved. It shall obtain the consent of the Member and any firm to be consulted.

16.4 Members shall report without delay to the Committee all preliminary or final anti-dumping actions taken. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports of any anti-dumping actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

16.5 Each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 5 and *(b)* its domestic procedures governing the initiation and conduct of such investigations.

Article 17
Consultation and Dispute Settlement

17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.

17.2 Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to any matter affecting the operation of this Agreement.

17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation.

17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.

17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

- **(i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and**
- **(ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.**

17.6 In examining the matter referred to in paragraph 5:

- **(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;**
- **(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law.**

17.7 Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such

information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided.

PART III

Article 18
Final Provisions

18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.

18.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

18.3 Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

18.3.1 With respect to the calculation of margins of dumping in refund procedures under paragraph 3 of Article 9, the rules used in the most recent determination or review of dumping shall apply.

18.3.2 For the purposes of paragraph 3 of Article 11, existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force on that date already included a clause of the type provided for in that paragraph.

18.4 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

18.5 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

18.6 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

18.7 The Annexes to this Agreement constitute an integral part thereof.

AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES.

http://www.wto.org/english/docs_e/legal_e/24-scm.doc

***Members* hereby *agree* as follows:**

PART I: GENERAL PROVISIONS

Article 1
Definition of a Subsidy

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

- **(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);**
- **(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);**
- **(iii) a government provides goods or services other than general infrastructure, or purchases goods;**
- **(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;**

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

Article 2
Specificity

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

PART II: PROHIBITED SUBSIDIES

Article 3
Prohibition

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;
(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

Article 4
Remedies

4.1 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member.

4.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

4.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

4.4 If no mutually agreed solution has been reached within 30 days of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body ("DSB") for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

4.5 Upon its establishment, the panel may request the assistance of the Permanent Group of Experts (referred to in this Agreement as the "PGE") with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE's conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification.

4.6 The panel shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 90 days of the date of the composition and the establishment of the panel's terms of reference.

4.7 If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn.

4.8 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 30 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 60 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.

4.10 In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate countermeasures, unless the DSB decides by consensus to reject the request.

4.11 In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ("DSU"), the arbitrator shall determine whether the countermeasures are appropriate.

4.12 For purposes of disputes conducted pursuant to this Article, except for time-periods specifically prescribed in this Article, time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein.

PART III: ACTIONABLE SUBSIDIES

Article 5
Adverse Effects

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:

- **(a) injury to the domestic industry of another Member;**
- **(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994;**
- **(c) serious prejudice to the interests of another Member.**

This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

Article 6
Serious Prejudice

6.1 Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of:

- **(a) the total ad valorem subsidizatio of a product exceeding 5 per cent;**
- **(b) subsidies to cover operating losses sustained by an industry;**
- **(c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;**
- **(d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.**

6.2 Notwithstanding the provisions of paragraph 1, serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not resulted in any of the effects enumerated in paragraph 3.

6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

- **(a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;**
- **(b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;**
- **(c) the effect of the subsidy is 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;**
- **(d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.**

6.4 For the purpose of paragraph 3(b), the displacement or impeding of exports shall include any case in which, subject to the provisions of paragraph 7, it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year). "Change in relative shares of the market" shall include any of the following situations: *(a)* there is an increase in the market share of the subsidized product; *(b)* the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; *(c)* the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy.

6.5 For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor

affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.

6.6 Each Member in the market of which serious prejudice is alleged to have arisen shall, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information that can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved.

6.7 Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist during the relevant period:

- **(a) prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third country market concerned;**
- **(b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining Member to another country or countries;**
- **(c) natural disasters, strikes, transport disruptions or other *force majeure* substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member;**
- **(d) existence of arrangements limiting exports from the complaining Member;**
- **(e) voluntary decrease in the availability for export of the product concerned from the complaining Member (including, *inter alia*, a situation where firms in the complaining Member have been autonomously reallocating exports of this product to new markets);**
- **(f) failure to conform to standards and other regulatory requirements in the importing country.**

6.8 In the absence of circumstances referred to in paragraph 7, the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel, including information submitted in accordance with the provisions of Annex V.

6.9 This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

Article 7
Remedies

7.1 Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member.

7.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to *(a)* the existence and nature of the subsidy in question, and *(b)* the injury caused to the domestic industry, or the nullification or impairment, or serious prejudice caused to the interests of the Member requesting consultations.

7.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy practice in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

7.4 If consultations do not result in a mutually agreed solution within 60 days, any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.

7.5 The panel shall review the matter and shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 120 days of the date of the composition and establishment of the panel's terms of reference.

7.6 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within 60 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members

7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

7.9 In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request.

7.10 In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist.

PART IV: NON-ACTIONABLE SUBSIDIES

Article 8
Identification of Non-Actionable Subsidies

8.1 The following subsidies shall be considered as non-actionable:

- **(a) subsidies which are not specific within the meaning of Article 2;**
- **(b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.**

8.2 Notwithstanding the provisions of Parts III and V, the following subsidies shall be non-actionable:

(a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if;

the assistance cover not more than 75 per cent of the costs of industrial research or 50 per cent of the costs of pre-competitive development activity, and provided that such assistance is limited exclusively to:

(i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);
(ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;
(iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought-in research, technical knowledge, patents, etc.;
(iv) additional overhead costs incurred directly as a result of the research activity;
(v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.

(b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development and non-specific (within the meaning of Article 2) within eligible regions provided that:

(i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;
(ii) the region is considered as disadvantaged on the basis of neutral and objective criteria[Y], indicating that the region's difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;
(iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors:

- one of either income per capita or household income per capita, or GDP per capita, which must not be above 85 per cent of the average for the territory concerned;
- unemployment rate, which must be at least 110 per cent of the average for the territory concerned;

as measured over a three-year period; such measurement, however, may be a composite one and may include other factors.

(c) assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:

(i) is a one-time non-recurring measure; and
(ii) is limited to 20 per cent of the cost of adaptation; and

(iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and
(iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and
(v) is available to all firms which can adopt the new equipment and/or production processes.

8.3 A subsidy programme for which the provisions of paragraph 2 are invoked shall be notified in advance of its implementation to the Committee in accordance with the provisions of Part VII. Any such notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2. Members shall also provide the Committee with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the programme. Other Members shall have the right to request information about individual cases of subsidization under a notified programme.

8.4 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 3 and, where necessary, may require additional information from the subsidizing Member concerning the notified programme under review. The Secretariat shall report its findings to the Committee. The Committee shall, upon request, promptly review the findings of the Secretariat (or, if a review by the Secretariat has not been requested, the notification itself), with a view to determining whether the conditions and criteria laid down in paragraph 2 have not been met. The procedure provided for in this paragraph shall be completed at the latest at the first regular meeting of the Committee following the notification of a subsidy programme, provided that at least two months have elapsed between such notification and the regular meeting of the Committee. The review procedure described in this paragraph shall also apply, upon request, to substantial modifications of a programme notified in the yearly updates referred to in paragraph 3.

8.5 Upon the request of a Member, the determination by the Committee referred to in paragraph 4, or a failure by the Committee to make such a determination, as well as the violation, in individual cases, of the conditions set out in a notified programme, shall be submitted to binding arbitration. The arbitration body shall present its conclusions to the Members within 120 days from the date when the matter was referred to the arbitration body. Except as otherwise provided in this paragraph, the DSU shall apply to arbitrations conducted under this paragraph.

Article 9
Consultations and Authorized Remedies

9.1 If, in the course of implementation of a programme referred to in paragraph 2 of Article 8, notwithstanding the fact that the programme is consistent with the criteria laid down in that paragraph, a Member has reasons to believe that this programme has resulted in serious adverse effects to the domestic industry of that Member, such as to cause damage which would be difficult to repair, such Member may request consultations with the Member granting or maintaining the subsidy.

9.2 Upon request for consultations under paragraph 1, the Member granting or maintaining the subsidy programme in question shall enter into such consultations as quickly as possible. The

purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.

9.3 If no mutually acceptable solution has been reached in consultations under paragraph 2 within 60 days of the request for such consultations, the requesting Member may refer the matter to the Committee.

9.4 Where a matter is referred to the Committee, the Committee shall immediately review the facts involved and the evidence of the effects referred to in paragraph 1. If the Committee determines that such effects exist, it may recommend to the subsidizing Member to modify this programme in such a way as to remove these effects. The Committee shall present its conclusions within 120 days from the date when the matter is referred to it under paragraph 3. In the event the recommendation is not followed within six months, the Committee shall authorize the requesting Member to take appropriate countermeasures commensurate with the nature and degree of the effects determined to exist.

PART V: COUNTERVAILING MEASURES

Article 10
Application of Article VI of GATT 1994

Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiate and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

Article 11
Initiation and Subsequent Investigation

11.1 Except as provided in paragraph 6, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry.

11.2 An application under paragraph 1 shall include sufficient evidence of the existence of *(a)* a subsidy and, if possible, its amount, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and *(c)* a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

- **(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;**

(ii) a complete description of the allegedly subsidized product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;
(iii) evidence with regard to the existence, amount and nature of the subsidy in question;
(iv) evidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15.

11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

11.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

11.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation.

11.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of the existence of a subsidy, injury and causal link, as described in paragraph 2, to justify the initiation of an investigation.

11.7 The evidence of both subsidy and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation and *(b)* thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

11.8 In cases where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the provisions of this Agreement shall be fully applicable and the transaction or transactions shall, for the purposes of this Agreement, be regarded as having taken place between the country of origin and the importing Member.

11.9 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either subsidization or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is *de minimis* , or where the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the

amount of the subsidy shall be considered to be *de minimis* if the subsidy is less than 1 per cent ad valorem.

11.10 An investigation shall not hinder the procedures of customs clearance.

11.11 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

Article 12
Evidence

12.1 Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

12.1.1 Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply. Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

12.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested Member or interested party shall be made available promptly to other interested Members or interested parties participating in the investigation.

12.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 11 to the known exporters and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the protection of confidential information, as provided for in paragraph 4.

12.2. Interested Members and interested parties also shall have the right, upon justification, to present information orally. Where such information is provided orally, the interested Members and interested parties subsequently shall be required to reduce such submissions to writing. Any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and interested parties participating in the investigation, due account having been given to the need to protect confidential information.

12.3 The authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 4, and that is used by the authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information.

12.4 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it

12.4.1 The authorities shall require interested Members or interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such Members or parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

12.4.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

12.5 Except in circumstances provided for in paragraph 7, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based.

12.6 The investigating authorities may carry out investigations in the territory of other Members as required, provided that they have notified in good time the Member in question and unless that Member objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if *(a)* the firm so agrees and *(b)* the Member in question is notified and does not object. The procedures set forth in Annex VI shall apply to investigations on the premises of a firm. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain and may make such results available to the applicants.

12.7 In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

12.8 The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

12.9 For the purposes of this Agreement, "interested parties" shall include:

- **(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and**
- **(ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.**

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

12.10 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding subsidization, injury and causality.

12.11 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

12.12 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

Article 13
Consultations

13.1 As soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution.

13.2 Furthermore, throughout the period of investigation, Members the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.

13.3 Without prejudice to the obligation to afford reasonable opportunity for consultation, these provisions regarding consultations are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating the investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with the provisions of this Agreement.

13.4 The Member which intends to initiate any investigation or is conducting such an investigation shall permit, upon request, the Member or Members the products of which are subject to such investigation access to non-confidential evidence, including the non-confidential summary of confidential data being used for initiating or conducting the investigation.

Article 14
Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

(a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment

practice (including for the provision of risk capital) of private investors in the territory of that Member;

(b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

(c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;

(d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

Article 15
Determination of Injury

15.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like product and *(b)* the consequent impact of these imports on the domestic producers of such products.

15.2 With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

15.4 The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity,

return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

15.5 It must be demonstrated that the subsidized imports are, through the effects of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

15.6 The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

15.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, *inter alia*, such factors as:

- **(i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;**
- **(ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;**
- **(iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;**
- **(iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and**
- **(v) inventories of the product being investigated.**

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further subsidized exports are imminent and that, unless protective action is taken, material injury would occur.

15.8 With respect to cases where injury is threatened by subsidized imports, the application of countervailing measures shall be considered and decided with special care.

Article 16
Definition of Domestic Industry

16.1 For the purposes of this Agreement, the term "domestic industry" shall, except as provided in paragraph 2, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are relate to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term "domestic industry" may be interpreted as referring to the rest of the producers.

16.2. In exceptional circumstances, the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such market sell all or almost all of their production of the product in question in that market, and *(b)* the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of subsidized imports into such an isolated market and provided further that the subsidized imports are causing injury to the producers of all or almost all of the production within such market.

16.3 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 2, countervailing duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of countervailing duties on such a basis, the importing Member may levy the countervailing duties without limitation only if *(a)* the exporters shall have been given an opportunity to cease exporting at subsidized prices to the area concerned or otherwise give assurances pursuant to Article 18, and adequate assurances in this regard have not been promptly given, and *(b)* such duties cannot be levied only on products of specific producers which supply the area in question.

16.4 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraphs 1 and 2.

16.5 The provisions of paragraph 6 of Article 15 shall be applicable to this Article.

Article 17
Provisional Measures

17.1 Provisional measures may be applied only if:

(a) an investigation has been initiated in accordance with the provisions of Article 11, a public notice has been given to that effect and interested Members and interested parties have been given adequate opportunities to submit information and make comments;

(b) a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports; and
(c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

17.2 Provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization.

17.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

17.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months.

17.5 The relevant provisions of Article 19 shall be followed in the application of provisional measures.

Article 18
Undertakings

18.1 Proceedings may be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings under which:

(a) the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects; or
(b) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the amount of the subsidy. It is desirable that the price increases be less than the amount of the subsidy if such increases would be adequate to remove the injury to the domestic industry.

18.2 Undertakings shall not be sought or accepted unless the authorities of the importing Member have made a preliminary affirmative determination of subsidization and injury caused by such subsidization and, in case of undertakings from exporters, have obtained the consent of the exporting Member.

18.3 Undertakings offered need not be accepted if the authorities of the importing Member consider their acceptance impractical, for example if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

18.4 If an undertaking is accepted, the investigation of subsidization and injury shall nevertheless be completed if the exporting Member so desires or the importing Member so decides. In such a case, if a negative determination of subsidization or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of an undertaking. In such cases, the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event

that an affirmative determination of subsidization and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

18.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that governments or exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the subsidized imports continue.

18.6 Authorities of an importing Member may require any government or exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking, and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

Article 19
Imposition and Collection of Countervailing Duties

19.1 If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn.

19.2 The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties whose interests might be adversely affected by the imposition of a countervailing duty.

19.3 When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

19.4 No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

Article 20
Retroactivity

20.1 Provisional measures and countervailing duties shall only be applied to products which enter for consumption after the time when the decision under paragraph 1 of Article 17 and paragraph 1 of Article 19, respectively, enters into force, subject to the exceptions set out in this Article.

20.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the subsidized imports would, in the absence of the provisional measures, have led to a determination of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

20.3 If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected. If the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released in an expeditious manner.

20.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive countervailing duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.6 In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

Article 21
Duration and Review of Countervailing Duties and Undertakings

21.1 A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

21.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or

varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. The duty may remain in force pending the outcome of such a review.

21.4 The provisions of Article 12 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

21.5 The provisions of this Article shall apply *mutatis mutandis* to undertakings accepted under Article 18.

Article 22
Public Notice and Explanation of Determinations

22.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

22.2 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report, adequate information on the following:

- **(i) the name of the exporting country or countries and the product involved;**
- **(ii) the date of initiation of the investigation;**
- **(iii) a description of the subsidy practice or practices to be investigated;**
- **(iv) a summary of the factors on which the allegation of injury is based;**
- **(v) the address to which representations by interested Members and interested parties should be directed; and**
- **(vi) the time-limits allowed to interested Members and interested parties for making their views known.**

22.3 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

22.4 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on the existence of a subsidy and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

- **(i) the names of the suppliers or, when this is impracticable, the supplying countries involved;**
- **(ii) a description of the product which is sufficient for customs purposes;**
- **(iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined;**
- **(iv) considerations relevant to the injury determination as set out in Article 15;**
- **(v) the main reasons leading to the determination.**

22.5 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

22.6 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 18 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

22.7 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 21 and to decisions under Article 20 to apply duties retroactively.

Article 23
Judicial Review

Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.

PART VI: INSTITUTIONS

Article 24
Committee on Subsidies and Countervailing Measures and Subsidiary Bodies

24.1 There is hereby established a Committee on Subsidies and Countervailing Measures composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

24.2 The Committee may set up subsidiary bodies as appropriate.

24.3 The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of them will be replaced every year. The PGE may be requested to assist a panel, as provided for in paragraph 5 of Article 4. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.

24.4 The PGE may be consulted by any Member and may give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that Member. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7.

24.5 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved.

PART VII: NOTIFICATION AND SURVEILLANCE

Article 25
Notifications

25.1 Members agree that, without prejudice to the provisions of paragraph 1 of Article XVI of GATT 1994, their notifications of subsidies shall be submitted not later than 30 June of each year and shall conform to the provisions of paragraphs 2 through 6.

25.2 Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.

25.3 The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes. In this connection,

and without prejudice to the contents and form of the questionnaire on subsidies, Members shall ensure that their notifications contain the following information:

(i) form of a subsidy (i.e. grant, loan, tax concession, etc.);
(ii) subsidy per unit or, in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year);
(iii) policy objective and/or purpose of a subsidy;
(iv) duration of a subsidy and/or any other time-limits attached to it;
(v) statistical data permitting an assessment of the trade effects of a subsidy.

25.4 Where specific points in paragraph 3 have not been addressed in a notification, an explanation shall be provided in the notification itself.

25.5 If subsidies are granted to specific products or sectors, the notifications should be organized by product or sector.

25.6 Members which consider that there are no measures in their territories requiring notification under paragraph 1 of Article XVI of GATT 1994 and this Agreement shall so inform the Secretariat in writing.

25.7 Members recognize that notification of a measure does not prejudge either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.

25.8 Any Member may, at any time, make a written request for information on the nature and extent of any subsidy granted or maintained by another Member (including any subsidy referred to in Part IV), or for an explanation of the reasons for which a specific measure has been considered as not subject to the requirement of notification.

25.9 Members so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting Member. In particular, they shall provide sufficient details to enable the other Member to assess their compliance with the terms of this Agreement. Any Member which considers that such information has not been provided may bring the matter to the attention of the Committee.

25.10 Any Member which considers that any measure of another Member having the effects of a subsidy has not been notified in accordance with the provisions of paragraph 1 of Article XVI of GATT 1994 and this Article may bring the matter to the attention of such other Member. If the alleged subsidy is not thereafter notified promptly, such Member may itself bring the alleged subsidy in question to the notice of the Committee.

25.11 Members shall report without delay to the Committee all preliminary or final actions taken with respect to countervailing duties. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports on any countervailing

duty actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

25.12 Each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 11 and *(b)* its domestic procedures governing the initiation and conduct of such investigations.

Article 26
Surveillance

26.1 The Committee shall examine new and full notifications submitted under paragraph 1 of Article XVI of GATT 1994 and paragraph 1 of Article 25 of this Agreement at special sessions held every third year. Notifications submitted in the intervening years (updating notifications) shall be examined at each regular meeting of the Committee.

26.2 The Committee shall examine reports submitted under paragraph 11 of Article 25 at each regular meeting of the Committee.

PART VIII: DEVELOPING COUNTRY MEMBERS

Article 27
Special and Differential Treatment of Developing Country Members

27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

- **(a) developing country Members referred to in Annex VII.**
- **(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.**

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies, and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the

Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

27.6 Export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years. Export competitiveness shall exist either *(a)* on the basis of notification by the developing country Member having reached export competitiveness, or *(b)* on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

27.7 The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7.

27.8 There shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of paragraph 9, shall be demonstrated by positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.

27.9 Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in paragraph 1 of Article 6, action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.

27.10 Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

- **(a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or**
- **(b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.**

27.11 For those developing country Members within the scope of paragraph 2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in paragraph 10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply

from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member. This provision shall expire eight years from the date of entry into force of the WTO Agreement.

27.12 The provisions of paragraphs 10 and 11 shall govern any determination of *de minimis* under paragraph 3 of Article 15.

27.13 The provisions of Part III shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

27.14 The Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs.

27.15 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.

PART IX: TRANSITIONAL ARRANGEMENTS.

Article 28
Existing Programmes

28.1 Subsidy programmes which have been established within the territory of any Member before the date on which such a Member signed the WTO Agreement and which are inconsistent with the provisions of this Agreement shall be:

- **(a) notified to the Committee not later than 90 days after the date of entry into force of the WTO Agreement for such Member; and**
- **(b) brought into conformity with the provisions of this Agreement within three years of the date of entry into force of the WTO Agreement for such Member and until then shall not be subject to Part II.**

28.2 No Member shall extend the scope of any such programme, nor shall such a programme be renewed upon its expiry.

Article 29
Transformation into a Market Economy

29.1 Members in the process of transformation from a centrally-planned into a market, free-enterprise economy may apply programmes and measures necessary for such a transformation.

29.2 For such Members, subsidy programmes falling within the scope of Article 3, and notified according to paragraph 3, shall be phased out or brought into conformity with Article 3 within a period of seven years from the date of entry into force of the WTO Agreement. In such a case, Article 4 shall not apply. In addition during the same period:

(a) Subsidy programmes falling within the scope of paragraph 1(d) of Article 6 shall not be actionable under Article 7;
(b) With respect to other actionable subsidies, the provisions of paragraph 9 of Article 27 shall apply.

29.3 Subsidy programmes falling within the scope of Article 3 shall be notified to the Committee by the earliest practicable date after the date of entry into force of the WTO Agreement. Further notifications of such subsidies may be made up to two years after the date of entry into force of the WTO Agreement.

29.4 In exceptional circumstances Members referred to in paragraph 1 may be given departures from their notified programmes and measures and their time-frame by the Committee if such departures are deemed necessary for the process of transformation.

PART X: DISPUTE SETTLEMENT.

Article 30

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

PART XI: FINAL PROVISIONS

Article 31
Provisional Application

The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

Article 32
Other Final Provisions

32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.

32.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

32.3 Subject to paragraph 4, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

32.4 For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force at that date already included a clause of the type provided for in that paragraph.

32.5 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question.

32.6 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

32.7 The Committee shall review annually the implementation and operation of this Agreement, taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

32.8 The Annexes to this Agreement constitute an integral part thereof.

ANNEX I

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES.

- **(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.**
- **(b) Currency retention schemes or any similar practices which involve a bonus on exports.**
- **(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.**
- **(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.**
- **(e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.**
- **(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.**
- **(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes58 in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.**
- **(h) The exemption, remission or deferral of prior-stage cumulative indirect taxes58 on goods or services used in the production of exported products in excess of the exemption,**

remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

(i) The remission or drawback of import charges58 in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.
Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

GENERAL AGREEMENT ON TRADE IN SERVICES.

http://www.wto.org/english/docs_e/legal_e/26-gats.doc

Members,

Recognizing **the growing importance of trade in services for the growth and development of the world economy;**

Wishing **to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries;**

Desiring **the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;**

Recognizing **the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;**

Desiring **to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, *inter alia*, through the strengthening of their domestic services capacity and its efficiency and competitiveness;**

Taking **particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development, trade and financial needs;**

Hereby *agree* as follows:

PART I
SCOPE AND DEFINITION

Article I
Scope and Definition

1. This Agreement applies to measures by Members affecting trade in services.

2. For the purposes of this Agreement, trade in services is defined as the supply of a service:

- **(a) from the territory of one Member into the territory of any other Member;**
- **(b) in the territory of one Member to the service consumer of any other Member;**
- **(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;**
- **(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.**

3. For the purposes of this Agreement:

- **(a) "measures by Members" means measures taken by:**
- **(i) central, regional or local governments and authorities; and**
- **(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;**

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

- **(b) "services" includes any service in any sector except services supplied in the exercise of governmental authority;**
- **(c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.**

PART II
GENERAL OBLIGATIONS AND DISCIPLINES

Article II
Most-Favoured-Nation Treatment

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

3. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

Article III
Transparency

1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.

3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.

4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.

5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.

Article III bis
Disclosure of Confidential Information

Nothing in this Agreement shall require any Member to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

Article IV
Increasing Participation of Developing Countries

1. The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to:

- **(a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia* through access to technology on a commercial basis;**
- **(b) the improvement of their access to distribution channels and information networks; and**
- **(c) the liberalization of market access in sectors and modes of supply of export interest to them.**

2. Developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members' service suppliers to information, related to their respective markets, concerning:

- **(a) commercial and technical aspects of the supply of services;**
- **(b) registration, recognition and obtaining of professional qualifications; and**
- **(c) the availability of services technology.**

3. Special priority shall be given to the least-developed country Members in the implementation of paragraphs 1 and 2. Particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

Article V
Economic Integration

1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

- **(a) has substantial sectoral coverage, and**
- **(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:**

  - **(i) elimination of existing discriminatory measures, and/or**
  - **(ii) prohibition of new or more discriminatory measures,**

  either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.

2. In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.

3.
- **(a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.**
- **(b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.**

4. Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.

5. If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply.

6. A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.

7. (a) Members which are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article.

(b) Members which are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time-frame shall report periodically to the Council for Trade in Services on its implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary.

(c) Based on the reports of the working parties referred to in subparagraphs (a) and (b), the Council may make recommendations to the parties as it deems appropriate.

8. A Member which is a party to any agreement referred to in paragraph 1 may not seek compensation for trade benefits that may accrue to any other Member from such agreement.

Article V bis
Labour Markets Integration Agreements

This Agreement shall not prevent any of its Members from being a party to an agreement establishing full integration of the labour markets between or among the parties to such an agreement, provided that such an agreement:

(a) exempts citizens of parties to the agreement from requirements concerning residency and work permits;

(b) is notified to the Council for Trade in Services.

Article VI
Domestic Regulation

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

2. (a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not

independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

(b) The provisions of subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

3. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.

4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;
(b) not more burdensome than necessary to ensure the quality of the service;
(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

(i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and
(ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations applied by that Member.

6. In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.

Article VII
Recognition

1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved

through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

2. A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.

3. A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.

4. Each Member shall:

- **(a) within 12 months from the date on which the WTO Agreement takes effect for it, inform the Council for Trade in Services of its existing recognition measures and state whether such measures are based on agreements or arrangements of the type referred to in paragraph 1;**
- **(b) promptly inform the Council for Trade in Services as far in advance as possible of the opening of negotiations on an agreement or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase;**
- **(c) promptly inform the Council for Trade in Services when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.**

5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

Article VIII
Monopolies and Exclusive Service Suppliers

1. Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments.

2. Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.

3. The Council for Trade in Services may, at the request of a Member which has a reason to believe that a monopoly supplier of a service of any other Member is acting in a manner inconsistent with

paragraph 1 or 2, request the Member establishing, maintaining or authorizing such supplier to provide specific information concerning the relevant operations.

4. If, after the date of entry into force of the WTO Agreement, a Member grants monopoly rights regarding the supply of a service covered by its specific commitments, that Member shall notify the Council for Trade in Services no later than three months before the intended implementation of the grant of monopoly rights and the provisions of paragraphs 2, 3 and 4 of Article XXI shall apply.

5. The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (*a*) authorizes or establishes a small number of service suppliers and (*b*) substantially prevents competition among those suppliers in its territory.

Article IX
Business Practices

1. Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.

2. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member.

Article X
Emergency Safeguard Measures

1. There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.

2. In the period before the entry into effect of the results of the negotiations referred to in paragraph 1, any Member may, notwithstanding the provisions of paragraph 1 of Article XXI, notify the Council on Trade in Services of its intention to modify or withdraw a specific commitment after a period of one year from the date on which the commitment enters into force; provided that the Member shows cause to the Council that the modification or withdrawal cannot await the lapse of the three-year period provided for in paragraph 1 of Article XXI.

3. The provisions of paragraph 2 shall cease to apply three years after the date of entry into force of the WTO Agreement.

Article XI
Payments and Transfers

1. Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.

2. Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund.

Article XII
Restrictions to Safeguard the Balance of Payments

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia,* the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.

2. The restrictions referred to in paragraph 1:

- **(a) shall not discriminate among Members;**
- **(b) shall be consistent with the Articles of Agreement of the International Monetary Fund;**
- **(c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member;**
- **(d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;**
- **(e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves.**

3. In determining the incidence of such restrictions, Members may give priority to the supply of services which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector.

4. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the General Council.

5.
- **(a) Members applying the provisions of this Article shall consult promptly with the Committee on Balance-of-Payments Restrictions on restrictions adopted under this Article.**
- **(b) The Ministerial Conference shall establish procedures for periodic consultations with the objective of enabling such recommendations to be made to the Member concerned as it may deem appropriate.**
- **(c) Such consultations shall assess the balance-of-payment situation of the Member concerned and the restrictions adopted or maintained under this Article, taking into account, *inter alia,* such factors as:**
  - **(i) the nature and extent of the balance-of-payments and the external financial difficulties;**
  - **(ii) the external economic and trading environment of the consulting Member;**
  - **(iii) alternative corrective measures which may be available.**

(d) The consultations shall address the compliance of any restrictions with paragraph 2, in particular the progressive phaseout of restrictions in accordance with paragraph 2(e).
(e) In such consultations, all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance of payments, shall be accepted and conclusions shall be based on the assessment by the Fund of the balance-of-payments and the external financial situation of the consulting Member.

6. If a Member which is not a member of the International Monetary Fund wishes to apply the provisions of this Article, the Ministerial Conference shall establish a review procedure and any other procedures necessary.

Article XIII
Government Procurement

1. Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

2. There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.

Article XIV
General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order;
(b) necessary to protect human, animal or plant life or health;
(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
(iii) safety;

(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;
(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

Article XIV bis
Security Exceptions

1. Nothing in this Agreement shall be construed:

(a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:

(i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;
(ii) relating to fissionable and fusionable materials or the materials from which they are derived;
(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

Article XV
Subsidies

1. Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects The negotiations shall also address the appropriateness of countervailing procedures. Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing country Members, for flexibility in this area. For the purpose of such negotiations, Members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.

2. Any Member which considers that it is adversely affected by a subsidy of another Member may request consultations with that Member on such matters. Such requests shall be accorded sympathetic consideration.

PART III
SPECIFIC COMMITMENTS

Article XVI
Market Access

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

(a) 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;
(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
(c) 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;
(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

Article XVII
National Treatment

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

Article XVIII
Additional Commitments

Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

PART IV
PROGRESSIVE LIBERALIZATION

Article XIX
Negotiation of Specific Commitments

1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

2. The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.

3. For each round, negotiating guidelines and procedures shall be established. For the purposes of establishing such guidelines, the Council for Trade in Services shall carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV. Negotiating guidelines shall establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations, as well as for the special treatment for least-developed country Members under the provisions of paragraph 3 of Article IV.

4. The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement.

Article XX
Schedules of Specific Commitments

1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:

- **(a) terms, limitations and conditions on market access;**
- **(b) conditions and qualifications on national treatment;**
- **(c) undertakings relating to additional commitments;**
- **(d) where appropriate the time-frame for implementation of such commitments; and**
- **(e) the date of entry into force of such commitments.**

2. Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

Article XXI
Modification of Schedules

1. (a) A Member (referred to in this Article as the "modifying Member") may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.

(b) A modifying Member shall notify its intent to modify or withdraw a commitment pursuant to this Article to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal.

2. (a) At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an "affected Member") by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.

(b) Compensatory adjustments shall be made on a most-favoured-nation basis.

3. (a) If agreement is not reached between the modifying Member and any affected Member before the end of the period provided for negotiations, such affected Member may refer the matter to arbitration. Any affected Member that wishes to enforce a right that it may have to compensation must participate in the arbitration.

(b) If no affected Member has requested arbitration, the modifying Member shall be free to implement the proposed modification or withdrawal.

4. (a) The modifying Member may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitration.

(b) If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings. Notwithstanding Article II, such a modification or withdrawal may be implemented solely with respect to the modifying Member.

5. The Council for Trade in Services shall establish procedures for rectification or modification of Schedules. Any Member which has modified or withdrawn scheduled commitments under this Article shall modify its Schedule according to such procedures.

PART V
INSTITUTIONAL PROVISIONS

Article XXII
Consultation

1. Each Member shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultation regarding such representations as may be made by any other Member with respect to any matter affecting the operation of this Agreement. The Dispute Settlement Understanding (DSU) shall apply to such consultations.

2. The Council for Trade in Services or the Dispute Settlement Body (DSB) may, at the request of a Member, consult with any Member or Members in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

3. A Member may not invoke Article XVII, either under this Article or Article XXIII, with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation. In case of disagreement between Members as to whether a measure falls within the scope of such an agreement between them, it shall be open to either Member to bring this matter before the Council for Trade in Services. The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members.

Article XXIII
Dispute Settlement and Enforcement

1. If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU.

2. If the DSB considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend the application to any other Member or Members of obligations and specific commitments in accordance with Article 22 of the DSU.

3. If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.

Article XXIV
Council for Trade in Services

1. The Council for Trade in Services shall carry out such functions as may be assigned to it to facilitate the operation of this Agreement and further its objectives. The Council may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions.

2. The Council and, unless the Council decides otherwise, its subsidiary bodies shall be open to participation by representatives of all Members.

3. The Chairman of the Council shall be elected by the Members.

Article XXV

Technical Cooperation

1. Service suppliers of Members which are in need of such assistance shall have access to the services of contact points referred to in paragraph 2 of Article IV.

2. Technical assistance to developing countries shall be provided at the multilateral level by the Secretariat and shall be decided upon by the Council for Trade in Services.

Article XXVI
Relationship with Other International Organizations

The General Council shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services.

PART VI
FINAL PROVISIONS

Article XXVII
Denial of Benefits

A Member may deny the benefits of this Agreement:

- **(a) to the supply of a service, if it establishes that the service is supplied from or in the territory of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement;**
- **(b) in the case of the supply of a maritime transport service, if it establishes that the service is supplied:**
  - **(i) by a vessel registered under the laws of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement, and**

(ii) by a person which operates and/or uses the vessel in whole or in part but which is of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement;

(c) to a service supplier that is a juridical person, if it establishes that it is not a service supplier of another Member, or that it is a service supplier of a Member to which the denying Member does not apply the WTO Agreement.

Article XXVIII
Definitions

For the purpose of this Agreement:

(a) "measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;
(b) "supply of a service" includes the production, distribution, marketing, sale and delivery of a service;
(c) "measures by Members affecting trade in services" include measures in respect of

(i) the purchase, payment or use of a service;
(ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;
(iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member;

(d) "commercial presence" means any type of business or professional establishment, including through

(i) the constitution, acquisition or maintenance of a juridical person, or
(ii) the creation or maintenance of a branch or a representative office,

within the territory of a Member for the purpose of supplying a service;

(e) "sector" of a service means,

(i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,
(ii) otherwise, the whole of that service sector, including all of its subsectors;

(f) "service of another Member" means a service which is supplied,

(i) from or in the territory of that other Member, or in the case of maritime transport, by a vessel registered under the laws of that other Member, or by a person of that other Member which supplies the service through the operation of a vessel and/or its use in whole or in part; or

(ii) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of that other Member;

(g) "service supplier" means any person that supplies a service;
(h) "monopoly supplier of a service" means any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service;
(i) "service consumer" means any person that receives or uses a service;
(j) "person" means either a natural person or a juridical person;
(k) "natural person of another Member" means a natural person who resides in the territory of that other Member or any other Member, and who under the law of that other Member:

(i) is a national of that other Member; or
(ii) has the right of permanent residence in that other Member, in the case of a Member which:

1. does not have nationals; or
2. accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services, as notified in its acceptance of or accession to the WTO Agreement, provided that no Member is obligated to accord to such permanent residents treatment more favourable than would be accorded by that other Member to such permanent residents. Such notification shall include the assurance to assume, with respect to those permanent residents, in accordance with its laws and regulations, the same responsibilities that other Member bears with respect to its nationals;

(l) "juridical person" means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;

(m) "juridical person of another Member" means a juridical person which is either:

(i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or
(ii) in the case of the supply of a service through commercial presence, owned or controlled by:

1. natural persons of that Member; or
2. juridical persons of that other Member identified under subpara-graph (i);

(n) a juridical person is:

(i) "owned" by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;
(ii) "controlled" by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;
(iii) "affiliated" with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person;

(o) "direct taxes" comprise all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES.

http://www.wto.org/english/docs_e/legal_e/15-sps.doc

***Members*,**

***Reaffirming* that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade;**

***Desiring* to improve the human health, animal health and phytosanitary situation in all Members;**

***Noting* that sanitary and phytosanitary measures are often applied on the basis of bilateral agreements or protocols;**

***Desiring* the establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade;**

***Recognizing* the important contribution that international standards, guidelines and recommendations can make in this regard;**

***Desiring* to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health;**

***Recognizing* that developing country Members may encounter special difficulties in complying with the sanitary or phytosanitary measures of importing Members, and as a consequence in access to markets, and also in the formulation and application of sanitary or phytosanitary measures in their own territories, and desiring to assist them in their endeavours in this regard;**

***Desiring* therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b);**

***Hereby agree* as follows:**

Article 1
General Provisions

1. This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.

2. For the purposes of this Agreement, the definitions provided in Annex A shall apply.

3. The annexes are an integral part of this Agreement.

4. Nothing in this Agreement shall affect the rights of Members under the Agreement on Technical Barriers to Trade with respect to measures not within the scope of this Agreement.

Article 2
Basic Rights and Obligations

1. Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.

2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

3. Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

4. Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).

Article 3
Harmonization

1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

2. Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.

3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.

4. Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures.

5. The Committee on Sanitary and Phytosanitary Measures provided for in paragraphs 1 and 4 of Article 12 (referred to in this Agreement as the "Committee") shall develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations.

Article 4
Equivalence

1. Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

2. Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures.

Article 5
Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection

1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

3. In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

4. Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

5. With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.

6. Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.

7. In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

8. When a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure.

Article 6
Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence

1. Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area - whether all of a country, part of a country, or all or parts of several countries - from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, *inter alia*, the level of prevalence of specific diseases or pests, the existence of eradication or control

programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.

2. Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.

3. Exporting Members claiming that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

Article 7
Transparency

Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.

Article 8
Control, Inspection and Approval Procedures

Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

Article 9
Technical Assistance

1. Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations. Such assistance may be, *inter alia*, in the areas of processing technologies, research and infrastructure, including in the establishment of national regulatory bodies, and may take the form of advice, credits, donations and grants, including for the purpose of seeking technical expertise, training and equipment to allow such countries to adjust to, and comply with, sanitary or phytosanitary measures necessary to achieve the appropriate level of sanitary or phytosanitary protection in their export markets.

2. Where substantial investments are required in order for an exporting developing country Member to fulfil the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved.

Article 10
Special and Differential Treatment

1. In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.

2. Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.

3. With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs.

4. Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations.

Article 11
Consultations and Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

2. In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative.

3. Nothing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement.

Article 12
Administration

1. A Committee on Sanitary and Phytosanitary Measures is hereby established to provide a regular forum for consultations. It shall carry out the functions necessary to implement the provisions of this Agreement and the furtherance of its objectives, in particular with respect to harmonization. The Committee shall reach its decisions by consensus.

2. The Committee shall encourage and facilitate ad hoc consultations or negotiations among Members on specific sanitary or phytosanitary issues. The Committee shall encourage the use of international standards, guidelines or recommendations by all Members and, in this regard, shall sponsor technical consultation and study with the objective of increasing coordination and integration

between international and national systems and approaches for approving the use of food additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs.

3. The Committee shall maintain close contact with the relevant international organizations in the field of sanitary and phytosanitary protection, especially with the Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention, with the objective of securing the best available scientific and technical advice for the administration of this Agreement and in order to ensure that unnecessary duplication of effort is avoided.

4. The Committee shall develop a procedure to monitor the process of international harmonization and the use of international standards, guidelines or recommendations. For this purpose, the Committee should, in conjunction with the relevant international organizations, establish a list of international standards, guidelines or recommendations relating to sanitary or phytosanitary measures which the Committee determines to have a major trade impact. The list should include an indication by Members of those international standards, guidelines or recommendations which they apply as conditions for import or on the basis of which imported products conforming to these standards can enjoy access to their markets. For those cases in which a Member does not apply an international standard, guideline or recommendation as a condition for import, the Member should provide an indication of the reason therefor, and, in particular, whether it considers that the standard is not stringent enough to provide the appropriate level of sanitary or phytosanitary protection. If a Member revises its position, following its indication of the use of a standard, guideline or recommendation as a condition for import, it should provide an explanation for its change and so inform the Secretariat as well as the relevant international organizations, unless such notification and explanation is given according to the procedures of Annex B.

5. In order to avoid unnecessary duplication, the Committee may decide, as appropriate, to use the information generated by the procedures, particularly for notification, which are in operation in the relevant international organizations.

6. The Committee may, on the basis of an initiative from one of the Members, through appropriate channels invite the relevant international organizations or their subsidiary bodies to examine specific matters with respect to a particular standard, guideline or recommendation, including the basis of explanations for non-use given according to paragraph 4.

7. The Committee shall review the operation and implementation of this Agreement three years after the date of entry into force of the WTO Agreement, and thereafter as the need arises. Where appropriate, the Committee may submit to the Council for Trade in Goods proposals to amend the text of this Agreement having regard, *inter alia*, to the experience gained in its implementation.

Article 13
Implementation

Members are fully responsible under this Agreement for the observance of all obligations set forth herein. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies. Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition,

Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this Agreement.

Article 14
Final Provisions

The least-developed country Members may delay application of the provisions of this Agreement for a period of five years following the date of entry into force of the WTO Agreement with respect to their sanitary or phytosanitary measures affecting importation or imported products. Other developing country Members may delay application of the provisions of this Agreement, other than paragraph 8 of Article 5 and Article 7, for two years following the date of entry into force of the WTO Agreement with respect to their existing sanitary or phytosanitary measures affecting importation or imported products, where such application is prevented by a lack of technical expertise, technical infrastructure or resources.

ANNEX A
DEFINITIONS.

1. *Sanitary or phytosanitary measure* - Any measure applied:

- **(a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;**
- **(b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;**
- **(c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or**
- **(d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.**

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

2. *Harmonization* - The establishment, recognition and application of common sanitary and phytosanitary measures by different Members.

3. *International standards, guidelines and recommendations*

- **(a) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide**

residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice;

(b) for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics;

(c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention; and

(d) for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee.

4. *Risk assessment* - The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

5. *Appropriate level of sanitary or phytosanitary protection* - The level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.

NOTE: Many Members otherwise refer to this concept as the "acceptable level of risk".

6. *Pest- or disease-free area* - An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease does not occur.

NOTE: A pest- or disease-free area may surround, be surrounded by, or be adjacent to an area - whether within part of a country or in a geographic region which includes parts of or all of several countries -in which a specific pest or disease is known to occur but is subject to regional control measures such as the establishment of protection, surveillance and buffer zones which will confine or eradicate the pest or disease in question.

7. *Area of low pest or disease prevalence* - An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease occurs at low levels and which is subject to effective surveillance, control or eradication measures.

ANNEX B
TRANSPARENCY OF SANITARY AND PHYTOSANITARY REGULATIONS

Publication of regulations

1. Members shall ensure that all sanitary and phytosanitary regulations which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them.

2. Except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member.

Enquiry points

3. Each Member shall ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents regarding:

- **(a) any sanitary or phytosanitary regulations adopted or proposed within its territory;**
- **(b) any control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures, which are operated within its territory;**
- **(c) risk assessment procedures, factors taken into consideration, as well as the determination of the appropriate level of sanitary or phytosanitary protection;**
- **(d) the membership and participation of the Member, or of relevant bodies within its territory, in international and regional sanitary and phytosanitary organizations and systems, as well as in bilateral and multilateral agreements and arrangements within the scope of this Agreement, and the texts of such agreements and arrangements.**

4. Members shall ensure that where copies of documents are requested by interested Members, they are supplied at the same price (if any), apart from the cost of delivery, as to the nationals of the Member concerned.

Notification procedures

5. Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall:

- **(a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;**
- **(b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;**

(c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations;
(d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.

6. However, where urgent problems of health protection arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 5 of this Annex as it finds necessary, provided that the Member:

(a) immediately notifies other Members, through the Secretariat, of the particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s);
(b) provides, upon request, copies of the regulation to other Members;
(c) allows other Members to make comments in writing, discusses these comments upon request, and takes the comments and the results of the discussions into account.

7. Notifications to the Secretariat shall be in English, French or Spanish.

8. Developed country Members shall, if requested by other Members, provide copies of the documents or, in case of voluminous documents, summaries of the documents covered by a specific notification in English, French or Spanish.

9. The Secretariat shall promptly circulate copies of the notification to all Members and interested international organizations and draw the attention of developing country Members to any notifications relating to products of particular interest to them.

10. Members shall designate a single central government authority as responsible for the implementation, on the national level, of the provisions concerning notification procedures according to paragraphs 5, 6, 7 and 8 of this Annex.

General reservations

11. Nothing in this Agreement shall be construed as requiring:

(a) the provision of particulars or copies of drafts or the publication of texts other than in the language of the Member except as stated in paragraph 8 of this Annex; or
(b) Members to disclose confidential information which would impede enforcement of sanitary or phytosanitary legislation or which would prejudice the legitimate commercial interests of particular enterprises.

ANNEX C
CONTROL, INSPECTION AND APPROVAL PROCEDURES

1. Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:

(a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;

(b) the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

(c) information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs;

(d) the confidentiality of information about imported products arising from or supplied in connection with control, inspection and approval is respected in a way no less favourable than for domestic products and in such a manner that legitimate commercial interests are protected;

(e) any requirements for control, inspection and approval of individual specimens of a product are limited to what is reasonable and necessary;

(f) any fees imposed for the procedures on imported products are equitable in relation to any fees charged on like domestic products or products originating in any other Member and should be no higher than the actual cost of the service;

(g) the same criteria should be used in the siting of facilities used in the procedures and the selection of samples of imported products as for domestic products so as to minimize the inconvenience to applicants, importers, exporters or their agents;

(h) whenever specifications of a product are changed subsequent to its control and inspection in light of the applicable regulations, the procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the regulations concerned; and

(i) a procedure exists to review complaints concerning the operation of such procedures and to take corrective action when a complaint is justified.

Where an importing Member operates a system for the approval of the use of food additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs which prohibits or restricts access to its domestic markets for products based on the absence of an approval, the importing Member shall consider the use of a relevant international standard as the basis for access until a final determination is made.

2. Where a sanitary or phytosanitary measure specifies control at the level of production, the Member in whose territory the production takes place shall provide the necessary assistance to facilitate such control and the work of the controlling authorities.

3. Nothing in this Agreement shall prevent Members from carrying out reasonable inspection within their own territories.

AGREEMENT ON SAFEGUARDS.

http://www.wto.org/english/docs_e/legal_e/25-safeg.doc

Members,

***Having* in mind the overall objective of the Members to improve and strengthen the international trading system based on GATT 1994;**

***Recognizing* the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control;**

***Recognizing* the importance of structural adjustment and the need to enhance rather than limit competition in international markets; and**

***Recognizing* further that, for these purposes, a comprehensive agreement, applicable to all Members and based on the basic principles of GATT 1994, is called for;**

Hereby *agree* as follows:

Article 1
General Provision

This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.

Article 2
Conditions

1. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

2. Safeguard measures shall be applied to a product being imported irrespective of its source.

Article 3
Investigation

1. A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

2. Any information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the competent authorities find that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

Article 4
Determination of Serious Injury or Threat Thereof

1. For the purposes of this Agreement:

- **(a) "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry;**
- **(b) "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility; and**
- **(c) in determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.**

2. (a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

(b) The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

(c) The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

Article 5
Application of Safeguard Measures

1. A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.

2. (a) In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

(b) A Member may depart from the provisions in subparagraph (a) provided that consultations under paragraph 3 of Article 12 are conducted under the auspices of the Committee on Safeguards provided for in paragraph 1 of Article 13 and that clear demonstration is provided to the Committee that (*i*) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period, (*ii*) the reasons for the departure from the provisions in subparagraph (a) are justified, and (*iii*) the conditions of such departure are equitable to all suppliers of the product concerned. The duration of any such measure shall not be extended beyond the initial period under paragraph 1 of Article 7. The departure referred to above shall not be permitted in the case of threat of serious injury.

Article 6
Provisional Safeguard Measures

In critical circumstances where delay would cause damage which it would be difficult to repair, a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. The duration of the provisional measure shall not exceed 200 days, during which period the pertinent requirements of Articles 2 through 7 and 12 shall be met. Such measures should take the form of

tariff increases to be promptly refunded if the subsequent investigation referred to in paragraph 2 of Article 4 does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry. The duration of any such provisional measure shall be counted as a part of the initial period and any extension referred to in paragraphs 1, 2 and 3 of Article 7.

Article 7
Duration and Review of Safeguard Measures

1. A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed four years, unless it is extended under paragraph 2.

2. The period mentioned in paragraph 1 may be extended provided that the competent authorities of the importing Member have determined, in conformity with the procedures set out in Articles 2, 3, 4 and 5, that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting, and provided that the pertinent provisions of Articles 8 and 12 are observed.

3. The total period of application of a safeguard measure including the period of application of any provisional measure, the period of initial application and any extension thereof, shall not exceed eight years.

4. In order to facilitate adjustment in a situation where the expected duration of a safeguard measure as notified under the provisions of paragraph 1 of Article 12 is over one year, the Member applying the measure shall progressively liberalize it at regular intervals during the period of application. If the duration of the measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalization. A measure extended under paragraph 2 shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalized.

5. No safeguard measure shall be applied again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, for a period of time equal to that during which such measure had been previously applied, provided that the period of non-application is at least two years.

6. Notwithstanding the provisions of paragraph 5, a safeguard measure with a duration of 180 days or less may be applied again to the import of a product if:

- **(a) at least one year has elapsed since the date of introduction of a safeguard measure on the import of that product; and**
- **(b) such a safeguard measure has not been applied on the same product more than twice in the five-year period immediately preceding the date of introduction of the measure.**

Article 8
Level of Concessions and Other Obligations

1. A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

2. If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.

3. The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.

Article 9
Developing Country Members

1. Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.

2. A developing country Member shall have the right to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period provided for in paragraph 3 of Article 7. Notwithstanding the provisions of paragraph 5 of Article 7, a developing country Member shall have the right to apply a safeguard measure again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, after a period of time equal to half that during which such a measure has been previously applied, provided that the period of non-application is at least two years.

Article 10
Pre-existing Article XIX Measures

Members shall terminate all safeguard measures taken pursuant to Article XIX of GATT 1947 that were in existence on the date of entry into force of the WTO Agreement not later than eight years after the date on which they were first applied or five years after the date of entry into force of the WTO Agreement, whichever comes later.

Article 11
Prohibition and Elimination of Certain Measures

1. (a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

(b) Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.

(c) This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.

2. The phasing out of measures referred to in paragraph 1(b) shall be carried out according to timetables to be presented to the Committee on Safeguards by the Members concerned not later than 180 days after the date of entry into force of the WTO Agreement. These timetables shall provide for all measures referred to in paragraph 1 to be phased out or brought into conformity with this Agreement within a period not exceeding four years after the date of entry into force of the WTO Agreement, subject to not more than one specific measure per importing Member, the duration of which shall not extend beyond 31 December 1999. Any such exception must be mutually agreed between the Members directly concerned and notified to the Committee on Safeguards for its review and acceptance within 90 days of the entry into force of the WTO Agreement. The Annex to this Agreement indicates a measure which has been agreed as falling under this exception.

3. Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1.

Article 12

<u>Notification and Consultation</u>

1. A Member shall immediately notify the Committee on Safeguards upon:

(a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;
(b) making a finding of serious injury or threat thereof caused by increased imports; and
(c) taking a decision to apply or extend a safeguard measure.

2. In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of

introduction, expected duration and timetable for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure.

3. A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

4. A Member shall make a notification to the Committee on Safeguards before taking a provisional safeguard measure referred to in Article 6. Consultations shall be initiated immediately after the measure is taken.

5. The results of the consultations referred to in this Article, as well as the results of mid-term reviews referred to in paragraph 4 of Article 7, any form of compensation referred to in paragraph 1 of Article 8, and proposed suspensions of concessions and other obligations referred to in paragraph 2 of Article 8, shall be notified immediately to the Council for Trade in Goods by the Members concerned.

6. Members shall notify promptly the Committee on Safeguards of their laws, regulations and administrative procedures relating to safeguard measures as well as any modifications made to them.

7. Members maintaining measures described in Article 10 and paragraph 1 of Article 11 which exist on the date of entry into force of the WTO Agreement shall notify such measures to the Committee on Safeguards not later than 60 days after the date of entry into force of the WTO Agreement.

8. Any Member may notify the Committee on Safeguards of all laws, regulations, administrative procedures and any measures or actions dealt with in this Agreement that have not been notified by other Members that are required by this Agreement to make such notifications.

9. Any Member may notify the Committee on Safeguards of any non-governmental measures referred to in paragraph 3 of Article 11.

10. All notifications to the Council for Trade in Goods referred to in this Agreement shall normally be made through the Committee on Safeguards.

11. The provisions on notification in this Agreement shall not require any Member to disclose confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 13
Surveillance

1. A Committee on Safeguards is hereby established, under the authority of the Council for Trade in Goods, which shall be open to the participation of any Member indicating its wish to serve on it. The Committee will have the following functions:

- **(a) to monitor, and report annually to the Council for Trade in Goods on, the general implementation of this Agreement and make recommendations towards its improvement;**
- **(b) to find, upon request of an affected Member, whether or not the procedural requirements of this Agreement have been complied with in connection with a safeguard measure, and report its findings to the Council for Trade in Goods;**
- **(c) to assist Members, if they so request, in their consultations under the provisions of this Agreement;**
- **(d) to examine measures covered by Article 10 and paragraph 1 of Article 11, monitor the phase-out of such measures and report as appropriate to the Council for Trade in Goods;**
- **(e) to review, at the request of the Member taking a safeguard measure, whether proposals to suspend concessions or other obligations are "substantially equivalent", and report as appropriate to the Council for Trade in Goods;**
- **(f) to receive and review all notifications provided for in this Agreement and report as appropriate to the Council for Trade in Goods; and**
- **(g) to perform any other function connected with this Agreement that the Council for Trade in Goods may determine.**

2. To assist the Committee in carrying out its surveillance function, the Secretariat shall prepare annually a factual report on the operation of this Agreement based on notifications and other reliable information available to it.

Article 14
Dispute Settlement

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes arising under this Agreement.

AGREEMENT ON AGRICULTURE.

http://www.wto.org/english/docs_e/legal_e/14-ag.doc

Members,

Having decided **to establish a basis for initiating a process of reform of trade in agriculture in line with the objectives of the negotiations as set out in the Punta del Este Declaration;**

Recalling **that their long-term objective as agreed at the Mid-Term Review of the Uruguay Round "is to establish a fair and market-oriented agricultural trading system and that a reform process should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines";**

Recalling **further that "the above-mentioned long-term objective is to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets";**

Committed **to achieving specific binding commitments in each of the following areas: market access; domestic support; export competition; and to reaching an agreement on sanitary and phytosanitary issues;**

Having agreed **that in implementing their commitments on market access, developed country Members would take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members, including the fullest liberalization of trade in tropical agricultural products as agreed at the Mid-Term Review, and for products of particular importance to the diversification of production from the growing of illicit narcotic crops;**

Noting **that commitments under the reform programme should be made in an equitable way among all Members, having regard to non-trade concerns, including food security and the need to protect the environment; having regard to the agreement that special and differential treatment for developing countries is an integral element of the negotiations, and taking into account the possible negative effects of the implementation of the reform programme on least-developed and net food-importing developing countries;**

Hereby *agree* as follows:

Part I

Article 1
Definition of Terms

In this Agreement, unless the context otherwise requires:

(a) "Aggregate Measurement of Support" and "AMS" mean the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement, which is:

(i) with respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule; and
(ii) with respect to support provided during any year of the implementation period and thereafter, calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule;

(b) "basic agricultural product" in relation to domestic support commitments is defined as the product as close as practicable to the point of first sale as specified in a Member's Schedule and in the related supporting material;
(c) "budgetary outlays" or "outlays" includes revenue foregone;
(d) "Equivalent Measurement of Support" means the annual level of support, expressed in monetary terms, provided to producers of a basic agricultural product through the application of one or more measures, the calculation of which in accordance with the AMS methodology is impracticable, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement, and which is:

(i) with respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule; and
(ii) with respect to support provided during any year of the implementation period and thereafter, calculated in accordance with the provisions of Annex 4 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule;

(e) "export subsidies" refers to subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement;
(f) "implementation period" means the six-year period commencing in the year 1995, except that, for the purposes of Article 13, it means the nine-year period commencing in 1995;

(g) "market access concessions" includes all market access commitments undertaken pursuant to this Agreement;

(h) "Total Aggregate Measurement of Support" and "Total AMS" mean the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent measurements of support for agricultural products, and which is:

(i) with respect to support provided during the base period (i.e. the "Base Total AMS") and the maximum support permitted to be provided during any year of the implementation period or thereafter (i.e. the "Annual and Final Bound Commitment Levels"), as specified in Part IV of a Member's Schedule; and

(ii) with respect to the level of support actually provided during any year of the implementation period and thereafter (i.e. the "Current Total AMS"), calculated in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule;

(i) "year" in paragraph (f) above and in relation to the specific commitments of a Member refers to the calendar, financial or marketing year specified in the Schedule relating to that Member.

Article 2
Product Coverage

This Agreement applies to the products listed in Annex 1 to this Agreement, hereinafter referred to as agricultural products.

Part II

Article 3
Incorporation of Concessions and Commitments

1. The domestic support and export subsidy commitments in Part IV of each Member's Schedule constitute commitments limiting subsidization and are hereby made an integral part of GATT 1994.

2. Subject to the provisions of Article 6, a Member shall not provide support in favour of domestic producers in excess of the commitment levels specified in Section I of Part IV of its Schedule.

3. Subject to the provisions of paragraphs 2(b) and 4 of Article 9, a Member shall not provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified therein and shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule.

Part III

Article 4
Market Access

1. Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments as specified therein.

2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties, except as otherwise provided for in Article 5 and Annex 5.

Article 5
Special Safeguard Provisions

1. Notwithstanding the provisions of paragraph 1(b) of Article II of GATT 1994, any Member may take recourse to the provisions of paragraphs 4 and 5 below in connection with the importation of an agricultural product, in respect of which measures referred to in paragraph 2 of Article 4 of this Agreement have been converted into an ordinary customs duty and which is designated in its Schedule with the symbol "SSG" as being the subject of a concession in respect of which the provisions of this Article may be invoked, if:

- **(a) the volume of imports of that product entering the customs territory of the Member granting the concession during any year exceeds a trigger level which relates to the existing market access opportunity as set out in paragraph 4; or, but not concurrently:**
- **(b) the price at which imports of that product may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price equal to the average 1986 to 1988 reference price for the product concerned.**

2. Imports under current and minimum access commitments established as part of a concession referred to in paragraph 1 above shall be counted for the purpose of determining the volume of imports required for invoking the provisions of subparagraph 1(a) and paragraph 4, but imports under such commitments shall not be affected by any additional duty imposed under either subparagraph 1(a) and paragraph 4 or subparagraph 1(b) and paragraph 5 below.

3. Any supplies of the product in question which were *en route* on the basis of a contract settled before the additional duty is imposed under subparagraph 1(a) and paragraph 4 shall be exempted from any such additional duty, provided that they may be counted in the volume of imports of the product in question during the following year for the purposes of triggering the provisions of subparagraph 1(a) in that year.

4. Any additional duty imposed under subparagraph 1(a) shall only be maintained until the end of the year in which it has been imposed, and may only be levied at a level which shall not exceed one third of the level of the ordinary customs duty in effect in the year in which the action is taken. The trigger level shall be set according to the following schedule based on market access opportunities

defined as imports as a percentage of the corresponding domestic consumption during the three preceding years for which data are available:

(a) where such market access opportunities for a product are less than or equal to 10 per cent, the base trigger level shall equal 125 per cent;
(b) where such market access opportunities for a product are greater than 10 per cent but less than or equal to 30 per cent, the base trigger level shall equal 110 per cent;
(c) where such market access opportunities for a product are greater than 30 per cent, the base trigger level shall equal 105 per cent.

In all cases the additional duty may be imposed in any year where the absolute volume of imports of the product concerned entering the customs territory of the Member granting the concession exceeds the sum of (*x*) the base trigger level set out above multiplied by the average quantity of imports during the three preceding years for which data are available and (*y*) the absolute volume change in domestic consumption of the product concerned in the most recent year for which data are available compared to the preceding year, provided that the trigger level shall not be less than 105 per cent of the average quantity of imports in (*x*) above.

5. The additional duty imposed under subparagraph 1(b) shall be set according to the following schedule:

(a) if the difference between the c.i.f. import price of the shipment expressed in terms of the domestic currency (hereinafter referred to as the "import price") and the trigger price as defined under that subparagraph is less than or equal to 10 per cent of the trigger price, no additional duty shall be imposed;
(b) if the difference between the import price and the trigger price (hereinafter referred to as the "difference") is greater than 10 per cent but less than or equal to 40 per cent of the trigger price, the additional duty shall equal 30 per cent of the amount by which the difference exceeds 10 per cent;
(c) if the difference is greater than 40 per cent but less than or equal to 60 per cent of the trigger price, the additional duty shall equal 50 per cent of the amount by which the difference exceeds 40 per cent, plus the additional duty allowed under (b);
(d) if the difference is greater than 60 per cent but less than or equal to 75 per cent, the additional duty shall equal 70 per cent of the amount by which the difference exceeds 60 per cent of the trigger price, plus the additional duties allowed under (b) and (c);
(e) if the difference is greater than 75 per cent of the trigger price, the additional duty shall equal 90 per cent of the amount by which the difference exceeds 75 per cent, plus the additional duties allowed under (b), (c) and (d).

6. For perishable and seasonal products, the conditions set out above shall be applied in such a manner as to take account of the specific characteristics of such products. In particular, shorter time periods under subparagraph 1(a) and paragraph 4 may be used in reference to the corresponding periods in the base period and different reference prices for different periods may be used under subparagraph 1(b).

7. The operation of the special safeguard shall be carried out in a transparent manner. Any Member taking action under subparagraph 1(a) above shall give notice in writing, including relevant data, to the Committee on Agriculture as far in advance as may be practicable and in any event within 10 days of the implementation of such action. In cases where changes in consumption volumes must be allocated to individual tariff lines subject to action under paragraph 4, relevant data shall include the

information and methods used to allocate these changes. A Member taking action under paragraph 4 shall afford any interested Members the opportunity to consult with it in respect of the conditions of application of such action. Any Member taking action under subparagraph 1(b) above shall give notice in writing, including relevant data, to the Committee on Agriculture within 10 days of the implementation of the first such action or, for perishable and seasonal products, the first action in any period. Members undertake, as far as practicable, not to take recourse to the provisions of subparagraph 1(b) where the volume of imports of the products concerned are declining. In either case a Member taking such action shall afford any interested Members the opportunity to consult with it in respect of the conditions of application of such action.

8. Where measures are taken in conformity with paragraphs 1 through 7 above, Members undertake not to have recourse, in respect of such measures, to the provisions of paragraphs 1(a) and 3 of Article XIX of GATT 1994 or paragraph 2 of Article 8 of the Agreement on Safeguards.

9. The provisions of this Article shall remain in force for the duration of the reform process as determined under Article 20.

Part IV

Article 6
Domestic Support Commitments

1. The domestic support reduction commitments of each Member contained in Part IV of its Schedule shall apply to all of its domestic support measures in favour of agricultural producers with the exception of domestic measures which are not subject to reduction in terms of the criteria set out in this Article and in Annex 2 to this Agreement. The commitments are expressed in terms of Total Aggregate Measurement of Support and "Annual and Final Bound Commitment Levels".

2. In accordance with the Mid-Term Review Agreement that government measures of assistance, whether direct or indirect, to encourage agricultural and rural development are an integral part of the development programmes of developing countries, investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures, as shall domestic support to producers in developing country Members to encourage diversification from growing illicit narcotic crops. Domestic support meeting the criteria of this paragraph shall not be required to be included in a Member's calculation of its Current Total AMS.

3. A Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule.

4. (a) A Member shall not be required to include in the calculation of its Current Total AMS and shall not be required to reduce:

(i) product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of that Member's total value of production of a basic agricultural product during the relevant year; and

(ii) non-product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of the value of that Member's total agricultural production.

(b) For developing country Members, the *de minimis* percentage under this paragraph shall be 10 per cent.

5. (a) Direct payments under production-limiting programmes shall not be subject to the commitment to reduce domestic support if:

(i) such payments are based on fixed area and yields; or
(ii) such payments are made on 85 per cent or less of the base level of production; or
(iii) livestock payments are made on a fixed number of head.

(b) The exemption from the reduction commitment for direct payments meeting the above criteria shall be reflected by the exclusion of the value of those direct payments in a Member's calculation of its Current Total AMS.

Article 7
General Disciplines on Domestic Support

1. Each Member shall ensure that any domestic support measures in favour of agricultural producers which are not subject to reduction commitments because they qualify under the criteria set out in Annex 2 to this Agreement are maintained in conformity therewith.

2. (a) Any domestic support measure in favour of agricultural producers, including any modification to such measure, and any measure that is subsequently introduced that cannot be shown to satisfy the criteria in Annex 2 to this Agreement or to be exempt from reduction by reason of any other provision of this Agreement shall be included in the Member's calculation of its Current Total AMS.
(b) Where no Total AMS commitment exists in Part IV of a Member's Schedule, the Member shall not provide support to agricultural producers in excess of the relevant *de minimis* level set out in paragraph 4 of Article 6.

Part V

Article 8
Export Competition Commitments

Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule.

Article 9
Export Subsidy Commitments

1. The following export subsidies are subject to reduction commitments under this Agreement:

(a) the provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative

or other association of such producers, or to a marketing board, contingent on export performance;

(b) the sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products at a price lower than the comparable price charged for the like product to buyers in the domestic market;

(c) payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived;

(d) the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services) including handling, upgrading and other processing costs, and the costs of international transport and freight;

(e) internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments;

(f) subsidies on agricultural products contingent on their incorporation in exported products.

2. (a) Except as provided in subparagraph (b), the export subsidy commitment levels for each year of the implementation period, as specified in a Member's Schedule, represent with respect to the export subsidies listed in paragraph 1 of this Article:

(i) in the case of budgetary outlay reduction commitments, the maximum level of expenditure for such subsidies that may be allocated or incurred in that year in respect of the agricultural product, or group of products, concerned; and

(ii) in the case of export quantity reduction commitments, the maximum quantity of an agricultural product, or group of products, in respect of which such export subsidies may be granted in that year.

(b) In any of the second through fifth years of the implementation period, a Member may provide export subsidies listed in paragraph 1 above in a given year in excess of the corresponding annual commitment levels in respect of the products or groups of products specified in Part IV of the Member's Schedule, provided that:

(i) the cumulative amounts of budgetary outlays for such subsidies, from the beginning of the implementation period through the year in question, does not exceed the cumulative amounts that would have resulted from full compliance with the relevant annual outlay commitment levels specified in the Member's Schedule by more than 3 per cent of the base period level of such budgetary outlays;

(ii) the cumulative quantities exported with the benefit of such export subsidies, from the beginning of the implementation period through the year in question, does not exceed the cumulative quantities that would have resulted from full compliance with the relevant annual quantity commitment levels specified in the Member's Schedule by more than 1.75 per cent of the base period quantities;

(iii) the total cumulative amounts of budgetary outlays for such export subsidies and the quantities benefiting from such export subsidies over the entire implementation period are no greater than the totals that would have resulted from full compliance

with the relevant annual commitment levels specified in the Member's Schedule; and

(iv) the Member's budgetary outlays for export subsidies and the quantities benefiting from such subsidies, at the conclusion of the implementation period, are no greater than 64 per cent and 79 per cent of the 1986-1990 base period levels, respectively. For developing country Members these percentages shall be 76 and 86 per cent, respectively.

3. Commitments relating to limitations on the extension of the scope of export subsidization are as specified in Schedules.

4. During the implementation period, developing country Members shall not be required to undertake commitments in respect of the export subsidies listed in subparagraphs (d) and (e) of paragraph 1 above, provided that these are not applied in a manner that would circumvent reduction commitments.

Article 10
Prevention of Circumvention of Export Subsidy Commitments

1. Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments.

2. Members undertake to work toward the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programmes and, after agreement on such disciplines, to provide export credits, export credit guarantees or insurance programmes only in conformity therewith.

3. Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of exports in question.

4. Members donors of international food aid shall ensure:

(a) that the provision of international food aid is not tied directly or indirectly to commercial exports of agricultural products to recipient countries;
(b) that international food aid transactions, including bilateral food aid which is monetized, shall be carried out in accordance with the FAO "Principles of Surplus Disposal and Consultative Obligations", including, where appropriate, the system of Usual Marketing Requirements (UMRs); and
(c) that such aid shall be provided to the extent possible in fully grant form or on terms no less concessional than those provided for in Article IV of the Food Aid Convention 1986.

Article 11
Incorporated Products

In no case may the per-unit subsidy paid on an incorporated agricultural primary product exceed the per-unit export subsidy that would be payable on exports of the primary product as such.

Part VI

Article 12
Disciplines on Export Prohibitions and Restrictions

1. Where any Member institutes any new export prohibition or restriction on foodstuffs in accordance with paragraph 2(a) of Article XI of GATT 1994, the Member shall observe the following provisions:

- **(a) the Member instituting the export prohibition or restriction shall give due consideration to the effects of such prohibition or restriction on importing Members' food security;**
- **(b) before any Member institutes an export prohibition or restriction, it shall give notice in writing, as far in advance as practicable, to the Committee on Agriculture comprising such information as the nature and the duration of such measure, and shall consult, upon request, with any other Member having a substantial interest as an importer with respect to any matter related to the measure in question. The Member instituting such export prohibition or restriction shall provide, upon request, such a Member with necessary information.**

2. The provisions of this Article shall not apply to any developing country Member, unless the measure is taken by a developing country Member which is a net-food exporter of the specific foodstuff concerned.

Part VII

Article 13
Due Restraint

During the implementation period, notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (referred to in this Article as the "Subsidies Agreement"):

- **(a) domestic support measures that conform fully to the provisions of Annex 2 to this Agreement shall be:**
  - **(i) non-actionable subsidies for purposes of countervailing duties;**
  - **(ii) exempt from actions based on Article XVI of GATT 1994 and Part III of the Subsidies Agreement; and**
  - **(iii) exempt from actions based on non-violation nullification or impairment of the benefits of tariff concessions accruing to another Member under Article II of GATT 1994, in the sense of paragraph 1(b) of Article XXIII of GATT 1994;**
- **(b) domestic support measures that conform fully to the provisions of Article 6 of this Agreement including direct payments that conform to the requirements of paragraph 5 thereof, as reflected in each Member's Schedule, as well as domestic support within *de minimis* levels and in conformity with paragraph 2 of Article 6, shall be:**
  - **(i) exempt from the imposition of countervailing duties unless a determination of injury or threat thereof is made in accordance with Article VI of GATT 1994 and**

Part V of the Subsidies Agreement, and due restraint shall be shown in initiating any countervailing duty investigations;

(ii) exempt from actions based on paragraph 1 of Article XVI of GATT 1994 or Articles 5 and 6 of the Subsidies Agreement, provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year; and

(iii) exempt from actions based on non-violation nullification or impairment of the benefits of tariff concessions accruing to another Member under Article II of GATT 1994, in the sense of paragraph 1(b) of Article XXIII of GATT 1994, provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year;

(c) export subsidies that conform fully to the provisions of Part V of this Agreement, as reflected in each Member's Schedule, shall be:

(i) subject to countervailing duties only upon a determination of injury or threat thereof based on volume, effect on prices, or consequent impact in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement, and due restraint shall be shown in initiating any countervailing duty investigations; and

(ii) exempt from actions based on Article XVI of GATT 1994 or Articles 3, 5 and 6 of the Subsidies Agreement.

Part VIII

Article 14
Sanitary and Phytosanitary Measures

Members agree to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures.

Part IX

Article 15
Special and Differential Treatment

1. In keeping with the recognition that differential and more favourable treatment for developing country Members is an integral part of the negotiation, special and differential treatment in respect of commitments shall be provided as set out in the relevant provisions of this Agreement and embodied in the Schedules of concessions and commitments.

2. Developing country Members shall have the flexibility to implement reduction commitments over a period of up to 10 years. Least-developed country Members shall not be required to undertake reduction commitments.

Part X

Article 16
Least-Developed and Net Food-Importing Developing Countries

1. Developed country Members shall take such action as is provided for within the framework of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries.

2. The Committee on Agriculture shall monitor, as appropriate, the follow-up to this Decision.

Part XI

Article 17
Committee on Agriculture

A Committee on Agriculture is hereby established.

Article 18
Review of the Implementation of Commitments

1. Progress in the implementation of commitments negotiated under the Uruguay Round reform programme shall be reviewed by the Committee on Agriculture.

2. The review process shall be undertaken on the basis of notifications submitted by Members in relation to such matters and at such intervals as shall be determined, as well as on the basis of such documentation as the Secretariat may be requested to prepare in order to facilitate the review process.

3. In addition to the notifications to be submitted under paragraph 2, any new domestic support measure, or modification of an existing measure, for which exemption from reduction is claimed shall be notified promptly. This notification shall contain details of the new or modified measure and its conformity with the agreed criteria as set out either in Article 6 or in Annex 2.

4. In the review process Members shall give due consideration to the influence of excessive rates of inflation on the ability of any Member to abide by its domestic support commitments.

5. Members agree to consult annually in the Committee on Agriculture with respect to their participation in the normal growth of world trade in agricultural products within the framework of the commitments on export subsidies under this Agreement.

6. The review process shall provide an opportunity for Members to raise any matter relevant to the implementation of commitments under the reform programme as set out in this Agreement.

7. Any Member may bring to the attention of the Committee on Agriculture any measure which it considers ought to have been notified by another Member.

Article 19

Consultation and Dispute Settlement

The provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, shall apply to consultations and the settlement of disputes under this Agreement.

Part XII

Article 20
Continuation of the Reform Process

Recognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations for continuing the process will be initiated one year before the end of the implementation period, taking into account:

- **(a) the experience to that date from implementing the reduction commitments;**
- **(b) the effects of the reduction commitments on world trade in agriculture;**
- **(c) non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and concerns mentioned in the preamble to this Agreement; and**
- **(d) what further commitments are necessary to achieve the above mentioned long-term objectives.**

Part XIII

Article 21
Final Provisions

1. The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.

SUMMARY OF WTO LITIGATED DECISIONS & SETTLED CASES.

UPDATE OF WTO DISPUTE SETTLEMENT CASES.

WT/DS/OV/25 (12 December 2005).

http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#dsb

COMPLETED PANEL AND APPELLATE BODY REVIEW.

APPELLATE BODY AND PANEL REPORTS ADOPTED

1. **WT/DS312 – Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia.**
2. **WT/DS302 – Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes.**
3. **WT/DS301 – European Communities – Measures Affecting Trade in Commercial Vessels.**
4. **WT/DS299 – European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea.**
5. **WT/DS296 – United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea.**
6. **WT/DS285 – United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services.**
7. **WT/DS282 – United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico.**
8. **WT/DS277 – United States – Investigation of the International Trade Commission in Softwood Lumber from Canada.**
9. **WT/DS276 – Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain.**
10. **WT/DS273 – Korea – Measures Affecting Trade in Commercial Vessels.**
11. **WT/DS269, WT/DS286 – European Communities – Customs Classification of Frozen Boneless Chicken Cuts.**
12. **WT/DS268 – United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina.**
13. **WT/DS267 – United States – Subsidies on Upland Cotton.**
14. **WT/DS265, WT/DS266, WT/DS283 – European Communities – Export Subsidies on Sugar.**
15. **WT/DS264 – United States – Final Dumping Determination on Softwood Lumber from Canada.**
16. **WT/DS257 – United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada.**
17. **WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258, WT/DS259 – United States – Definitive Safeguard Measures on Imports of Certain Steel Products.**
18. **WT/DS246 – European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries.**
19. **WT/DS245 – Japan – Measures Affecting the Importation of Apples.**
20. **WT/DS244 – United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan.**
21. **WT/DS243 – United States – Rules of Origin for Textiles and Apparel Products.**
22. **WT/DS241 – Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil.**
23. **WT/DS238 – Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches.**
24. **WT/DS236 – United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada.**
25. **WT/DS231 – European Communities – Trade Description of Sardines.**
26. **WT/DS222 – Canada – Export Credits and Loan Guarantees for Regional Aircraft.**
27. **WT/DS221 – United States – Section 129(c)(1) of the Uruguay Round Agreements Act.**

28. **WT/DS219 – European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil.**
29. **WT/DS217, WT/DS234 – United States – Continued Dumping and Subsidy Offset Act of 2000.**
30. **WT/DS213 – United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany.**
31. **WT/DS212 – United States – Countervailing Measures Concerning Certain Products from the European Communities.**
32. **WT/DS211 – Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey.**
33. **WT/DS207 – Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products.**
34. **WT/DS206 – United States – Anti-Dumping and Countervailing Measures on Steel Plate from India.**
35. **WT/DS204 – Mexico – Measures Affecting Telecommunications Services.**
36. **WT/DS202 – United States – Definitive Safeguard Measures On Imports Of Circular Welded Carbon Quality Line Pipe From Korea.**
37. **WT/DS194 – United States – Measures Treating Export Restraints as Subsidies.**
38. **WT/DS192 – United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan.**
39. **WT/DS189 – Argentina – Definitive Anti-Dumping Measures on Carton-Board Imports from Germany and Definitive Anti-Dumping Measures on Imports of Ceramic Tiles from Italy.**
40. **WT/DS184 – United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan.**
41. **WT/DS179 – United States – Anti-Dumping measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea.**
42. **WT/DS177, WT/DS178 – United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand.**
43. **WT/DS176 – United States – Section 211 Omnibus Appropriations Act of 1998.**
44. **WT/DS174, WT/DS290 – European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs.**
45. **WT/DS170 – Canada – Term of Patent Protection.**
46. **WT/DS166 – United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities.**
47. **WT/DS165 – United States – Import Measures on Certain Products from the European Communities.**
48. **WT/DS163 – Korea – Measures Affecting Government Procurement.**
49. **WT/DS162 – United States – Anti-Dumping Act of 1916.**
50. **WT/DS161, WT/DS169 – Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef.**
51. **WT/DS160 – United States – Section 110(5) of US Copyright Act.**
52. **WT/DS156 – Guatemala – Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico.**
53. **WT/DS155 – Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather.**
54. **WT/DS152 – United States – Sections 301 – 310 of the Trade Act 1974.**
55. **WT/DS146, WT/DS175 – India – Measures Affecting the Automotive Sector.**
56. **WT/DS141 – European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India.**
57. **WT/DS139, WT/DS142 – Canada – Certain Measures Affecting the Automotive Industry.**
58. **WT/DS138 – United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom.**
59. **WT/DS136 – United States – Anti-Dumping Act of 1916.**
60. **WT/DS135 – European Communities – Measures Affecting Asbestos and Products Containing Asbestos.**
61. **WT/DS132 – Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States.**
62. **WT/DS126 – Australia – Subsidies Provided to Producers and Exporters of Automotive Leather.**
63. **WT/DS122 – Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland.**
64. **WT/DS121 – Argentina – Safeguard Measures on Imports of Footwear.**
65. **WT/DS114 – Canada – Patent Protection of Pharmaceutical Products.**
66. **WT/DS108 – United States – Tax Treatment for "Foreign Sales Corporations".**
67. **WT/DS103, WT/DS113 – Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products.**
68. **WT/DS99 – United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea.**
69. **WT/DS98 – Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products.**
70. **WT/DS90 – India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products.**
71. **WT/DS87, WT/DS110 – Chile – Taxes on Alcoholic Beverages.**
72. **WT/DS79 – India – Patent Protection for Pharmaceutical and Agricultural Chemical Products.**
73. **WT/DS76 – Japan – Measures Affecting Agricultural Products.**

74. **WT/DS75, WT/DS84 – Korea – Taxes on Alcoholic Beverages.**
75. **WT/DS70 – Canada – Measures Affecting the Export of Civilian Aircraft.**
76. **WT/DS69 – European Communities – Measures Affecting Importation of Certain Poultry Products.**
77. **WT/DS62, WT/DS67, WT/DS68 – European Communities – Customs Classification of Certain Computer Equipment.**
78. **WT/DS60 – Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico.**
79. **WT/DS58 – United States – Import Prohibition of Certain Shrimp and Shrimp Products.**
80. **WT/DS56 – Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items.**
81. **WT/DS54, WT/DS55, WT/DS59, WT/DS64 – Indonesia – Certain Measures Affecting the Automobile Industry.**
82. **WT/DS50 – India – Patent Protection for Pharmaceutical and Agricultural Chemical Products.**
83. **WT/DS48 – European Communities – Measures Affecting Livestock and Meat (Hormones).**
84. **WT/DS46 – Brazil – Export Financing Programme for Aircraft.**
85. **WT/DS44 – Japan – Measures Affecting Consumer Photographic Film and Paper.**
86. **WT/DS34 – Turkey – Restrictions on Imports of Textile and Clothing Products.**
87. **WT/DS33 – United States – Measures Affecting Imports of Woven Wool Shirts and Blouses.**
88. **WT/DS31 – Canada – Certain Measures Concerning Periodicals.**
89. **WT/DS27 – European Communities – Regime for the Importation, Sale and Distribution of Bananas.**
90. **WT/DS26 – European Communities – Measures Concerning Meat and Meat Products (Hormones).**
91. **WT/DS24 – United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear.**
92. **WT/DS22 – Brazil – Measures Affecting Desiccated Coconut.**
93. **WT/DS18 – Australia – Measures Affecting the Importation of Salmon.**
94. **WT/DS8, WT/DS10, WT/DS11 – Japan – Taxes on Alcoholic Beverages.**
95. **WT/DS2, WT/DS4 – United States – Standards for Reformulated and Conventional Gasoline.**

WT/DS312 – Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia.

Complaint by Indonesia. On 4 June 2004, Indonesia requested consultations with Korea concerning the imposition of definitive anti-dumping duties by Korea on imports of business information paper and uncoated wood-free printing paper from Indonesia and certain aspects of the investigation leading to the imposition of such duties.

According to the request for consultations from Indonesia, Korea violates its WTO obligations in respect of the following aspects:

- **Korea's initiation of investigation, notwithstanding several deficiencies such as the applicants' failure to include in the application sufficient and adequate evidence of dumping, injury and causal link;**
- **Korea's failure to provide in the Notice of Initiation any information regarding the factors on which the allegation of injury was based.**
- **the way Korea granted confidential treatment to information contained in the application,.**
- **Korea's making of a request for information from a firm not subject to investigation, without having obtained the agreement of that firm and having notified the Indonesian Government of such request,**
- **Korea's rejection of information related to the sales of a certain firm, without explaining the reason.**
- **Korea's preliminary determination, in such respects as: like products, constructed value, best information available, denial of access to information, and the refusal to provide an opportunity to the exporters to present their views;**
- **Korea's final determination, in such respects as: like products, individual dumping margins, constructed value, treating a certain firm and other firms as a single economic unit; the impact and effect of the dumped imports on the domestic industry and prices in the domestic market, failure to evaluate all relevant economic factors and indices, and denial of access to information.**

Indonesia considers that these Korean measures are inconsistent with: Article VI of GATT 1994, inter alia, Article VI:1, VI:2 and VI:6; Articles 1, 2.1, 2.2, 2.2.1.1, 2.2.2, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1(i), 5.2, 5.3, 5.4, 5.7, 6.1.2, 6.2, 6.4, 6.5, 6.5.1, 6.5.2, 6.7, 6.8. 6.10, 9.3, 12.1.1(iv), 12.2, 12.3, Annex I, and paragraphs 3, 6, and 7 of Annex II of the Anti-Dumping Agreement.

On 16 August 2004, Indonesia requested the establishment of a panel. At its meeting on 31 August 2004, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Indonesia, the DSB established a panel at its meeting on 27 September 2004. Canada, China, the European Communities, Japan and the United States reserved their third-party rights. On 18 October 2004, Indonesia requested the Director General to compose the panel. On 25 October 2004, the Director-General composed the panel.

On 25 April 2005, the Chairman of the Panel informed the DSB that it would not be possible for the Panel to complete its work in six months in light of scheduling conflicts, and that it expected to complete its work in July 2005. On 28 October 2005, the Panel Report was circulated to Members. In its Report:

- **The Panel found that the Korea Trade Commission ("the KTC") acted inconsistently with relevant provisions of the Anti-dumping Agreement ("the Agreement") in determining the margin of dumping for one Indonesian company, in failing to provide a proper disclosure of the verification results and the details of the calculations of the constructed normal values for two Indonesian companies, and in also failing to exercise special circumspection in the use of information from secondary sources instead of domestic sales data provided by these two Indonesian companies. With respect to the KTC's injury determination, the Panel found that the KTC erred in its assessment of the impact of dumped imports on the domestic industry and in not requiring that good cause for confidential treatment be shown regarding the information submitted in the application which was by nature confidential.**
- **The Panel concluded that the KTC did not act inconsistently with the relevant Articles of the Agreement in resorting to facts available with respect to two Indonesian companies, in rejecting the domestic sales data submitted by these two companies, in using constructed normal values for them, in treating three Indonesian companies belonging to the same Group as a single exporter and assigning a single margin of dumping to them. With respect to the KTC's injury determination, the Panel also concluded that the KTC did not err in its price analysis, in its treatment of the dumped imports made by the Korean producers from the subject countries and in disclosing its determination concerning the effect of the prices of dumped imports on the Korean industry.**
- **The Panel exercised judicial economy regarding the consequential claims raised by Indonesia, and did not address other claims withdrawn by Indonesia.**
- **The Panel rejected Indonesia's request that the Panel suggest that Korea bring its measures into conformity with its WTO obligations by revoking the anti-dumping measure at issue.**

At its meeting on 28 November 2005, the DSB adopted the Report of the Panel.

WT/DS302 – Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes.

Complaint by Honduras. On 8 October 2003, Honduras requested consultations with the Dominican Republic concerning certain measures affecting the importation and internal sale of cigarettes. This request is a new and expanded version of a complaint filed by Honduras on 28 August 2003 (WT/DS300/1). According to Honduras, the Dominican Republic:

- **applies special rules, procedures and administrative practices to determine the value of imported cigarettes for the purpose of applying the Selective Consumption Tax (inter alia, in certain instances, considers the value of imported cigarettes to be equal to the value of the "nearest similar" product in the domestic market), and fails to establish and apply transparent and generally applicable criteria for determining the value of imported cigarettes (inter alia, fails to establish and apply such criteria for the identification of the "nearest similar" product);**
- **does not publish the surveys conducted by the Central Bank that are to be used to determine the value of cigarettes for the purpose of applying the Selective Consumption Tax;**
- **accords conditions of competition to imported cigarettes that are less favourable than those accorded to domestic cigarettes by requiring that stamps be affixed to cigarettes packages in the territory of the Dominican Republic;**
- **entails costs and administrative burdens hindering the importation of cigarettes by requiring importers of cigarettes to post a bond;**
- **levies a transitional surcharge for economic stabilization of 2% of the CIF value of the imported goods;**
- **levies a foreign exchange fee of 4.75% of the value of the imported merchandise.**

Honduras considers that these Dominican Republic's measures are inconsistent with Articles II:1(b), III:2, III:4, X:1, X:3(a), XI:1, and XV:4 of GATT 1994.

On 23 October 2003, Guatemala and Nicaragua requested to join the consultations. On 28 October 2003, the Dominican Republic accepted both requests.

On 8 December 2003, Honduras requested the establishment of a panel. At its meeting on 19 December 2003, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Honduras, the DSB established a panel at its meeting on 9 January 2004. China, Chile, the European Communities and the United States reserved their third-party rights. On 19 January 2004, Guatemala, Nicaragua and El Salvador reserved their third-party rights.

On 17 February 2004, the Panel was composed. On 23 August 2004, the Chairman of the Panel informed the DSB that the Panel expected to complete its work by October 2004. On 26 November 2004, the Panel report was circulated to Members. The Panel found that:

- **The transitional surcharge and the foreign exchange fee imposed by the Dominican Republic are inconsistent with Article II:1(b) of GATT 1994. The foreign exchange fee is not justified under Article XV:9(a) of GATT 1994;**
- **The stamp requirement imposed on cigarettes by the Dominican Republic is inconsistent with Article III:4 of GATT 1994;**

- **Honduras did not demonstrate that the bond requirement imposed on cigarette importers by the Dominican Republic violates either Article X:1 or Article III:4 of GATT 1994; and**
- **Before the legislation was amended in January 2004, the Dominican Republic imposed its Selective Consumption Tax on imported cigarettes in a manner inconsistent with Articles III:2 and X of GATT 1994.**

The Panel then recommended that the Dominican Republic bring its measures (namely, the foreign exchange fee, the transitional surcharge and the stamp requirement) into conformity with its WTO obligations.

On 24 January 2005, the Dominican Republic notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. On 7 February 2005, Honduras notified its intention to appeal certain issues of law and legal interpretations developed by the Panel.

On 22 March 2005, the Chairman of the Appellate Body informed the DSB that the Appellate Body would not be able to circulate its Report within the 60-day period due to the time required for completion and translation of the Report, and that it estimated it would be circulated to WTO Members no later than 25 April 2005.

On 25 April 2005, the report of the Appellate Body was circulated to Members. The Appellate Body upheld the Panel's legal findings. The Appellate Body:

- **Upheld the Panel's finding that the stamp requirement imposed on cigarettes by the Dominican Republic is inconsistent with Article III:4 of GATT 1994 and is not justified under the exception of Article XX(d);**
- **Upheld the Panel's finding that Honduras failed to demonstrate that the bond requirement imposed on cigarette importers by the Dominican Republic violates Article III:4 of GATT 1994; and,**
- **Rejected the appeal regarding the alleged Panel's failure to conduct and objective assessment of the matter.**

At its meeting on 19 May 2005, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report.

<u>WT/DS301 – European Communities – Measures Affecting Trade in Commercial Vessels.</u>

Complaint by Korea. On 3 September 2003, Korea requested consultations with the European Communities concerning certain measures by the EC and its member States in favour of their shipbuilding industry which, according to Korea, are inconsistent with their WTO obligations. These measures are as follows:

- **EC Regulation 1177/2002 ("TDM Regulation") and EC Regulation 1540/98, as well as the EC member States' implementing provisions. These measures provide for subsidies in favour of commercial vessels in various forms;**
- **The provision by the EC and the member States of subsidies in support of commercial vessels built in the EC, in form of (a) operational aid granted on a contractual basis in forms such as grants, export credits, guarantees or tax breaks, (b) restructuring aid, (c) regional or**

other investment aid, (d) research and development aid, (e) environmental protection aid and (f) insolvency and closure aid.

Korea considered that these measures are in breach of their obligations under the provisions of the WTO Agreements, inter alia:

- **Articles 1, 2, 3.1, 5(a) and (c), 6.3(a), (b) or (c), 6.4 and 6.5 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement");**
- **Articles I:1 and III:4 of GATT 1994; and**
- **Article 23(1) and (2) of the DSU and Articles 4, 7 and 32(1) of the SCM Agreement.**

Concerning the last point, the request states that the TDM Regulation and the member States' implementing measures "have been designed and implemented as unilateral measures seeking redress of a perceived violation of Korea's obligations under the SCM Agreement" and "constitute specific actions against perceived subsidies of another Member". This may refer to the dispute concerning Korea's own subsidies, on which a panel was established in July 2003 (WT/DS273).

Korea also considered that the above-described measures nullify or impair benefits accruing to Korea under the WTO Agreements, within the meaning of Articles XXIII:1(a) and (b) of GATT 1994 and Article 5(b) of the SCM Agreement.

On 12 September 2003, China requested to join the consultations.

On 5 February 2004, Korea requested the establishment of a panel. At its meeting on 17 February 2004, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Korea, the DSB established a panel at its meeting on 19 March 2004. China, Japan and the United States reserved their third-party rights. On 13 May 2004, the Panel was composed. On 5 November 2004, the Chairman of the Panel informed the DSB that it would not be able to complete its work in six months inter alia due to certain postponements in the Panel's timetable and other scheduling difficulties, and that the Panel hoped to complete its work by the end of February 2005. On 22 April 2005, the Panel report was circulated to Members.

- **Regarding the claim of Korea under Article III:4 of the GATT 1994, the Panel found that the subsidies authorized under the TDM Regulation were covered by the notion of "the payment of subsidies exclusively to domestic producers" in Article III:8(b) of the GATT 1994, and thus were not "prevented" by Article III.**
- **Regarding the claim of Korea under Article I:1 of the GATT 1994, the Panel found that since the subsidies authorized under the TDM Regulation were not covered by Article III:4 of the GATT 1994 by virtue of Article III:8(b), they were also not covered by the phrase "all matters referred to in paragraphs 2 and 4 of Article III" in Article I:1.**
- **Regarding Korea's claim under Article 32.1 of the SCM Agreement, the Panel found that although the measures at issue were "specific" within the meaning of that provision as interpreted by the Appellate Body, the measures at issue did not constitute action "against" a subsidy of another member as that term has been interpreted by the Appellate Body.**
- **Regarding Korea's claim under Article 23.1 of the DSU, the Panel interpreted this provision as imposing a general obligation on WTO Members not to act unilaterally when seeking the redress of a violation of an obligation under the WTO Agreement. The Panel found that the European Communities had adopted the TDM mechanism in response to what it considered**

to be a violation by Korea of its obligations under the SCM Agreement and that the Communities was seeking to induce Korea to remove its allegedly WTO-inconsistent subsidies. Accordingly, the Panel concluded that the European Communities had acted inconsistently with Article 23.1 of the DSU.

As above, the Panel found that the measures at issue constitute a violation of Article 23.1 of the DSU, while the Panel rejects the claims of Korea that the measures at issue are in breach of Articles I and III of the GATT 1994 and Article 32.1 of the SCM Agreement. On 20 June 2005, the Panel Report was adopted by the DSB.

WT/DS299 – European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea.

Complaint by Korea. On 25 July 2003, Korea requested consultations with the European Communities concerning the EC's provisional countervailing measures and any final countervailing measures which may be finalized and implemented later this year against dynamic random access memory chips ("DRAMs") from Korea.

According to Korea, when considering the determinations with respect to the provisional measures against the DRAMs from Korea, which have already been implemented, and any final measures on the same products, which may be finalized and implemented later this year, the European Commission failed to comply with various WTO substantive and procedural requirements, including demonstration of the existence of a financial contribution and a benefit conferred, and demonstration of specificity of the subsidies concerned.

In Korea's view, these EC's measures at issue are inconsistent with the EC's obligations under the following WTO provisions:

- **Articles VI:3 and X.3 of GATT 1994;**
- **Articles 1, 2, 10, 11, 12, 14, 15, 17, 22 and 32.1 of the Agreement on Subsidies and Countervailing Measures.**
- **On 25 August 2003, Korea requested further consultations with the EC concerning the EC's final countervailing measures, which were adopted by the European Council on 11 August 2003 and published in the Official Journal of the EC on 22 August 2003.**

Korea wished to consult on the same issues raised in its previous consultations request, but from the additional perspectives of the adopted final measures.
Korea further elaborated the EC's violation of Article 15 of the SCM Agreement. Korea claimed that the material injury finding by the EC is inconsistent, inter alia, with Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

On 19 November 2003, Korea requested the establishment of a panel. At its meeting on 1 December 2003, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Korea, the DSB established a panel at its meeting on 23 January 2004. China, Japan, Chinese Taipei and the United States reserved their third-party rights.

On 24 March 2004, the Panel was composed. Following the resignation of the Chairperson on 22 June 2004, a new Chairman of the Panel was appointed on 27 July 2004.

On 17 June 2005, the Panel Report was circulated to Members. The Panel finds as follows:

- **The Panel rejects most of Korea's claims with regard to the question of subsidization, and finds that for three of the five programmes the EC's determinations of financial contribution and benefit are consistent with the *SCM Agreement*. The Panel upholds Korea's claims with respect to the so-called "grant methodology" applied by the European Communities for calculating the amount of the benefit which it finds to be inconsistent with the *SCM Agreement*.**
- **In respect of the injury determination, the Panel also rejects most of Korea's claims. However, the Panel upholds Korea's claim that the EC failed to examine the factor "wages" as a relevant factor affecting the domestic industry. The Panel also finds against the European Communities with regard to the investigating authority's causation analysis which the Panel considers not to have complied with the requirement not to attribute injury caused by other factors to the subsidized imports. At its meeting on 3 August 2005, the DSB adopted the Panel Report.**

WT/DS296 – United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea.

Complaint by Korea. On 30 June 2003, Korea requested consultations with the United States concerning the US authorities' affirmative preliminary and final countervailing duty determinations, the preliminary injury determination and any subsequent determinations that may be made during the injury investigation, on DRAMs and DRAM modules from Korea. Korea is also challenging all related laws and regulations, including Section 771 of the US Tariff Act of 1930 and 19 CFR 351 respectively.

Korea claimed that the above determinations are inconsistent, inter alia, with Articles VI:3 and X:3 of the GATT 1994 and Articles 1, 2, 10, 11, 12, 14, 17, 22, 32.1 of the SCM Agreement.

On 18 August 2003, Korea requested further consultations with regard to the US authorities' countervailing duty determinations on DRAMs and DRAM modules from Korea. This request concerns the USITC's affirmative final injury determination and the DOC's final countervailing duty order, both of which were published on 11 August 2003, that is, after the first request for consultations was made by Korea. Korea claimed that the determinations mentioned above are inconsistent, inter alia, with Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

On 19 November 2003, Korea requested the establishment of a panel. At its meeting on 1 December 2003, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Korea, the DSB established a panel at its meeting on 23 January 2004. China, the EC, Japan and Chinese Taipei reserved their third-party rights.

On 23 February 2004, Korea requested the Director General to compose the panel. On 5 March 2004, the Director-General composed the panel.

On 16 August 2004, the Chairman of the Panel informed the DSB that it would not be able to complete its work in six months in light of the schedule which was agreed after consultations with the parties, and that the Panel expected to complete its work in December 2004.

On 21 February 2005, the Panel report was circulated to Members.

- **Concerning the DOC's finding of financial contribution to Hynex Inc., the Panel found that the DOC did not properly demonstrate that the Korean Government availed itself of that capacity to entrust and direct all Group B and C creditors (i.e., two groups of creditors which were not 100% owned by the Korean Government) to participate in all financial contributions at issue in this case. The Panel therefore found that there was insufficient evidence to support a generalized finding of entrustment or direction with respect to all private bodies and the multiple transactions over the period of investigation. Thus, the Panel concluded that the DOC's determination of entrustment or direction of those creditors is inconsistent with Article 1.1(a)(1)(iv) of the SCM Agreement.**
- **Concerning the DOC's finding of benefit conferred to Hynex, the Panel found that, since Group B and C creditors were not found to be entrusted or directed by the Korean Government (and therefore their financial relationship with Hynix was not considered a financial contribution), they could have been used as possible benchmarks for the determination of benefit. Thus, the Panel found that the DOC's benefit determination is inconsistent with Articles 1.1(b) of the SCM Agreement.**
- **Concerning specificity, the Panel found that the DOC's finding of entrustment or direction cannot provide a proper basis for the determination of specificity in respect of alleged subsidies provided by Group B and C creditors. However, to the extent that the DOC's finding of specificity in respect of Group A creditors was based on the Government of Korea's activity specifically focused on Hynix, the Panel considered that such finding was consistent with Article 2 of the SCM Agreement.**
- **Concerning the ITC's injury determination, the Panel rejected all but one claim by Korea, related to non-attribution. The Panel found that the ITC did not properly ensure that injury caused by one known factor other than the allegedly subsidized imports was not attributed to the allegedly subsidized imports. Therefore, the Panel found a violation of the ITC's obligation under Article 15.5 of the SCM Agreement.**
- **The Panel either rejected or exercised judicial economy on all other claims by Korea related to verification meetings, burden of proof, Article 4.4 of the DSU, the levying of countervailing duties (Article 19.4 of the SCM Agreement and Article VI.3 of the GATT 1994), Articles 10 and 32.1 of the SCM Agreement and Article 22.3 of the SCM Agreement.**

On 29 March 2005, the United States notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. (The United States appealed with regard to the DOC's subsidy determination, but not with regard to the ITC's injury determination.) On 27 June 2005, the Appellate Body circulated its report to Members. In its Report:

- **The Appellate Body modified the Panel's interpretation of Article 1.1(a)(1)(iv) and found errors in the Panel's review of the evidence underlying the USDOC's finding of entrustment or direction. The Appellate Body concluded that these errors undermined the Panel's conclusion that the evidence could not support the USDOC's finding of entrustment or direction and, therefore, reversed this conclusion, as well as the Panel's finding of inconsistency with Article 1.1(a)(1)(iv). The Appellate Body further determined that it could not arrive at a conclusion, based on its own analysis, as to whether the USDOC's subsidy determination was consistent with Article 1.1(a)(1)(iv).**
- **The Appellate Body also reversed the Panel's findings of inconsistency with Article 1.1(b) (benefit) and Article 2 (specificity) of the *SCM Agreement* because they were premised on the**

finding of inconsistency with Article 1.1(a)(1)(iv). The Appellate Body determined that there were neither sufficient factual findings by the Panel nor undisputed facts in the record to allow it to complete the analysis.

- **The Appellate Body also found that the Panel had failed to comply with its obligations under Article 11 of the DSU to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case", *inter alia*, by failing to apply the proper standard of review.**
- **As a result of the Appellate Body's reversals, there remain no findings of WTO-inconsistency with respect to the USDOC's *subsidy* determination.**

At its meeting on 20 July 2005, the DSB adopted the Appellate Body Report and the Panel Report as modified by the Appellate Body Report.

WT/DS285 – United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services.

Complaint by Antigua and Barbuda. On 21 March 2003, Antigua and Barbuda requested consultations with the US regarding measures applied by central, regional and local authorities in the US which affect the cross-border supply of gambling and betting services. Antigua and Barbuda considered that the cumulative impact of the US measures is to prevent the supply of gambling and betting services from another WTO Member to the United States on a cross-border basis.

According to Antigua and Barbuda, the measures at issue may be inconsistent with the US obligations under the GATS, and in particular Articles II, VI, VIII, XI, XVI and XVII thereof, and the US Schedule of Specific Commitments annexed to the GATS.

On 12 June 2003, Antigua and Barbuda requested the establishment of a panel. At its meeting on 24 June 2003, the DSB deferred the establishment of a panel. Further to a second request by Antigua and Barbuda, the DSB established a panel at its meeting on 21 July 2003. Canada, the EC, Mexico and Chinese Taipei reserved their third-party rights. On 23 July 2003, Japan reserved its third-party rights.

On 15 August 2003, Antigua and Barbuda requested the Director General to compose the panel. On 25 August 2003, the Director-General composed the panel. On 29 January 2004, the Chairman of the Panel informed the DSB that it would not be possible for the Panel to complete its work in six months because various factors had had an impact on the Panel's timetable, such as a party's request for preliminary rulings, the intervention of the holiday season, the heavy agenda of the panelists as well as the complexity of the legal and factual questions which had been raised. The Panel hoped to complete its work by the end of April 2004.

In the context of the negotiations for a mutually agreed solution to the present dispute, the parties requested the Panel to suspend the panel proceedings, in accordance with Article 12.12 of the DSU, until 23 August 2004. On 25 June 2004, the Panel has agreed to this request. The parties subsequently requested a continuation of the suspension until 4 October 2004, and the Panel agreed to the request on 18 August 2004. The parties requested a continuation of the suspension until 16 November 2004, and the Panel agreed to the request on 8 October 2004. On 5 November 2004 Antigua requested the resumption of the panel proceedings to the Panel and the United States did not objected to this request. The Panel has therefore agreed to resume the panel proceedings as from 8 November 2004.

On 10 November 2004, the report of the Panel was circulated to Members. The Panel found that:

- **The GATS Schedule of the United States has been interpreted to include specific commitments for gambling and betting services under the sub-sector entitled "Other Recreational Services (except sporting)";**
- **Three US federal laws (the Wire Act, the Travel Act and the Illegal Gambling Business Act) and the provisions of four US state laws (those of Louisiana, Massachusetts, South Dakota and Utah) on their face, prohibit one, several or all means of delivery included in mode 1 of GATS (i.e. cross-border supply), contrary to the United States' specific market access commitments for gambling and betting services for mode 1. Therefore, the United States failed to accord services and service suppliers of Antigua treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in the US Schedule, contrary to Article XVI:1 and Article XVI:2 of the GATS (i.e. concerning market access);**
- **Antigua failed to demonstrate that the measures at issue are inconsistent with Articles VI:1 and VI:3 of the GATS (i.e. concerning domestic regulation);**
- **The United States was not able to invoke successfully the GATS exceptions provisions. In this regard, the United States was not able to demonstrate that the Wire Act, the Travel Act and the Illegal Gambling Business Act are "necessary" under Articles XIV(a) and XIV(c) of the GATS (i.e. "exceptions" provisions, including for public morals) and are consistent with the requirements of the chapeau of Article XIV of the GATS;**
- **The Panel decided to exercise judicial economy with respect to Antigua's claims under Articles XI (i.e. concerning payments and transfers) and XVII (i.e. concerning national treatment) of the GATS.**

On 7 January 2005, United States notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. On 19 January 2005, Antigua and Barbuda notified its intention to appeal certain issues of law and legal interpretations developed by the Panel.

On 8 March 2005, the Chairman of the Appellate Body informed the DSB that the Appellate Body would not be able to circulate its Report within the 60-day period due to the time required for completion and translation of the Report, and that it estimated it would be circulated to WTO Members no later than 7 April 2005.

On 7 April 2005, the report of the Appellate Body was circulated. The Appellate Body:

- **upheld the Panel's finding that an alleged "total prohibition" on the cross-border supply of gambling and betting services cannot, in and of itself, constitute a "measure" subject to dispute settlement under the GATS;**
- **found that the Panel should not have ruled on claims advanced by Antigua with respect to eight state laws of the United States, as to which Antigua had not made a prima facie case of inconsistency with the GATS;**
- **upheld the Panel's finding, albeit for different reasons, that the United States' Schedule includes a commitment to grant full market access in gambling and betting services. In particular, in the course of its interpretation of the United States' Schedule, the Appellate Body disagreed with the Panel's designation of two documents—referred to as W/120 and the 1993 Scheduling Guidelines—as "context" for the interpretation of Members' Schedules, finding instead that they constitute "preparatory work";**

- **upheld the Panel's finding that the United States acts inconsistently with Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2 by maintaining certain limitations on market access not specified in its Schedule; and**
- **reversed the Panel's finding that the United States had not shown that the three federal statutes are "necessary to protect public morals or to maintain public order", within the meaning of Article XIV(a); found that the United States' measures are justified under Article XIV(a) of the GATS as measures "necessary to protect public morals or to maintain public order"; and upheld, albeit on a narrower ground, the Panel's finding that the United States had failed to show that these measures satisfy the conditions of the chapeau of Article XIV.**

At its meeting of 20 April 2005, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

WT/DS282 – United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico.

Complaint by Mexico. On 18 February 2003, Mexico requested consultations with the US as regards several anti-dumping measures imposed by the US on imports of OCTG from Mexico, including the final determinations in some administrative and sunset reviews; and the US authorities' determination regarding the continuation of the anti-dumping orders. In addition to these measures, Mexico's request includes a number of laws, regulations and administrative practices (such as "zeroing") used by the US authorities in the above determinations. Mexico considers that the above anti-dumping measures are incompatible with Articles 1, 2, 3, 6, 11 and 18 of the Anti-Dumping Agreement, Articles VI and X of the GATT 1994 and Article XVI:4 of the WTO Agreement.

On 29 July 2003, Mexico requested the establishment of a panel. At its meeting on 18 August 2003, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Mexico, the DSB established a panel at its meeting on 29 August 2003. Argentina, China, the EC, Japan, Chinese Taipei and Venezuela reserved their third-party rights. On 5 September 2003, Canada reserved its third-party rights. On 11 February 2004, the Panel was composed.

On 16 August 2004, the Chairman of the Panel informed the DSB that it would not be able to complete its work in six months in light of the schedule which was agreed after consultations with the parties, and that the Panel expected to complete its work in March 2005.

On 20 June 2005, the Report of the Panel was circulated to Members. In its report:

- **Regarding Mexico's claims on the legal instruments governing determinations of likelihood of recurrence of dumping, the Panel concluded that USDOC practice in sunset reviews was not a measure properly before it, and therefore declined to rule on that aspect of Mexico's arguments. The Panel further found that the US Statute and the SAA were not, themselves, inconsistent with Article 11.3 of the Anti-Dumping Agreement, but that the Sunset Policy Bulletin (SPB) as such was inconsistent with Article 11.3.**
- **Regarding Mexico's claims on the USDOC determination of likelihood of recurrence of dumping, the Panel found that USDOC had made its determination of likelihood of continuation or recurrence of dumping exclusively on the basis of a decline in import**

volumes, and failed to consider potentially relevant evidence. Therefore, the Panel ruled that the sunset determination was not consistent with Article 11.3.

- **The Panel also found that the USITC did not act inconsistently with Article 11.3 in concluding that expiry of the anti-dumping measure on OCTG from Mexico would be likely to lead to continuation or recurrence of injury, and that the USDOC did not act inconsistently with Article 11.2 in determining not to terminate the anti-dumping measure with respect to two Mexican exporters based on their specific circumstances. The Panel also concluded that certain provisions cited by Mexico are not applicable to reviews, and in addition it did not need to rule on a number of dependent and consequential claims.**

On 4 August 2005, Mexico notified its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel. On 16 August 2005, the United States notified its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel. On 26 September 2005, the Appellate Body informed the DSB that due to the time required for completion and translation of the Report, it would not be able to circulate its Report within 60-day period, and that it was estimated that the Report would be circulated to Members no later than 2 November 2005.

On 2 November 2005, the Appellate Body circulated its Report to Members. The Appellate Body upheld the Panel's finding that the *USITC did not act inconsistently* with Article 11.3 of the *Anti-Dumping Agreement*, and ruled that it is not necessary to establish the existence of a causal link between likely dumping and likely injury. However, the Appellate Body reversed the Panel with respect to the *Sunset Policy Bulletin*, ruling that the Panel failed to make an objective assessment of the matter, including an objective assessment of the facts of the case, as required by Article 11 of the DSU. Essentially, the Appellate Body found that the Panel did not adequately assess the evidence in order to come to its conclusion that the Bulletin establishes an irrebuttable presumption regarding likelihood of continuation or recurrence of dumping .

At its meeting on 28 November 2005, the DSB adopted the Appellate Body Report and the Panel Report as modified by the Appellate Body Report.

WT/DS277 – United States – Investigation of the International Trade Commission in Softwood Lumber from Canada.

Complaint by Canada. On 20 December 2002, Canada requested consultations with the United States regarding the investigation of the USITC in Softwood Lumber from Canada (Invs. Nos. 701-TA-414 and 731-TA-928 (Final)) and the final definitive anti dumping and countervailing duties applied as a result of the USITC's final determination made on 2 May 2002, notice of which was published in the United States Federal Register on 22 May 2002 (Volume 67, Number 99 at pp. 36022-36023) that an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada that the Department of Commerce has determined are subsidized and sold in the United States at less than fair value.

Canada claimed that, through these measures, the United States has violated its obligations under Article VI:6(a) of the GATT 1994, Articles 1, 3.1, 3.2, 3.3, 3.4, 3.5, 3.7, 3.8, 12 and 18.1 of the Anti-Dumping Agreement and Articles 10, 15.1, 15.2, 15.3, 15.4, 15.5, 15.7, 15.8, 22 and 32.1 of the SCM Agreement.

On 3 April 2003, Canada requested the establishment of a panel.

At its meeting on 15 April 2003, the DSB deferred the establishment of the panel. Further to a second request by Canada, the DSB established a panel at its meeting on 7 May 2003. The EC and Japan reserved their third party rights. On 16 May 2003, Korea reserved its third party rights. On 12 June 2003, Canada requested the Director-General to compose the panel. On 19 June 2003, the Director-General composed the panel. On 19 December 2003, the Chairman of the Panel informed the DSB that it would not be possible for the Panel to complete its work in six months in light of scheduling comflicts. The Panel expected to complete its work in February 2004.

On 22 March 2004, the Panel report was circulated to Members. The Panel found that, in its final threat of injury determination, the US International Trade Commission (USITC) failed to comply with the requirements of Articles 3.5 and 3.7 the AD Agreement and Article 15.5 and 15.7 of the SCM Agreement in finding a likely imminent substantial increase in imports and a casual link between imports and threat of injury to the domestic industry in the US producing softwood lumber. The Panel found that the USITC's finding of likelihood of substantially increased imports was not consistent with the requirements of the Agreements, and that the causation conclusion rested on this inconsistent finding. The Panel therefore found that the anti-dumping and countervailing measures imposed by the US on imports of softwood lumber from Canada are inconsistent with the US obligations under those provisions, and recommended that those measures be brought into conformity with the US obligations.

At its meeting on 26 April 2004, the DSB adopted the Panel report.

<u>WT/DS276 – Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain.</u>

Complaint by the United States. On 17 December 2002, the United States requested consultations with Canada as regards matters concerning the export of wheat by the Canadian Wheat Board and the treatment accorded by Canada to grain imported into Canada.

According to the United States, the actions of the Government of Canada and the Canadian Wheat Board (entity enjoying exclusive rights to purchase and sell Western Canadian wheat for human consumption) related to export of wheat appear to be inconsistent with paragraphs 1(a) and 1(b) of Article XVII of GATT 1994.

As regards the treatment of grain imported into Canada, the United States maintains that the following Canadian measures are inconsistent with Article III of the GATT 1994 and Article 2 of TRIMs since they discriminate against imported grain:

- **Under the Canadian Grain Act and Canadian regulations, imported wheat cannot be mixed with Canadian domestic grain being received into or discharged out of grain elevators, and**
- **Canadian Law caps the maximum revenues that railroads may receive on the shipment of domestic grain but not revenues received on the shipment of imported grain; and Canada provides a preference for domestic grain over imported grain when allocating government-owned railcars.**

On 20 December 2002, the European Communities, Japan and Mexico requested to join the consultations. On 24 December 2002, Australia requested to join the consultations. On 6 March 2003, the US requested the establishment of a panel. At its meeting on 18 March 2003, the DSB deferred the

establishment of a panel. Further to a second request by the US, the DSB established a Panel at its meeting on 31 March 2003. Chile, Chinese Taipei, the EC, Japan and Mexico reserved their third-party rights. On 9 and 10 April 2003 respectively, China and Australia reserved their third-party rights. On 2 May 2003, Canada requested the Director-General to compose the panel. On 12 May 2003, the Director-General composed the panel. On 30 June 2003, the United States submitted a new request for the establishment of a panel. On 1 July 2003, the Chair of the Panel informed the DSB that it had agreed to the United States' request to suspend the Panel for three weeks from 1-21 July 2003. The DSB established a second panel at its meeting on 11 July 2003. Australia, Chile, China, the EC, Japan and Chinese Taipei reserved their third-party rights. On 25 July 2003, Mexico reserved its third-party rights. On 11 July 2003, the second Panel was composed. Further to a request by the United States, acceded to by the Panel, the preliminary ruling by the Panel was circulated to Members for their information on 21 July 2003. On 30 October 2003, the Chairman of the Panel informed the DSB that the first Panel would not be able to complete its work within six months due to the three week suspension requested by the US following the issuance of a preliminary ruling by the Panel and the harmonization of this Panel's timetable with that of the second Panel and that the Panel expected to issue its final report to the parties in February 2004.

On 6 April 2004, the Panel report was circulated to Members. The Panel found that:

- **The United States had failed to establish its claim that Canada had breached its obligations under Article XVII:1 of the GATT 1994 with respect to the Canadian Wheat Board (CWB);**
- **Section 57(c) of the Canada Grain Act, and Section 56(1) of the Canada Grain Regulations were inconsistent with Article III:4 of the GATT 1994 and were not justified under Article XX(d) of the GATT 1994;**
- **Sections 150(1) and (2) of the Canada Transportation Act were inconsistent with Article III:4 of GATT 1994;**
- **The United States had failed to establish its claim that section 87 of the Canada Grain Act was inconsistent with Article III:4 of the GATT 1994 and Article 2 of the TRIMs Agreement.**

On 1 June 2004, the United States notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel.
On 30 August 2004, the Appellate Body Report was circulated to Members. The Appellate Body upheld the Panel's conclusion that the United States had not demonstrated that the Canadian Wheat Board (CWB) Export Regime is inconsistent with Article XVII:1 of the GATT 1994. At its meeting on 27 September 2004, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

<u>WT/DS273 – Korea – Measures Affecting Trade in Commercial Vessels.</u>

Complaint by the European Communities. On 21 October 2002, the European Communities requested consultations with Korea on certain measures establishing subsidies to its shipbuilding industry which, according to the European Communities, are inconsistent with Korea's obligations under the SCM Agreement. These measures are as follows:

- **Corporate restructuring subsidies in the form of debt forgiveness, debt and interest relief and debt-to-equity swaps, provided through government-owned and government-controlled banks;**

- **Special taxation on in-kind contribution and the special taxation on spin-off scheme provided in the Special Tax Treatment Control Law which establishes two tax programmes limited to companies under corporate restructuring and provided tax concessions to Daewoo;**
- **Pre-shipment loans and advance payment refund guarantees provided by the state-owned Export-Import Bank of Korea ("KEXIM") to all Korean shipyards.**

The EC indicated that the subsidies in question were granted with respect to the production of commercial vessels for international commerce, including: bulk carriers, container ships, oil tankers, product and chemical tankers, LNG/LPG carriers, passenger and RoRo ferries and other non-cargo vessels (including offshore units).

The EC considered that the Korean measures are in breach of Korea's obligations under the provisions of the SCM Agreement, in particular, but not necessarily exclusively of: Articles 1, 2, 3.1, 5(a), 5(c), 6.3 and 6.5 of the SCM Agreement.

On 12 June 2003, the EC requested the establishment of a panel. At its meeting on 24 June 2003, the DSB deferred the establishment of a panel. Further to a second request by the EC, the DSB established a panel at its meeting on 21 July 2003. China, Japan, Mexico, Norway, Chinese Taipei and the United States reserved their third-party rights. The DSB also agreed, following the request by the EC, to initiate the Annex V procedures pursuant to paragraph 2 of Annex V of the SCM Agreement with respect to developing information concerning serious prejudice under Annex V of the SCM Agreement.

On 11 August 2003, the EC requested the Director-General to compose the panel. On 20 August 2003, the panel was composed.

Following the passing away on 11 April 2004 of Chairman of the Panel, and pursuant to a joint request of the parties on 6 May 2004, the Director-General on 11 May 2004 appointed a new Chairman to the Panel.

On 7 March 2005, the Panel report was circulated to Members. The Panel found that certain (but not all) KEXIM pre-shipment loans and advance payment refund guarantees are prohibited export subsidies, and thus that Korea is in violation of Articles 3.1(a) and 3.2 of the SCM Agreement. In accordance with Article 4.7 of the SCM Agreement, the Panel recommends that Korea withdraw the relevant subsidies without delay, i.e., within 90 days.

- **With regard to the KEXIM legal regime, the Panel, finding the mandatory/discre-tionary distinction was still valid, found the KEXIM legal regime did not require the provision of export subsidies, and that therefore it did not violate Articles 3.1(a) and 3.2 of the SCM Agreement.**
- **With regard to individual APRGs and PSLs identified by the EC, all of these were found to be government financial contributions and contingent on export performance. In only certain instances, however, did the Panel find that the EC had established that the fees and interest rates charged were below the terms that the beneficiaries could have obtained on the market. The Panel found that those APRGs and PSLs provided at below-market terms were prohibited export subsidies, in violation of Articles 3.1(a) and 3.2 of the SCM Agreement.**
- **With regard to the corporate restructurings, the Panel found that while the transactions constituted "financial contributions" and the government-owned creditors were "public bodies" in the sense of SCM Article 1.1(a)(1), the EC had not established that the private**

sector creditors were "entrusted or directed" by the government to provide financial contributions. Looking at the terms of the restructurings, the Panel found that the EC had not established that the decisions to restructure rather than liquidate were inconsistent with commercial considerations, nor that the terms of the individual elements of the restructurings were inconsistent with commercial considerations. Thus, the Panel found that the EC had not demonstrated that the restructurings involved subsidization.

- **With regard to serious prejudice, the Panel examined this claim only in respect of the individual instances of KEXIM financing that it had found to constitute prohibited export subsidies, and that involved financing of any of the three ship types covered by the claim (LNGs, container ships and product/chemical tankers). The Panel found that the EC had not established that these subsidized transactions had caused significant suppression or depression of world prices for any of the three ship types, because of the relatively small numbers of such transactions in relation to the total number of sales of these ships by the Korean industry and in the world market as a whole, and because the EC had not presented specific evidence linking these transactions to overall suppression/depression of world price levels for these ships, and indeed had not attempted to make this argument.**

The DSB adopted the Panel report on 11 April 2005.

WT/DS269, WT/DS286 – European Communities – Customs Classification of Frozen Boneless Chicken Cuts.

Complaints by Brazil (WT/DS269) and Thailand (WT/DS286). On 11 October 2002, Brazil requested consultations with the European Communities concerning EC Commission Regulation No. 1223/2002 ("Regulation No. 1223/2002"), of 8 July 2002, which provides a new description of frozen boneless chicken cuts under the EC Combined Nomenclature ("CN") code 0207.14.10. According to Brazil, this new description includes a salt content to the product that did not exist before and subjects the imports of these products to a higher tariff than that applicable to salted meat (CN code 0210) in the EC's Schedules under the GATT 1994.

Brazil submits that Regulation No. 1223/2002 automatically forces products that were previously imported under CN code 0210.99.39, and subject to an ad valorem tariff rate of 15,4%, to be classified under CN code 0207.14.10, and subject to a higher tariff rate of 102,4 €/100kg/net. This tariff rate of 102,4 €/100kg/net is in excess of the tariff rate for salted meat (CN code 0210) provided for in the EC's Schedules under the GATT 1994.

As a result of this measure, Brazil considered that its commerce has been accorded treatment less favourable than that provided in the EC Schedules, in contravention of the obligations of the EC under Articles II and XXVIII of the GATT 1994. In addition, Brazil claimed that the application of this measure by the EC nullifies and impairs, within the meaning of Article XXIII:1, benefits accruing to Brazil directly or indirectly under the GATT 1994.

On 25 October 2002, the United States requested to join the consultations.

On 25 March 2003, Thailand requested consultations with the EC on the same matter. According to Thailand, the measure at issue is inconsistent with the EC's obligations under Articles II:1(a) and II:1(b) of the GATT 1994 and its Schedule of Concessions. On 3 and 10 April 2003 respectively, Brazil and the United States requested to join the consultations. The EC informed the DSB that it had accepted the request of Brazil to join the consultations.

On 19 September 2003, Brazil requested the establishment of a panel. At its meeting on 2 October 2003, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Brazil, the DSB established a panel at its meeting on 7 November 2003. Chile, China, Thailand and the United States reserved their third-party rights.

On 27 October 2003, Thailand requested the establishment of a panel. At its meeting on 7 November 2003, the DSB deferred the establishment of a panel. On 21 November 2003, further to a second request by Thailand for the establishment of a panel, the DSB established a single panel, pursuant to an agreement between the parties and in accordance with Article 9.1 of the DSU. The Members which had reserved their third party rights in the panel established at the request of Brazil were also considered as third parties in the single panel. In addition, Brazil, Columbia and Chile reserved their third-party rights in the single panel.

On 17 June 2004, Brazil and Thailand requested the Director-General to compose the panel. On 28 June 2004, the Director-General composed the panel. On 14 July 2004, Chile informed the Panel that it did not want to participate as third-party in these panel proceedings.

On 14 September 2004, Colombia informed the Panel that it did not want to participate as third-party in these panel proceedings.

On 19 November 2004, the Chairman of the Panel informed the DSB that it would not be able to complete its work in six months due to the complexity of the case and the sensitivity of the legal and factual questions that have been raised, and that the Panel hoped to complete its work by the end of March 2005.

On 30 May 2005, the Panel report was circulated to Members. The Panel found that the measure at issue is inconsistent with the EC's obligations under Articles II:1(a) and II:1(b) of the GATT 1994, because the products at issue were covered by the concession contained in heading 02.10 and yet, the measure at issue resulted in the imposition of customs duties on the product at issue in excess of the duties provided for in respect of the concession contained in heading 02.10, by classifying the products at issue under the concession contained in heading 02.07.

On 13 June 2005, the European Communities notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel in these reports. On 27 June 2005, Brazil notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel in these reports. On 11 August 2005, the Chairman of the Appellate Body informed the DSB that due to the time required for completion and translation of the Report, the Appellate Body would not be able to circulate its Report by 12 August 2005, and that it estimated that the Appellate Body Report in this appeal would be circulated to WTO Members no later than 12 September 2005.

On 12 September 2005, the Appellate Body circulated its Report to Members. The Appellate Body essentially upheld the procedural and substantive conclusions of the Panel, such that it found that the European Communities' measures to be WTO-inconsistent, although the Appellate Body relied on different reasoning. However, the Appellate Body reversed the Panel's finding that the European Communities' practice, between 1996 and 2002, of classifying the products at issue as salted meat constitutes "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" under Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

At its meeting on 27 September 2005, the DSB adopted the Appellate Body Report and the Panel Report as modified by the Appellate Body report.

WT/DS268 – United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina.

Complaint by Argentina. On 7 October 2002, Argentina requested consultations with the US regarding the final determinations of the US Department of Commerce ("DOC") and the US International Trade Commission ("ITC") in the sunset reviews of the anti-dumping duty order on OCTG from Argentina, issued on 7 November 2000 (65 Federal Register 66701) and June 2001 (USITC Pub. No. 3434), respectively, and the DOC's determination to continue the anti-dumping duty order on OCTG from Argentina, issued on 25 July 2001 (66 Federal Register 38630).

Argentina considered that general US laws, regulations, policies and procedures related to the administration of sunset reviews and the application of anti-dumping measures were inconsistent either on their face or as applied with Articles 1, 2, 3, 5, 6, 11, 12, and 18 of the Anti-Dumping Agreement (ADA); Articles VI and X of the General Agreement on Tariffs and Trade (GATT) 1994; and Article XVI:4 of the WTO Agreement.

Furthermore, Argentina claimed that the sunset review conducted by the DOC is inconsistent with Articles 2, 5, 5.8, 11.3, 11.4, 12.1, and 12.3 of the ADA. It also claimed that the sunset review conducted by the ITC was inconsistent with Articles 3 and 11.3 of the ADA.

On 3 April 2003, Argentina requested the establishment of a panel. At its meeting on 15 April 2003, the DSB deferred the establishment of the panel. Further to a second request by Argentina, the DSB established a panel at its meeting on 19 May 2003. The EC, Japan, Korea, Mexico and Chinese Taipei reserved their third-party rights. On 22 August 2003, Argentina requested the Director-General to compose the panel. On 4 September 2003, the Director-General composed the panel.

On 4 March 2004, the Chairman of the Panel informed the DSB that it would not be able to complete its work in six months in light of scheduling conflicts and that the Panel expected to complete its work in June 2004.

On 16 July 2004, the report of the Panel was circulated to Members. The Panel found that:

- **Certain provisions of United States' law regarding waivers in sunset reviews and certain provisions of the Sunset Policy Bulletin (SPB) concerning the DOC's obligation to determine likelihood of continuation or recurrence of dumping in sunset reviews are inconsistent with the US obligations under certain provisions of the ADA. With respect to the DOC's likelihood determinations in the OCTG sunset review, the Panel finds that the DOC acted inconsistently with certain provisions of the ADA, but did not act inconsistently with other provisions of that Agreement;**
- **The US law's standard for the likelihood of continuation or recurrence of injury determinations in sunset reviews and the ITC's determinations in the OCTG sunset review are not inconsistent with the relevant articles of the ADA.**

On 31 August 2004, United States notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. On 28 October 2004, the Chairman of the Appellate Body informed the DSB that the Appellate Body would not be able to circulate its Report within 60-day

period due to the time required for completion and translation of the Report, and that the Appellate Body expected to complete its work no later than 29 November 2004 On 29 November 2004, the Appellate Body Report was circulated to Members. The Appellate Body:
with respect to the issues appealed by the United States:

- **upheld the Panel's finding that Argentina's challenges to certain provisions of United States law—namely, Sections 751(c) and 752(c) of the Tariff Act of 1930, the Statement of Administrative Action, and the Sunset Policy Bulletin—were set out with sufficient clarity in Argentina's request for the establishment of a panel, as required by Article 6.2 of the DSU;**
- **upheld the Panel's finding that the Sunset Policy Bulletin is a "measure" subject to WTO dispute settlement proceedings;**
- **found that the Panel did not meet its obligation under Article 11 of the DSU to "make an objective assessment of the matter before it", with respect to the Panel's analysis leading to its conclusion that the Sunset Policy Bulletin is inconsistent with Article 11.3 of the Anti-Dumping Agreement (governing reviews of anti-dumping duties after five years) because the Panel relied solely on overall statistics and did not appear to conduct a qualitative analysis of the cases filed in evidence. Consequently, the Appellate Body reversed this conclusion of the Panel;**
- **upheld the Panel's finding that Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations – provisions that allow for parties to be considered to have waived their rights to participation in a sunset review proceeding under certain circumstances – are inconsistent with Article 11.3 of the Anti-Dumping Agreement because the USDOC's determinations based on such waivers do not qualify as reasoned conclusions based on positive evidence;**
- **upheld the Panel's finding that Section 351.218(d)(2)(iii) of the USDOC Regulations —a provision that allows for parties to be "deemed" to have waived their rights to participation in a sunset review proceeding under certain circumstances—is inconsistent with Articles 6.1 and 6.2 of the Anti-Dumping Agreement because the deemed waiver negates a party's ample opportunity to present evidence and full opportunity to defend its interests as required by Article 6.1 and 6.2; and**
- **found that the Panel, in the course of arriving at its conclusions on waivers (points 4 and 5 above), did not fail to meet its obligations under Article 11 of the DSU to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case";**
- **with respect to the issues appealed by Argentina:**
- **upheld the Panel's finding that the disciplines in Article 3 of the Anti-Dumping Agreement regarding original determination of injury do not apply to investigating authorities when making determinations in sunset reviews. The Appellate Body further found that the Panel did not err in its interpretation of the term "injury" in Article 11.3 of the Anti-Dumping Agreement, or in its analysis with respect to the factors that must be considered by an investigating authority when making a determination in a sunset review;**
- **upheld the Panel's finding that investigating authorities are not prohibited, by virtue of Article 11.3 of the Anti-Dumping Agreement, from "cumulating" the effects of likely dumped imports when determining whether injury to the domestic industry would be likely to continue or recur after termination of anti-dumping duties. The Appellate Body further upheld the Panel's finding that the conditions applicable to such "cumulation" set out in Article 3.3 of the Anti-Dumping Agreement do not apply in the context of sunset reviews under Article 11.3;**
- **found that the Panel did not err in its interpretation of the term "likely" in Article 11.3 of the Anti-Dumping Agreement, and upheld the Panel's finding that the determination made by**

the United States International Trade Commission ("USITC"), with respect to the likelihood of continuation or recurrence of injury to the domestic industry upon termination of anti-dumping duties, was not inconsistent with Article 11.3 of the Anti-Dumping Agreement;

- **upheld the Panel's finding that Sections 752(a)(1) and 752(a)(5) of the Tariff Act of 1930—which allow the USITC to consider the likelihood of injury recurring "within a reasonably foreseeable time"—are not inconsistent with Article 11.3 of the Anti-Dumping Agreement. The Appellate Body further upheld the Panel's finding that the United States did not act inconsistently with Article 11.3 of the Anti-Dumping Agreement in the application of these provisions by the USITC in the sunset review determination underlying this dispute; and**
- **declined to rule on Argentina's conditional appeal of two issues, one under the Anti-Dumping Agreement relating to the "practice" of the USODC in sunset reviews, and the other under the GATT 1994 relating to the administration of sunset review laws by the USDOC.**

At its meeting on 17 December 2004, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

WT/DS267 – United States – Subsidies on Upland Cotton.

Complaint by Brazil. On 27 September 2002 Brazil requested consultations with the US regarding prohibited and actionable subsidies provided to US producers, users and/or exporters of upland cotton, as well as legislation, regulations, statutory instruments and amendments thereto providing such subsidies (including export credits), grants, and any other assistance to the US producers, users and exporters of upland cotton ("US upland cotton industry").

Brazil contended that these measures were inconsistent with the obligations of the US under the following provisions: Articles 5(c), 6.3(b), (c) and (d), 3.1(a) (including item (j) of the Illustrative List of Export Subsidies in Annex I), 3.1(b), and 3.2 of the SCM Agreement; Articles 3.3, 7.1, 8, 9.1 and 10.1 of the Agreement on Agriculture; and Article III:4 of GATT 1994. Brazil was of the view that the US statutes, regulations, and administrative procedures listed above were inconsistent with these provisions as such and as applied.

On 9 October and 11 October 2002, Zimbabwe and India, respectively, requested to join the consultations. On 14 October 2002, Argentina and Canada requested to join the consultations. The United States informed the DSB that it had accepted the requests of Argentina and India to join the consultations.

On 6 February 2003, Brazil requested the establishment of a panel. At its meeting on 19 February 2003, the DSB deferred the establishment of a panel. Further to a second request by Brazil, the DSB established a Panel at its meeting on 18 March 2003. Argentina, Canada, China, Chinese Taipei, the EC, India, Pakistan and Venezuela reserved their third-party rights to participate in the Panel's proceedings. At that meeting, the Chairman of the DSB announced that he continued to consult with Brazil and the US on the issue of appointing a DSB representative to facilitate the information-gathering process, pursuant to the Annex V procedures under the SCM Agreement, which had been invoked by Brazil in its panel request. On 24 March 2003, Benin reserved its third-party rights. On 25 March 2003, Australia reserved its third-party rights. On 26 March 2003, Paraguay reserved its third-party rights. On 28 March 2003, New Zealand reserved its third-party rights. On 4 April 2003, Chad reserved its third-party rights. On 9 May 2003, Brazil requested the Director-General to compose the panel. On 19 May 2003, the Director-General composed the panel.

On 17 November 2003, the Chairman of the Panel informed the DSB that it would not be able to complete its work in six months due to the complexity of the matter and that the Panel expected to issue its final report to the parties in May 2004.

On 8 September 2004, the report of the Panel was circulated to Members. The Panel found that:

- **agricultural export credit guarantees are subject to WTO export subsidy disciplines and three United States export credit guarantee programmes are prohibited export subsidies which have no Peace Clause protection and are in violation of those disciplines;**
- **the United States also grants several other prohibited subsidies in respect of cotton;**
- **United States' domestic support programmes in respect of cotton are not protected by the Peace Clause, and certain of these programmes result in serious prejudice to Brazil's interests in the form of price suppression in the world market.**

In respect of the prohibited subsidies, the Panel recommended that the United States withdraw the measures found to be inconsistent without delay, that is, within six months of the date of adoption of the Panel report by the DSB or 1 July 2005 (whichever is earlier). In respect of the actionable subsidies, the Panel referred to Article 7.8 of the SCM Agreement.

On 18 October 2004, United States notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. On 16 December 2004, the Chairman of the Appellate Body informed the DSB that due to the numerous and complex issues arising in this dispute, the Appellate Body would not be able to circulate its Report by Friday, 17 December 2004. The Chairman then stated in the letter that in the light of the numerous and complex issues raised, the increased burden on the Appellate Body as well as the translation services, the intervening holiday period, and the fact that the Appellate Body expected to be considering two or three other appeals in the coming weeks, the Appellate Body estimated that the Appellate Body Report in this appeal would be circulated to WTO Members no later than Thursday, 3 March 2005.

On 3 March 2005, the Appellate Body Report was circulated to Members. The Appellate Body found inter alia as follows:

(a) As regards the applicability of the Peace Clause to this dispute, the Appellate Body:

- **upholds the Panel's finding that two challenged measures (production flexibility contract and direct payments) are related to the type of production undertaken after the base period and thus are not green box measures conforming fully to paragraph 6(b) of Annex 2 to the Agreement on Agriculture; and, therefore, are not exempt, by virtue of Article 13(a)(ii), from actions under Article XVI of GATT 1994 and Part III of the SCM Agreement;**
- **modifies the Panel's interpretation of the phrase "support to a specific commodity" in Article 13(b)(ii), but upholds the Panel's conclusion that the challenged domestic support measures granted support to upland cotton; and**
- **upholds the Panel's finding that the challenged domestic support measures granted, between 1999 and 2002, support to upland cotton in excess of that decided during the 1992 benchmark period and, therefore, that these measures are not exempt, by virtue of Article 13(b)(ii), from actions under Article XVI:1 of the GATT 1994 and Part III of the SCM Agreement;**

(b) As regards serious prejudice, the Appellate Body:

- **upholds the Panel's finding that the effect of the challenged price-contingent subsidies (marketing loan program payments, user marketing (Step 2) payments, market loss assistance payments, and counter-cyclical payments) are significant price suppression within the meaning of Article 6.3(c) of the SCM Agreement, by in turn upholding the Panel's findings that: (i) the "same market" in Article 6.3(c) may be a "world market", a "world market" for upland cotton exists, and "the A-Index can be taken to reflect a world price in the world market for upland cotton"; (ii) "a causal link exists" between the price-contingent subsidies and significant price suppression, and that this link is not attenuated by other factors raised by the United States; (iii) it was not required to quantify precisely the benefit conferred on upland cotton by the price-contingent subsidies; and (iv) the effect of the price-contingent subsidies for marketing years 1999 to 2002 is significant price suppression in the same period;**
- **finds that the Panel set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind this finding, as required by Article 12.7 of the DSU; and**
- **finds it unnecessary to rule on the interpretation of the term "world market share" in Article 6.3(d) of the SCM Agreement and neither upholds nor reverses the Panel's finding that this term means world supply share;**

(c) As regards user marketing (Step 2) payments, the Appellate Body:

- **upholds the Panel's findings that Step 2 payments to domestic users of United States upland cotton, under Section 1207(a) of the FSRI Act of 2002, are subsidies contingent on the use of domestic over imported goods that are inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement; and**
- **upholds the Panel's findings that Step 2 payments to exporters of United States upland cotton, pursuant to Section 1207(a) of the FSRI Act of 2002, are subsidies contingent upon export performance within the meaning of Article 9.1(a) of the Agreement on Agriculture that are inconsistent with Articles 3.3 and 8 of that Agreement and Articles 3.1(a) and 3.2 of the SCM Agreement;**

(d) As regards export credit guarantee programs, the Appellate Body:

- **in a majority opinion, upholds the Panel's finding that Article 10.2 of the Agreement on Agriculture does not exempt export credit guarantees from the export subsidy disciplines in Article 10.1 of that Agreement;**
- **one Member of the Division, in a separate opinion, expresses the contrary view that Article 10.2 of the Agreement on Agriculture exempts export credit guarantees from the disciplines of Article 10.1 of that Agreement until international disciplines are agreed upon;**
- **finds that the Panel did not improperly apply the burden of proof in finding that the United States' export credit guarantee programs are prohibited export subsidies under Article 3.1(a) of the SCM Agreement and are consequently inconsistent with Article 3.2 of that Agreement;**
- **upholds the Panel's finding that "the United States export credit guarantee programmes at issue—GSM 102, GSM 103 and SCGP—constitute a per se export subsidy within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the SCM Agreement", and upholds the Panel's findings that these export credit guarantee programs**

are export subsidies for purposes of Article 3.1(a) of the SCM Agreement and are inconsistent with Articles 3.1(a) and 3.2 of that Agreement; and

- **finds that the Panel did not err in exercising judicial economy in respect of Brazil's allegation that the United States' export credit guarantee programs are prohibited export subsidies, under Article 3.1(a) of the SCM Agreement, because they confer a "benefit" within the meaning of Article 1.1 of that Agreement.**

At its meeting on 21 March 2005, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

WT/DS265, WT/DS266, WT/DS283 – European Communities – Export Subsidies on Sugar.

Complaints by Australia (WT/DS265), Brazil (WT/DS266) and Thailand (WT/DS283). On 27 September 2002, Australia and Brazil requested consultations with the European Communities concerning the export subsidies provided by the EC in the framework of its Common Organisation of the Market for the sugar sector. The requests concerned Council Regulation (EC) No. 1260/2001 of 19 June 2001 on the EC's common organization of the markets in the sugar sector, and all other legislation, regulations, administrative policies and other instruments relating to the EC regime for sugar and sugar containing products including the rules adopted pursuant to the procedure referred to in Article 42(2) of Council Regulation (EC) No. 1260/2001, and any other provision related thereto. On 14 March 2003, Thailand requested consultations with the European Communities on the same matter.

Australia contended that the EC provides under the above measures export subsidies in excess of the export subsidy commitments that it has specified in Section II of Part IV of its Schedule of Concessions, in relation to "C sugar" and an amount of 1.6 million tons of sugar per year and possibly also sugar in incorporated products. It further alleges that the EC may also be paying a higher per unit subsidy on incorporated products than on the primary product. In addition, under the EC sugar regime refiners are paid a subsidy, in the form of the intervention price, for refining EC sugar which is not available to imported sugar, thus affording less favourable treatment to imported products.

According to Australia, the regulation and related instruments and measures taken thereunder appear to be inconsistent with, at least:

- **Articles 3.3, 8, 9.1, 10.1 and 11 of the Agreement on Agriculture,**
- **Articles 3.1 and 3.2 of the SCM Agreement; and**
- **Articles III:4 and XVI of GATT 1994.**

According to Brazil, the EC provides, under Council Regulation (EC) No. 1260/2001, export subsidies for sugar and sugar containing products above its reduction commitment levels specified in Section II of Part IV of its Schedule of Concessions. Brazil explained that the EC intervention price system for sugar guarantees a high price for the sugar that is produced within certain production quotas (A and B quotas). Sugar produced in excess of these quotas (so-called C sugar) cannot be sold internally in the year in which it is produced: it must be exported or carried over to fulfil the following year's production quotas. Under the EC's common organization of the sugar market and its regulatory framework, exporters of C sugar are able to export C sugar at prices below its total cost of production. In addition, according to the EC's Schedule for sugar and the agricultural notifications submitted by the EC to the WTO for marketing years 1995/1996 through 2000/2001, the EC provides

export subsidies in excess of its commitments to approximately 1.6 million tons of sugar per year. The export subsidies provided by the EC (referred to in the EC Council Regulation (EC) No. 1260/2001 as "export refunds") cover the difference between the world market price and the high prices in the Community for the products in question, thus enabling those products to be exported.

Brazil also believed that the EC sugar regime accords less favourable treatment to imported sugar and is thus in violation of Article III:4 of the GATT 1994. Brazil claimed that, by providing export subsidies for sugar in excess of its reduction commitment levels the EC is acting inconsistently with at least the requirements of:

- **Articles 3.3, 8, 9.1(a) and (c), and 10.1 of the Agreement on Agriculture;**
- **Articles 3.1(a) and 3.2 of the SCM Agreement; and**
- **Articles III:4 and XVI of GATT 1994.**

According to Thailand:

- **The EC sugar regime accords imported sugar a less favourable treatment than that accorded to domestic sugar and provides for subsidies contingent upon the use of domestic over imported products;**
- **The EC sugar regime accords export subsidies above its reduction commitment levels specified in Section II of Part IV of the EC's Schedule to the sugar produced in excess of its production quotas (so-called C sugar);**
- **The EC provides export subsidies (known as "export refunds") that cover the difference between the world market price and the high prices in the EC for the products in question, thus enabling those products to be exported.**

Thailand considered that the above subsidies are inconsistent with the EC's obligations under:

- **Article III:4 of GATT 1994;**
- **Articles 3.1(a), 3.1(b) and 3.2 of the SCM Agreement; and**
- **Articles 3.3, 8, 9.1 and 10.1 of the Agreement on Agriculture.**

In the dispute WT/DS265, Barbados, Belize, Brazil, Canada, Colombia, Congo, Côte d'Ivoire, Fiji, Guyana, India, Jamaica, Kenya, Madagascar, Malawi, Mauritius, St. Kitts and Nevis, Swaziland and Zimbabwe requested to join the consultations. On 24 October 2002, the EC informed the DSB that it had accepted the requests of Barbados, Belize, Brazil, Canada, Colombia, Congo, Côte d'Ivoire, Fiji, Guyana, India, Jamaica, Kenya, Madagascar, Malawi, Mauritius, St. Kitts and Nevis, Swaziland and Zimbabwe to join the consultations.

In the dispute WT/DS266, Australia, Barbados, Belize, Canada, Colombia, Congo, Côte d'Ivoire, Fiji, Guyana, India, Jamaica, Kenya, Madagascar, Malawi, Mauritius, St. Kitts and Nevis, Swaziland and Zimbabwe requested to join the consultations. On 24 October 2002, the EC informed the DSB that it had accepted the requests of Australia, Barbados, Belize, Canada, Colombia, Congo, Côte d'Ivoire, Fiji, Guyana, India, Jamaica, Kenya, Madagascar, Malawi, Mauritius, St. Kitts and Nevis, Swaziland and Zimbabwe to join the consultations.

On 9 July 2003, Australia, Brazil and Thailand each requested the establishment of a panel. At its meeting on 21 July 2003, the DSB deferred the establishment of the panels. Further to second requests to establish a panel from Australia, Brazil and Thailand, the DSB established a single panel at its

meeting on 29 August 2003. Barbados, Canada, China, Colombia, Jamaica, Mauritius, New Zealand, Trinidad and Tobago and the US reserved their third-party rights. On 1 September 2003, Belize, Cuba, Fiji and Guyana reserved their third-party rights. On 2 September 2003, Paraguay and Swaziland reserved their third-party rights. On 5 September 2003, India, Madagascar and Malawi reserved their third-party rights. On 8 September 2003, Australia, Brazil, St. Kitts and Nevis, Tanzania and Thailand reserved their third-party rights. On 26 September 2003, Kenya reserved its third-party right. On 5 November 2003, Côte d'Ivoire reserved its third-party right.

On 15 December 2003, Australia, Brazil and Thailand requested the Director-General to determine the composition of the panel. On 23 December 2003, the Director-General composed the Panel. On 23 June 2004, the Chairman of the Panel informed the DSB that it would not be able to complete its work in six months due to the complexity of the matter and that the Panel expected to complete its work by early September 2004.

On 15 October 2004, the Panel circulated to Members its separate but identical reports with respect to WT/DS283, WT/DS266 and WT/DS265 respectively. The Panel found, inter alia, that:

- **the European Communities' annual budgetary outlay and quantity commitment levels for exports of subsidized sugar were determined with reference to the entries specified in Section II, Part IV of its Schedule and the content of Footnote 1 in relation to these entries was of no legal effect and did not enlarge or otherwise modify the European Communities' specified commitment levels.**
- **the European Communities' exports of sugar had exceeded its annual commitment levels since 1995, and in particular since the marketing year 2000/2001.**
- **producers/exporters of "ACP/India equivalent sugar" that exceeded the European Communities' reduction commitment levels received subsidies within the meaning of Article 9.1(a) of the Agreement on Agriculture.**
- **producers/exporters of C sugar that exceeded the European Communities' reduction commitment levels received payments on export by virtue of governmental action, within the meaning of Article 9.1(c) of the Agreement on Agriculture.**

In light of Article 10.3 of the Agreement on Agriculture, which provides that where a Member exports an agricultural product in quantities that exceed its quantity commitment level, that Member will be treated as if it has granted WTO-inconsistent export subsidies for the excess quantities, unless the Member presents adequate evidence to "establish" the contrary, the Panel reached the conclusion that the European Communities had not demonstrated that the exports of C sugar and "ACP/India equivalent" sugar in excess of its annual commitment levels were not subsidized.

The Panel concluded that the European Communities, through its sugar regime, had acted inconsistently with its obligations under Articles 3.3 and 8 of the Agreement on Agriculture, by providing export subsidies within the meaning of Article 9.1(a) and (c) of the Agreement on Agriculture in excess of the quantity commitment level and the budgetary outlay commitment level specified in Section II, Part IV of Schedule CXL.

At its meeting of 13 December 2004, following a request from all the parties, the DSB agreed to extend the 60-day period for the adoption of the Panel report until 31 January 2005. On 13 January 2005, the European Communities notified its intention to appeal certain issues of law and legal interpretations developed by the Panel.

On 28 April 2005, the report of the Appellate Body was circulated. The Appellate Body found that:

- **Footnote 1 does not enlarge or otherwise modify the European Communities' commitment levels as specified in its Schedule; Footnote 1 does not contain a commitment to limit subsidization of exports of ACP/India equivalent sugar; and that Footnote 1 is inconsistent with the Agreement on Agriculture, because it does not contain a budgetary outlay commitment and does not subject subsidized exports of ACP/India equivalent sugar to reduction commitments.**
- **in the particular circumstances of this dispute, there is a "payment" in the form of a transfer of financial resources from the high revenues resulting from sales of A and B sugar, to the export production of C sugar, within the meaning of Article 9.1(c) of the Agreement on Agriculture; such payments were "on the export" within the meaning of Article 9.1(c), because C sugar, under European Communities' law, must be exported; and that the European Communities had acted inconsistently with Articles 3.3 and 8 of the Agreement on Agriculture by providing export subsidies in excess of its commitment levels as specified in its Schedule.**
- **the Panel erred in not ruling on the Complaining Parties' claims under the SCM Agreement, because the Panel's ruling under the Agreement on Agriculture was insufficient to fully resolve the dispute, especially in relation to implementation of a remedy; but that because there was insufficient material before it, it was not in a position to complete the legal analysis and to examine the Complaining Parties' claims under the SCM Agreement that were left unaddressed by the Panel.**

At its meeting of 19 May 2005, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

<u>WT/DS264 – United States – Final Dumping Determination on Softwood Lumber from Canada.</u>

Complaint by Canada. On 13 September 2002, Canada requested consultations under Article 4.8 of the DSU (urgency procedure) with the US concerning the final affirmative determination of sales at less than fair value (dumping) with respect to certain softwood lumber products from Canada (Inv. No. A-122-838) announced by the US Department of Commerce (DOC) on 21 March 2002 pursuant to section 735 of the Tariff Act of 1930, as amended on 22 May 2002 (Final Determination). The measures at issue include the initiation of the investigation, the conduct of the investigation and the Final Determination.

Canada considered these measures and, in particular, the determinations made and methodologies adopted therein by the DOC under authority of the United States Tariff Act of 1930, to violate Articles 1, 2.1, 2.2, 2.4, 2.6, 5.1, 5.2, 5.3, 5.4, 5.8, 6.1, 6.2, 6.4, 6.9 and 9.3 of the Anti-Dumping Agreement and Articles VI and X:3(a) of the GATT 1994.

On 6 December 2002, Canada requested the establishment of a panel. At its meeting of 19 December 2002, the DSB deferred the establishment of a panel. Further to a second request by Canada, a panel was established by the DSB at its meeting on 8 January 2003. The EC and India reserved their third-party rights. On 15 January 2003, Japan reserved its third-party rights. On 25 February 2003, the Panel was composed.

On 25 August 2003, the Chairman of the Panel informed the DSB that due to the complexity of the matter, the Panel would not be able to complete its work in six months. The Panel expected to issue its

final report to the parties in December 2003. On 2 December 2003, the Chairman of the Panel informed the DSB that the Panel expected to issue its final report to the parties in February 2004.

On 13 April 2004, the Panel report was circulated to Members. The Panel found that, in its final dumping determination, the US Department of Commerce (DOC) failed to comply with the requirements of Articles 2.4.2 of the AD Agreement because the DOC did not take into account all export transactions by applying the "zeroing" methodology when calculating the margin of dumping. (One member of the Panel issued a dissenting opinion regarding the finding on "zeroing".) The Panel found that all other claims submitted by Canada failed.

On 13 May 2004, the United States notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel. On 8 July 2004, the Chairman of the Appellate Body informed the DSB that it would not be possible for the Appellate Body to complete its work within 60-day period due to the time required for completion and translation of the Report. The Appellate Body expected to complete its work no later than 11 August 2004.

On 11 August 2004, the Appellate Body Report was circulated to Members. The Appellate Body:

- **upheld the Panel's finding that the United States had acted inconsistently with the Anti-Dumping Agreement by calculating margins of dumping on the basis of a methodology incorporating the practice of "zeroing";**
- **reversed the Panel's finding that the United States did not act inconsistently with the Anti-Dumping Agreement when calculating the amount of financial expense attributable to the production of softwood lumber for Abitibi, one of the Canadian companies under investigation. Although the Appellate Body reversed the Panel on this issue, it was not required itself to rule on whether the United States had acted inconsistently with its WTO obligations in this regard; and**
- **upheld the Panel's finding that the United States did not act inconsistently with certain provisions of the Anti-Dumping Agreement when calculating the amount for by-product revenue from the "sale" of wood chips for Tembec, another Canadian company under investigation. The Appellate Body did not disturb the Panel's finding that the United States had not acted in a biased, non-objective, or other than even-handed manner.**

At its meeting on 31 August 2004, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

WT/DS257 – United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada.

Complaint by Canada. On 3 May 2002, Canada requested consultations with the US. The request concerned the final affirmative countervailing duty determination by the US Department of Commerce (File No. C-122839) issued on 25 March 2002, with respect to certain softwood lumber from Canada. The measures at issue include the initiation and conduct of the investigation, the final determination, provision of expedited reviews, and other matters related to these measures. Canada contended that these measures were inconsistent with, and violate US obligations under Articles 1, 2, 10, 11, 12, 14, 15, 19, 22 and 32.1 of the SCM Agreement and Articles VI:3 and X:3 of GATT 1994.

On 18 July 2002, Canada requested the establishment of a panel. At its meeting on 29 July 2002, the DSB deferred the establishment of a panel. On 19 August 2002, Canada requested the withdrawal of its previous request for the establishment of a panel and submitted a new request. In particular, Canada claimed that in initiating the Lumber IV investigation, the United States had violated Articles 10, 11.4 and 32.1 of the SCM Agreement. In all the other claims, the new request corresponded to the previous one (18 July 2002). At its meeting on 30 August 2002, the DSB deferred the establishment of a panel. At its meeting on 1 October 2002, the DSB established a panel. The EC, India and Japan reserved their third-party rights to participate in the panel proceedings. On 8 November 2002, the panel was composed.

On 29 August 2003, the Panel report was circulated to Members. The Panel found that the USDOC Final Countervailing Duty Determination was inconsistent with Articles 10, 14, 14(d) and 32.1 SCM Agreement and Article VI:3 of GATT 1994. The Panel decided to apply judicial economy as regards Canada's claims under Article 19.4 SCM Agreement and Article VI:3 of GATT 1994 concerning the methodologies used to calculate the subsidy rate; and its claims of violation of the procedural rules of evidence set forth in Article 12 SCM Agreement. Further to Canada's statement at the first substantive meeting of the Panel with the parties that it did not consider it appropriate to press its claims under Articles 10, 11.4 and 32.1 of the SCM Agreement concerning the initiation of the investigation, the Panel also refrain from addressing and making a ruling on these claims. Accordingly, the Panel recommended that the DSB requests the United States to bring its measure into conformity with its obligations under the SCM Agreement and GATT 1994.

On 2 October 2003, the United States notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel. However, on 3 October 2003, the United States withdrew its notice of appeal for scheduling reasons, although the withdrawal is conditional on the US right to file a new notice of appeal within the timeframe permitted by the DSU.

On 21 October 2003, the United States notified its decision to re-file its appeal to the Appellate Body of certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel.

On 17 December 2003, the Chairman of the Appellate Body informed the DSB that the Appellate Body would not be able to circulate its Report within the 60-day period due to the time required for completion and translation of the Report and it estimated that the Appellate Body Report would be circulate to WTO Members no later than 19 January 2004.

On 19 January 2004, the Appellate Body Report was circulated to Members. The Appellate Body:

- **upheld the Panel's finding that the US had correctly determined that harvesting rights granted by Canadian provincial governments in respect of standing timber constituted the provision of goods under Article 1.1 of the SCM Agreement;**
- **reversed the Panel's interpretation of Article 14(d) of the SCM Agreement and the Panel's finding that the US had improperly determined the existence and amount of the "benefit" resulting from the financial contribution provided. Then the Appellate Body found that it was unable to complete the legal analysis of whether the US had correctly determined benefit in this investigation, due to insufficient factual findings by the Panel and insufficient undisputed facts in the Panel record; and**

- **upheld the Panel's finding that the US had acted inconsistently with provisions of the SCM Agreement and the GATT 1994 by failing to analyze whether subsidies were passed through in sales of logs by sawmill-owning harvesters to unrelated lumber producers. On the other hand, the Appellate Body reversed the Panel's findings that the US acted inconsistently with its WTO obligations by failing to consider whether subsidies were passed through in sales of primary lumber by sawmills to unrelated lumber remanufacturers, because both primary and remanufactured lumbers were products subject to USDOC's aggregate investigation.**

At its meeting on 17 February 2004, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258, WT/DS259 – United States – Definitive Safeguard Measures on Imports of Certain Steel Products.

Complaints by the European Communities (WT/DS248), Japan (WT/DS249), Korea (WT/DS251), China (WT/DS252), Switzerland (WT/DS253), Norway (WT/DS254), New Zealand (WT/DS258) and Brazil (WT/DS259).

On 7 March 2002, the European Communities requested consultations with the United States regarding the definitive safeguard measures imposed by the US in the form of an increase in duties on imports of certain flat steel, hot-rolled bar, cold-finished bar, rebar, certain welded tubular products, carbon and alloy fittings, stainless steel bar, stainless steel rod, tin mill products and stainless steel wire and in the form of a tariff rate quota on imports of slabs effective as of 20 March 2002. The European Communities considered that the aforementioned US measures were in breach of US obligations under the Agreement on Safeguards and GATT 1994, and in particular Articles 2.1, 2.2 ,3.1, 3.2, 4.1, 4.2, 5.1, 5.2, 7.1 and 9.1 of the Agreement on Safeguards and Articles I:1, XIII and XIX:1 of GATT 1994. The European Communities also reserved all its rights regarding the pursuit of the remedies provided for under the Agreement on Safeguards and the DSU.

On 14 March 2002, Japan and Korea requested to join the consultations. On 15 March 2002, Switzerland and Canada also requested to join the consultations. On 20 March 2002, Venezuela also requested to join the consultations. On 21 March 2002, Norway and China requested to join the consultations as well. On 22 March 2002, Mexico also requested to join the consultations. On 25 March 2002, New Zealand also requested to join the consultations. The US informed the DSB that it had accepted the requests of Canada, China, Japan, Korea, Mexico, New Zealand, Norway, Switzerland and Venezuela to join the consultations.

On 20 March 2002, Japan (WT/DS249) requested consultations with the United States also with regard to the definitive safeguard measures imposed by the US on the imports of certain steel products and claimed violations of Articles 2.1, 2.2, 3.1, 3.2, 4.1, 4.2, 5.1, 7.1, 7.4. 8.1, 12.1, 12.2, 12.3 of the Agreement on Safeguards and Articles I:1, II, X:3, XIII and XIX:2 of GATT 1994. On 27 March, Norway requested to join the consultations. On 5 April, Mexico requested to join the consultations. On 9 April 2002, New Zealand requested to join the consultations. The US informed the DSB that it had accepted the requests of Mexico, New Zealand and Norway to join the consultations.

On 20 March 2002, Korea (WT/DS251) requested consultations with the United States also with regard to the definitive safeguard measures imposed by the US on the imports of certain steel

products and the related laws of the US, including Sections 201 and 202 of the Trade Act of 1974 and Section 311 of the NAFTA Implementation Act. Korea claimed violations of Articles 2.1, 2.2, 3, 4, 5, 7.1, 7.4, 8.1, 9.1 and 12 of the Agreement on Safeguards, Articles X:3 and XIX:1 of GATT 1994 and Article XVI:4 of the Marrakesh Agreement. On 27 March 2002, Japan and Norway requested to join the consultations. On 5 April, Mexico and New Zealand requested to join the consultations. The US informed the DSB that it had accepted the requests of Japan, Mexico, New Zealand and Norway to join the consultations.

On 26 March 2002, China (WT/DS252) requested consultations with the United States also with regard to the definitive safeguard measures imposed by the US on imports of certain steel products and claimed violations of Articles 2.1, 2.2, 3.1, 3.2, 4.1, 4.2, 5.1, 5.2, 7.1, 8.1, 9.1 and 12 of the Agreement on Safeguards and Articles I:1, II, X:3, XIX:1 and XIX:2 of GATT 1994. On 4 April 2002, Japan requested to join the consultations. On 5 April 2002, New Zealand also requested to join the consultations. The US informed the DSB that it had accepted the requests of Japan and New Zealand to join the consultations.

On 3 April 2002, Switzerland (WT/DS253) also requested consultations with the United States with regard to the definitive safeguard measures imposed by the US on imports of certain steel products and claimed violations of Articles 2.1, 2.2, 3, 4.1, 4.2, 5.1, 7.1, 8.1 and 12 of the Agreement on Safeguards and Articles I:1 and XIX:1 of GATT 1994. On 11 April 2002, New Zealand requested to join the consultations. On 15 April 2002, Japan requested to join the consultations. The US informed the DSB that it had accepted the requests of Japan and New Zealand to join consultations.

On 4 April 2002, Norway (WT/DS254) requested consultations with the United States with regard to the same safeguard measures imposed by the US on imports of certain steel products and claimed violations of Articles 3, 4.1, 4.2, 5.1, 7, 8.1, 9.1 and 12 of the Agreement on Safeguards and Articles I:1, II, X:3 and XIX of GATT 1994. On 11 April 2002, New Zealand requested to join the consultations. On 15 April 2002, Japan requested to join the consultations. The US informed the DSB that it had accepted the requests of Japan and New Zealand to join consultations.

On 14 May 2002, New Zealand (WT/DS258) requested consultations with the United States with regard to the same safeguard measures on steel imposed by the US and claimed violations of Articles 2.1, 2.2, 3.1, 3.2, 4.1, 4.2, 5.1, 7, 8.1 and 12 of the Agreement on Safeguards and Articles I:1, X and XIX:1 of GATT 1994. On 24 May 2002, the European Communities requested to join the consultations. On 27 May 2002, Japan requested to join the consultations. On 30 May 2002, Korea requested to join the consultations. On 31 May 2002, Norway, China and Mexico requested to join the consultations. The US informed the DSB that it had accepted the requests of China, the EC, Japan, Korea, Mexico and Norway to join consultations.

On 21 May 2002, Brazil (WT/DS259) requested consultations with the United States with regard to the same definitive safeguard measures imposed by the US on imports of certain steel products. On 24 May 2002, the European Communities requested to join the consultations. On 27 May 2002, Japan requested to join the consultations. On 30 May 2002, Korea requested to join the consultations. On 31 May 2002, Norway, China and Mexico requested to join the consultations. The US informed the DSB that it had accepted the requests of China, the EC, Japan, Korea, Mexico and Norway to join consultations.

Further to individual requests for the establishment of a panel submitted by the eight complainants at the following DSB meetings:

- **3 June 2002 – the EC claimed that the US measures violated Articles 2.1, 3.1, 4.2(a), 4.2(b), 4.2(c) and 5.1 of the Agreement on Safeguards and Article XIX:1 of GATT 1994;**
- **14 June 2002 – Japan claimed that the US measures violated Articles 2, 3, 4 and 5 of the Agreement on Safeguards and Articles I:1, X:3 and XIX:1 of GATT 1994. Korea claimed that the US measures violated Articles 2, 3, 4, 5, 7.1, 8.1, 9.1 and 12 of the Agreement on Safeguards and Articles X:3, XIII and XIX of GATT 1994;**
- **24 June 2002 – China claimed that the US measures violated Articles 2.1, 3.1, 4.1, 4.2, 5.1, 5.2, 8.1, 9.1 and 12 of the Agreement on Safeguards and Articles I:1, II and XIX of GATT 1994. Switzerland claimed that the US measures violated Articles 2.1, 2.2, 3.1, 4, 5.1 and 8.1 of the Agreement on Safeguards and Article XIX:1 of GATT 1994. Norway claimed that the US measures violated Articles 2, 3, 4, 5.1, 7.1 and 9.1 of the Agreement on Safeguards and Articles I:1, X:3(a) and XIX of GATT 1994;**
- **8 July 2002 – New Zealand claimed that the US measures violated Articles 2.1, 2.2, 3.1, 4.2, 5.1, 7 and 8.1 of the Agreement on Safeguards and Articles X:3(a) and XIX:1 of GATT 1994;**
- **29 July 2002 – Brazil claimed that the US measures violated Articles 2.1, 2.2, 3.1, 4 and 5 of the Agreement on Safeguards and Articles I:1, X:3 and XIX:1 of GATT 1994;**

The DSB established a single Panel, pursuant to an agreement between the parties and in accordance with Article 9.1 of the DSU.

The Members which had reserved their third-party rights in the Panels established at the request of these parties were also considered as third parties in the single Panel. Canada, Chinese Taipei, Cuba, Malaysia, Mexico, Thailand, Turkey and Venezuela have reserved their rights to participate in the Panel proceedings as a third party.

On 15 July 2002, the DSB was notified of a procedural agreement between the United States and the European Communities, Japan, Korea, China, Switzerland, Norway and New Zealand. On 18 July 2002, the DSB was notified of a procedural agreement between the United States and Brazil.

On 15 July 2002, the European Communities, Japan, Korea, China, Switzerland, Norway and New Zealand requested the Director-General to determine the composition of the Panel. On 25 July 2002, the Panel was composed.

On 23 October 2002, Malaysia decided to withdraw as a third party from the panel proceedings.

On 20 February 2003, the Chairman of the Panel informed the DSB that the Panel would not be able to complete its work in six months due to the volume, complexities and sensitivity of the legal and factual questions that had been raised. The Panel hoped to complete its work by the end of April 2003.

The Panel circulated its Reports to Members on 11 July 2003. The Panel concluded that all the United States' safeguard measures at issue were inconsistent with at least one of the following WTO pre-requisites for the imposition of a safeguard measure: lack of demonstration of (i) unforeseen developments; (ii) increased imports; (iii) causation; and (iv) parallelism. The Panel thus requested the United States to bring the relevant safeguard measures into conformity with its obligations under the Agreement on Safeguards and GATT 1994.

On 11 August 2003, the US notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel.

On 8 October 2003, the Chairman of the Appellate Body informed the DSB that the Appellate Body would not be able to circulate its Report within 60 days due to the time required for completion and translation of the Report and that it estimated that the Appellate Body Report in this appeal would be circulated to WTO Members no later than 10 November 2003.

On 10 November 2003, the Appellate Body Report was circulated to Members. The Appellate Body upheld the Panel's ultimate conclusions that each of the ten safeguard measures at issue in this dispute was inconsistent with the United States' obligations under Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards. The Appellate Body reversed the Panel's findings that the US failed to provide a reasoned and adequate explanation on "increased imports" and on the existence of a "causal link" between increased imports and serious injury for two of the ten safeguard measures. Ultimately, however, even these measures were found to be inconsistent with the WTO Agreement on other grounds.

At its meeting on 10 December 2003, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

WT/DS246 – European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries.

Complaint by India. On 5 March 2002, India requested consultations with the EC concerning the conditions under which the EC accords tariff preferences to developing countries under its current scheme of generalized tariff preferences ("GSP scheme").

India presented this request pursuant to Article 4 of the DSU, Article XXIII:1 of the GATT 1994 and paragraph 4(b) of the so called Enabling Clause.

India considered that the tariff preferences accorded by the EC under the special arrangements, (i) for combatting drug production and trafficking and (ii) for the protection of labour rights and the environment, create undue difficulties for India's exports to the EC, including for those under the general arrangements of the EC's GSP scheme, and nullify or impair the benefits accruing to India under the most favoured nation provisions of Article I:1 of the GATT 1994 and paragraphs 2(a), 3(a) and 3(c) of the Enabling Clause.

In India's view, the conditions under which the EC accorded tariff preferences under the special arrangements could not be reconciled with the requirements provided in paragraphs 2(a), 3(a) and 3(c) of the Enabling Clause.

On 20 March 2002, Venezuela requested to be joined in the consultations. On 21 March 2002, Colombia requested to be joined in the consultations.

On 6 December 2002, India requested the establishment of a panel. At its meeting of 19 December 2002, the DSB deferred the establishment of a panel. At its meeting on 27 January 2003, the DSB established a Panel. During the meeting, Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Paraguay, Peru, Sri Lanka, Venezuela and the US reserved their third-party rights. On 28 January 2003, Nicaragua reserved its third-party rights. On 29 January 2003, Panama

reserved its third-party rights. On 3 February, Mauritius and Pakistan reserved their third-party rights. On 6 February, Bolivia reserved its third party rights. On 24 February 2003, India requested the Director-General to compose the Panel. On 6 March 2003, the Director-General composed the Panel.

On 22 September 2003, the Chairman of the Panel informed the DSB that it would not be possible to complete its work in six months due to the complexity of the matter involved and that the Panel expected to complete its work at the end of October 2003.

On 1 December 2003, the Panel report was circulated to the Members. The Panel found that: (i) India has demonstrated that the tariff preferences under the Special Arrangements to Combat Drug Production and Trafficking (the "Drug Arrangements") provided in the EC's GSP scheme are inconsistent with Article I:1 of GATT 1994; (ii) the EC has failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause, which requires that the GSP benefits be provided on a "non-discriminatory" basis; and (iii) the EC has failed to demonstrate that the Drug Arrangements are justified under Article XX(b) of GATT 1994 since the measure is not "necessary" for the protection of human life or health in the EC, nor is it in conformity with the Chapeau of Article XX. (One panelist presented a dissenting opinion that the Enabling Clause is not an exception to Article I:1 and that India has not made a claim under the Enabling Clause.)

On 8 January 2004, the European Communities notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report. On 5 March 2004, the Chairman of the Appellate Body informed the DSB that it would not be possible for the Appellate Body to complete its work within the 60-day period due to the time required for completion and translation of its Report. The Appellate Body estimated that the Report would be circulated to Members no later than 7 April 2004.

On 7 April 2004, the Appellate Body Report was circulated to Members. In the Report:

- **The Appellate Body upheld two of the Panel's findings ((i) the Enabling Clause operates as an exception to Article I:1 of the GATT 1994; and (ii) the Enabling Clause does not exclude the applicability of Article I:1 of the GATT 1994). The Appellate Body modified, however, one of the Panel's findings with respect to the relationship between Article I:1 of the GATT 1994 and the Enabling Clause. The Appellate Body found that the complaining party is obliged not only to claim inconsistency with Article I:1 of the GATT 1994, but also to raise the relevant provisions of the Enabling Clause that the complaining party argues are not satisfied by the challenged measure. Based on these findings, and because the EC did not appeal any other aspect of the Panel's reasoning with respect to Article I:1, the Appellate Body found that it need not rule on the Panel's conclusion as to the consistency of the challenged measure with Article I:1 of the GATT 1994.**
- **The Appellate Body reversed the Panel's legal interpretation of paragraph 2(a) of the Enabling Clause and footnote 3 thereto, by concluding that, in granting differential tariff treatment, preference-granting countries are required, by virtue of the term "non-discriminatory", to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the same "development, financial and trade needs" to which the treatment in question is intended to respond. With respect to the consistency of the challenged measure with the Enabling Clause, the Appellate Body upheld, albeit for different reasons, the Panel's conclusion that the European Communities failed to demonstrate that the challenged measure was justified under paragraph 2(a) of the Enabling Clause.**

At its meeting on 20 April 2004, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

WT/DS245 – Japan – Measures Affecting the Importation of Apples.

Complaint by the United States. On 1 March 2002, the United States requested consultations with Japan regarding restrictions allegedly imposed by Japan on imports of apples from the United States.

The United States' complaint arose from the maintenance by Japan of quarantine restrictions on apples imported into Japan, which restrictions were said to be necessary to protect against introduction of fire blight. Among the measures the United States complained of were the prohibition of imported apples from orchards in which any fire blight was detected, the requirement that export orchards be inspected three times yearly for the presence of fire blight and the disqualification of any orchard from exporting to Japan should fire blight be detected within a 500 meter buffer zone surrounding such orchard.

- **The United States claimed that these measures might be inconsistent with the obligations of Japan under:**
- **Article XI of GATT 1994,**
- **Articles 2.2, 2.3, 5.1, 5.2, 5.3, 5.6, 6.1, 6.2 and 7 and Annex B of the SPS Agreement, and**
- **Article 14 of the Agreement on Agriculture.**

On 7 May 2002, the United States requested the establishment of a panel. At its meeting on 22 May 2002, the DSB deferred the establishment of a panel. Further to a second request to by the United States, at its meeting on 3 June 2002, the DSB established a panel. Australia, Brazil and the EC reserved their third-party rights. On 10 June 2002, New Zealand reserved its third party rights. On 12 June 2002, Chinese Taipei reserved its third party rights.

On 9 July 2002, the US requested the Director-General to compose the panel. On 17 July 2002, the panel was composed. On 16 January 2003, the Chairman of the Panel informed the DSB that the Panel could not complete its work within 6 months from its composition. The Panel expected to issue its final report to the parties by the end of May 2003.

The Panel circulated its Report to Members on 15 July 2003. The Panel found that Japan's phytosanitary measure imposed on imports of apples from the United States was contrary to Article 2.2 of the SPS Agreement and was not justified under Article 5.7 of the SPS Agreement and that Japan's 1999 Pest Risk Assessment did not meet the requirements of Article 5.1 of the SPS Agreement.

On 28 August 2003, Japan notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel.

On 23 October 2003, the Chairman of the Appellate Body informed the DSB that the Appellate Body would not be able to circulate its Report within 60 days due to the time required for completion and translation of the Report and that it estimated that the Appellate Body Report in this appeal would be circulated to WTO Members no later than 26 November 2003.

On 26 November 2003, the report of the Appellate Body was circulated. The Appellate Body rejected all four of Japan's claims on appeal. The Appellate Body upheld the Panel's findings that Japan's

phytosanitary measure at issue was inconsistent with Japan's obligations under Articles 2.2, 5.7, and 5.1 of the SPS Agreement. The Appellate Body also found that the Panel properly discharged its duties under Article 11 of the DSU in the Panel's assessment of the facts of the case. The US sole claim on appeal challenged the "authority" of the Panel to make findings and draw conclusions with respect to apples other than "mature, symptomless" apple fruit. The Appellate Body rejected this claim, finding that the Panel did have the "authority" to make rulings covering all apple fruit that could possibly be exported from the United States to Japan, including apples other than "mature, symptomless" apples.

At its meeting on 10 December 2003, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

WT/DS244 – United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan.

Complaint by Japan. On 30 January 2002, Japan requested consultations with the United States in respect of the final determinations of both the United States Department of Commerce (DOC) and the United States International Trade Commission in the full sunset review of the anti-dumping duties imposed on imports of corrosion-resistant carbon steel flat products from Japan. These determinations were issued on 2 August 2000 and 21 November 2000, respectively.

- **Japan claimed that these determinations were erroneous and based on deficient rulings, procedures and provisions pertaining to the United States Tariff Act of 1930, as amended ("the Act") and related regulations.**
- **Japan further claimed that the procedures and provisions of the Act and related regulations as well as the above determinations were inconsistent with, inter alia, Articles VI and X of GATT 1994; Articles 2, 3, 5, 6 (including Annex II), 11, 12, and 18.4 of the Anti-Dumping Agreement; and Article XVI:4 of the WTO Agreement.**

On 13 February 2002, the EC requested to join the consultations. On 14 February 2002, India requested to join the consultations.

On 4 April 2002, Japan requested the establishment of a panel. At its meeting on 17 April 2002, the DSB deferred the establishment of a panel. Further to a second request from Japan, the DSB established a panel at its meeting on 22 May 2002. Brazil, Canada, Chile, EC, India. Korea, Norway and Venezuela reserved third-party rights to participate in the Panel proceedings.

On 9 July 2002, Japan requested the Director-General to compose the panel. On 17 July 2002, the panel was composed.

On 5 August 2002 Venezuela decided to withdraw as a third party from the panel proceedings.

On 9 January 2003, the Chair of the Panel informed the DSB that it would not be possible to complete its work within six months due to the timetable adopted after having heard the parties' views and based on the time periods prescribed in Appendix 3 of the DSU. The Panel expected to complete its work by April 2003. On 22 May 2003, the Panel issued its report to the parties to the dispute. On 14 August 2003, the Panel circulated its Report to the Members. The Panel rejected all of Japan's claims challenging various aspects of the US laws and regulations regarding the conduct of "sunset" reviews of anti-dumping duties under US law. The Panel found, inter alia, that the obligations pertaining to

evidentiary standards for self-initiation and de minimis standards in investigations do not apply to sunset reviews. The Panel also rejected Japan's argument that the US Sunset Policy Bulletin – which, by its own terms, provides guidance on methodological or analytical issues not explicitly addressed by the US statute and regulations – was a mandatory instrument that could be challenged as such in WTO dispute settlement. Rather, the Panel found that the Bulletin may be challenged only in respect of its application by the US Department of Commerce ("USDOC") in a particular case. The Panel further found that the USDOC's determination of likelihood of continuation or recurrence of dumping in this particular case was not WTO-inconsistent. Accordingly, the Panel made no recommendation.

On 15 September 2003, Japan sent its notification of an appeal to the DSB and filed the Notice of Appeal with the Appellate Body.

On 12 November 2003, the Chairman of the Appellate Body informed the DSB that the Appellate Body would not be able to circulate its Report within 60 days due to the time required for completion and translation of the Report and that it estimated that the Appellate Body Report in this appeal would be circulated to WTO Members no later than 15 December 2003.

On 15 December 2003, the report of the Appellate Body was circulated to Members. The Appellate Body upheld three findings but reversed four of the Panel's legal findings. The Appellate Body found, contrary to the Panel, that the Bulletin can be challenged in WTO dispute settlement. However, the Appellate Body did not find any of the provisions of the Bulletin inconsistent with the Anti-Dumping Agreement or the WTO Agreement. Although its analysis of Japan's claims differed from that of the Panel in important respects, the Appellate Body did not make any finding that the US had acted inconsistently with its obligations under the Anti-Dumping Agreement or the WTO Agreement.

At its meeting on 9 January 2004, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

WT/DS243 – United States – Rules of Origin for Textiles and Apparel Products.

Complaint by India. On 11 January 2002, India requested consultations with the United States in respect of its rules of origin applicable to imports of textiles and apparel products as set out in Section 334 of the Uruguay Round Agreements Act, Section 405 of the Trade and Development Act of 2000 and the customs regulations implementing these provisions.

India argued that, prior to the above mentioned Section 334, the rule of origin applicable to textiles and apparel products was the "substantial transformation" rule. India considered that Section 334 changed the system by identifying specific processing operations which would confer origin to the various types of textiles and apparel products. In India's view, these changes appear to have been made to protect the United States textiles and clothing industry from import competition. India indicated that the changes introduced by Section 334 had already been challenged by the European Communities on the grounds that they were incompatible with the United States' obligations under the Agreement on Rules of Origin and other WTO Agreements (WT/DS151). India explained that that dispute was settled through a procès-verbal whereby the United States agreed to introduce legislation amending Section 334. According to India, the changes introduced by the amending legislation, i.e. Section 405, were aimed at taking account of the particular export interests of the European Communities.

India is of the view that the changes introduced by Sections 334 and 405 have resulted in extraordinary complex rules under which the criteria that confer origin vary between similar products and processing operations. India argued that the structure of the changes, the circumstances under which they were adopted and their effect on the conditions of competition for textiles and apparel products suggest that they serve trade policy purposes. On those grounds, India questioned the compatibility of those changes with paragraphs (b), (c), (d) and (e) of Article 2 of the Agreement on Rules of Origin.

On 7 May 2002, India requested the establishment of a panel. At its meeting on 22 May 2002, the DSB deferred the establishment of a panel . Further to a second request by India, the DSB established a panel at its meeting on 24 June 2002. EC, Pakistan and the Philippines reserved their third party rights. On 3 July 2002, Bangladesh reserved its third party rights. On 4 July 2002, China reserved its third party rights. On 10 October 2002, the Panel was composed. On 9 April 2003, the Chairman of the Panel informed the DSB that due to the complexity of the matter, the Panel would not be able to complete its work in six months. The Panel expects to issue its final report to the parties in early May 2003.

On 20 June 2003, the Panel Report was circulated to Members. The Panel found that:

- **India failed to establish that section 334 of the Uruguay Round Agreements Act is inconsistent with Articles 2(b) or 2(c) of the RO Agreement; and**
- **India failed to establish that section 405 of the Trade and Development Act is inconsistent with Articles 2(b), 2(c) or 2(d) of the RO Agreement;**
- **India failed to establish that the customs regulations contained in 19 C.F.R. § 102.21 are inconsistent with Articles 2(b), 2(c) or 2(d) of the RO Agreement;**
- **At its meeting on 21 July 2003, the DSB adopted the Panel Report.**

<u>WT/DS241 – Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil.</u>

Complaint by Brazil. On 7 November 2001, Brazil requested consultations with Argentina in respect of the definitive anti-dumping duties imposed by Argentina on imports of poultry from Brazil, classified under Mercosur tariff line 0207.11.00 and 0207.12.00. These measures were adopted by the Ministry of Economy of Argentina in Resolution 574 from 21 July 2000, published in the Argentinean Official Gazette on 24 July 2000. Brazil considered that the definitive anti-dumping duties imposed, as well as the investigation conducted by the Argentinean Authorities might have been flawed and based on erroneous or deficient procedures, inconsistent with Argentina's obligations under Articles 1, 2, 3, 4, 5, 6, 9, 12 and Annex II of the Anti-Dumping Agreement, Article VI of the GATT 1994, and Articles 1 and 7 of the Customs Valuation Agreement.

On 19 November 2001, the EC requested to join the consultations. On 25 February 2002, Brazil requested the establishment of a panel. At its meeting on 8 March 2002, the DSB deferred the establishment of a panel. At the DSB meeting on 17 April 2002, the panel was established. Argentina noted that notwithstanding the establishment of the panel at the present meeting, it was still hopeful that a mutually satisfactory solution to the dispute could be found. Canada, Chile, the EC, Guatemala, Paraguay and the US reserved their third-party rights.

On 17 June 2002, Brazil requested the Director-General to compose the panel. On 27 June 2002, the panel was composed.

On 18 December 2002, the Chair of the Panel informed the DSB that it would not be possible to complete its work in six months due to the schedule agreed with the parties and that the Panel expected to complete its work by the beginning of April 2003.

On 22 April 2003, the Panel circulated its Report to the Members. The Panel found that Argentina had acted inconsistently with its obligations under Articles 2.4, 2.4.2, 3.1, 3.2, 3.3, 3.4, 3.5, 5.1, 5.8, 6.1.1, 6.1.3, 6.8 and Annex II, 6.10 and 12.1 of the Anti-Dumping Agreement. The Panel also concluded that Argentina had not acted inconsistently with a number of Articles from the same Agreement and declined to rule on a number of claims for judicial economy reasons.

At its meeting on 19 May 2003, the DSB adopted the Panel Report.

WT/DS238 – Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches.

Complaint by Chile. On 14 September 2001, Chile requested consultations with Argentina in respect of a definitive safeguard measure which Argentina applies on imports of peaches preserved in water containing added sweetening matter, including syrup, preserved in any other form or in water. According to Chile Argentina's definitive safeguard measure is inconsistent with Articles 2, 4, 5 and 12 of the Agreement on Safeguards, and Article XIX:1 of GATT 1994.

On 6 December 2001, Chile requested the establishment of a panel. At its meeting on 18 December 2001, the DSB deferred the establishment of the panel. At the DSB meeting on 18 January 2002, a panel was established. Immediately after the establishment, Chile stated that it would not, for the moment, proceed with the appointment of panelists, as it was still hoping to reach a mutually satisfactory solution with Argentina. The European Communities, Paraguay and the United States reserved their third-party rights to participate in the Panel's proceedings. On 13 March 2002, Chile informed the Chairman of the DSB that it would like the composition of the panel to go ahead. The panel was composed on 16 April 2002.

On 15 October 2002, the Chair of the Panel informed the DSB that it would not be possible to complete its work in six months due to the schedule agreed with the parties and that the Panel expected to circulate its report at the end of January 2003. On 14 February 2003, the Panel circulated its Report to the Members. The Panel concluded that the Argentine preserved peaches measure was imposed inconsistently with certain provisions of the Agreement on Safeguards and GATT 1994. In particular:

- **Argentina acted inconsistently with its obligations under Article XIX:1(a) of GATT 1994 by failing to demonstrate the existence of unforeseen developments as required;**
- **Argentina acted inconsistently with its obligations under Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards by failing to make a determination of an increase in imports, in absolute or relative terms, as required;**
- **Argentina acted inconsistently with its obligations under Article XIX:1(a) of GATT 1994 and Articles 2.1, 4.1(b) and 4.2(a) of the Agreement on Safeguards because the competent authorities, in their determination of the existence of a threat of serious injury:**
  - **did not evaluate all of the relevant factors having a bearing on the situation of the domestic industry;**
  - **did not provide a reasoned and adequate explanation of how the facts supported their determination; and**
  - **did not find that serious injury was clearly imminent.**

- **The Panel did not find that Argentina acted inconsistently with its obligations under Articles 2.1 and 4.1(b) of the Agreement on Safeguards by basing a finding of the existence of a threat of serious injury on an allegation, conjecture or remote possibility. The Panel exercised judicial economy with respect to all other claims.**

At its meeting on 15 April 2003, the DSB adopted the Panel Report.

WT/DS236 – United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada.

Complaint by Canada. On 21 August 2001, Canada requested consultations with the US concerning the preliminary countervailing duty determination and the preliminary critical circumstances determination made by the US Department of Commerce on 9 August 2001, with respect to certain softwood lumber from Canada. This request also concerned US measures on company-specific expedited reviews and administrative reviews. In particular:

- **As far as the preliminary countervailing duty determination is concerned, Canada considered this determination to be inconsistent with US obligations under Articles 1, 2, 10, 14, 17.1, 17.5, 19.4 and 32.1 of the SCM Agreement and Article VI(3) of GATT 1994.**
- **With respect to the preliminary critical circumstances determination, Canada considered this determination to be inconsistent with Articles 17.1, 17.3, 17.4, 19.4 and 20.6 of the SCM Agreement.**
- **As regards US measures on company-specific expedited reviews and administrative reviews, Canada considered these measures are inconsistent with US obligations under Article VI:3 of the GATT 1994 and Articles 10, 19.3, 19.4, 21.1, 21.2 and 32.1 of the SCM Agreement.**
- **Canada also considered that the US had failed to ensure that its laws and regulations are in conformity with its WTO obligations as required by Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.**

On the grounds that the affirmative preliminary countervailing duty and critical circumstances determinations had an immediate and significant trade impact, Canada requested urgent consultations pursuant to Article 4.8 of the DSU. Although accepting Canada's request to enter into consultations, the US did not accept this to be a case of urgency for the purposes of Article 4.8 of the DSU since the measures in question involve the posting of bond for or deposit of preliminary duties which could be refunded in whole or in part.

On 25 October 2001, Canada requested the establishment of a panel. At its meeting on 5 November 2001, the DSB deferred the establishment of a panel. At its meeting on 5 December 2001, the DSB established a panel. The EC and India reserved their third-party rights to participate in the panel proceedings. On 17 December 2001, Japan requested to participate in the proceedings as a third party.

On 22 January 2002, Canada requested the Director-General to determine the composition of the panel. On 1 February 2002, the Director-General composed the panel.
On 27 September 2002, the Panel Report was circulated. The Panel found that the USDOC Preliminary Countervailing Duty Determination:

- **was not inconsistent with Article 1.1 (a) SCM Agreement when the USDOC found that the provision of stumpage constituted a financial contribution, in the form of the provision of a good or service;**

- **failed to determine the existence and amount of benefit to the producers of the subject merchandise on the basis of the prevailing market conditions in Canada as required by Article 1.1 (b) and Article 14 and 14 (d) SCM Agreement; and**
- **failed to establish that a benefit was conferred to certain producers of the subject merchandise as the USDOC did not examine whether a benefit was passed through by the unrelated upstream producers of log inputs to the downstream producers of the subject merchandise;**

Therefore, the Panel concluded that the USDOC's imposition of provisional measures based on the preliminary countervailing duty determination was inconsistent with the US obligations under Articles 1.1 (b), 10, 14, 14 (d), and 17.1(b) SCM Agreement.

The Panel exercised judicial economy in respect of Canada's claim that the USDOC instructions transmitted to the United States Customs Service on 4 September 2001, imposed provisional measures in excess of the subsidy preliminarily found to exist in a manner inconsistent with Articles 10, 17.2, 17.5, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of GATT 1994.

The Panel further concluded that the retroactive imposition of a provisional measure on the basis of the USDOC Preliminary Critical Circumstances Determination is inconsistent with Articles 20.6, 17.3, and 17.4 SCM Agreement and exercised judicial economy in respect of Canada's claim that the USDOC failed to establish the existence of critical circumstances under Article 20.6 SCM Agreement in its Preliminary Critical Circumstances Determination.

Finally, the Panel concluded that the US laws and regulations challenged by Canada on expedited and administrative reviews are not inconsistent with the SCM Agreement as they do not require the executive authority to act in a manner inconsistent with the US obligations under Articles 19 and 21 of the SCM Agreement concerning expedited and administrative reviews. As a result the Panel rejected Canada's claims that the United States has failed to ensure that its laws and regulations are in conformity with its WTO obligations as required by Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

The Panel recommended that the DSB request the United States to bring its measure into conformity with its obligations under the SCM Agreement.

At its meeting on 1 November 2002, the DSB adopted the Panel Report.

<u>WT/DS231 – European Communities – Trade Description of Sardines.</u>

Complaint by Peru. On 20 March 2001, Peru requested consultations with the EC concerning Regulation (EEC) 2136/89 which, according to Peru, prevents Peruvian exporters to continue to use the trade description "sardines" for their products.
Peru submitted that, according to the relevant Codex Alimentarius standards (STAN 94-181 rev. 1995), the species "sardinops sagax sagax" are listed among those species which can be traded as "sardines". Peru, therefore, considered that the above Regulation constitutes an unjustifiable barrier to trade, and, hence, in breach of Articles 2 and 12 of the TBT Agreement and Article XI:1 of GATT 1994. In addition, Peru argues that the Regulation is inconsistent with the principle of non-discrimination, and, hence, in breach of Articles I and III of GATT 1994.

Further to Peru's request, the DSB established a Panel at its meeting on 24 July 2001. Canada, Chile, Colombia, Ecuador, Venezuela and the US reserved their third-party rights. On 31 August 2001, Peru requested the Director-General to determine the composition of the Panel. On 11 September 2001, the Panel was composed. On 11 March 2002, the Panel informed the DSB that it would not be able to issue its report within 6 months, due to the complexity of the matter and scheduling constraints. The Panel expects to complete its work by end of April 2002. On 3 May 2002, the parties to the dispute requested the Panel to suspend its proceedings, pursuant to Article 12.12 of the DSU, until 21 May 2002. On 6 May 2002, the Panel agreed to this request.

The Panel Report was circulated to Members on 29 May 2002. The Panel concluded that the EC Regulation was inconsistent with Article 2.4 of the TBT Agreement.
On 28 June 2002, the EC notified its decision to appeal to the Appellate Body certain issues of law covered in the in the Panel report and certain legal interpretations developed by the Panel.

On 26 September 2002 the report of the Appellate Body was circulated. The Appellate Body:

- **found that the condition attached to the withdrawal of the Notice of Appeal of 25 June 2002 was permissible, and that the appeal of the EC, commenced by the Notice of Appeal of 28 June 2002, was admissible;**
- **found that the amicus curiae briefs submitted were admissible but their contents did not assist in deciding the appeal;**
- **upheld the Panel's finding, in paragraph 7.35 of the Panel Report, that the EC Regulation is a "technical regulation" under the TBT Agreement;**
- **upheld the Panel's findings, in paragraph 7.60 of the Panel Report, that Article 2.4 of the TBT Agreement applies to measures that were adopted before 1 January 1995 but which have not "ceased to exist", and, in paragraph 7.83 of the Panel Report, that Article 2.4 of the TBT Agreement applies to existing technical regulations, including the EC Regulation;**
- **upheld the Panel's finding, in paragraph 7.70 of the Panel Report, that Codex Stan 94 is a "relevant international standard" under Article 2.4 of the TBT Agreement;**
- **upheld the Panel's finding, in paragraph 7.112 of the Panel Report, that Codex Stan 94 was not used "as a basis for" the EC Regulation within the meaning of Article 2.4 of the TBT Agreement;**
- **reversed the Panel's finding, in paragraph 7.52 of the Panel Report, that, under the second part of Article 2.4 of the TBT Agreement, the burden of proof rested with the EC to demonstrate that Codex Stan 94 is an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued" by the EC through the EC Regulation, and found, instead, that the burden of proof rested with Peru to demonstrate that Codex Stan 94 is an effective and appropriate means to fulfil those "legitimate objectives", and, upheld the Panel's finding, in paragraph 7.138 of the Panel Report, that Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation;**
- **rejected the claim of the EC that the Panel did not conduct "an objective assessment of the facts of the case", as required by Article 11 of the DSU;**
- **rejected the claim of the EC that the Panel made a determination, in paragraph 7.127 of the Panel Report, that the EC Regulation is trade-restrictive, and, declared moot and without legal effect the two statements, in paragraph 6.11 and in footnote 35 of the Panel Report, on the trade-restrictive character of the EC Regulation; and**
- **found it unnecessary to complete the analysis under Article 2.2 of the TBT Agreement, Article 2.1 of the TBT Agreement, or Article III:4 of the GATT 1994.**

Therefore, the Appellate Body upheld the Panel's finding, in paragraph 8.1 of the Panel Report, that the EC Regulation is inconsistent with Article 2.4 of the TBT Agreement.

The Appellate Body recommended that the DSB request the EC to bring the EC Regulation, as found in its and in the Panel Report, as modified by its Report, to be inconsistent with Article 2.4 of the TBT Agreement, into conformity with EC's obligations under that Agreement.

On 23 October 2002, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report.

WT/DS222 – Canada – Export Credits and Loan Guarantees for Regional Aircraft.

Complaint by Brazil. On 22 January 2001, Brazil requested consultations with Canada concerning subsidies which are allegedly being granted to Canada's regional aircraft industry. Brazil's claims are as follows:

- **Export credits, within the meaning of Item (k) of Annex I to the SCM Agreement, are being provided to Canada's regional aircraft industry by the Export Development Corporation (EDC) and the Canada Account.**
- **Loan guarantees, within the meaning of Item (j) of Annex I to the SCM Agreement, are being provided by EDC, Industry Canada, and the Province of Quebec, to support exports of Canada's regional aircraft industry.**
- **Brazil takes the view that all of the above-mentioned measures are subsidies, within the meaning of Article 1 of the SCM Agreement, since they are financial contributions that confer a benefit.**
- **According to Brazil, they are also contingent, in law or in fact, upon export, and constitute, therefore, a violation of Article 3 of the SCM Agreement.**

Further to Brazil's request, the DSB established a panel at its meeting of 12 March 2001. Australia, the EC, India and the US reserved their third party rights. On 7 May 2001, Brazil requested the Director-General to determine the composition of the Panel. On 11 May 2001, the Panel was composed.

On 9 August 2001, the Panel informed the DSB that it would not be possible to complete its work within the 3 months deadline from its composition. The panel informed that it expected to complete its work by October 2001. On 28 January 2002, the Panel circulated its report to the Members. The Panel:

- **rejected Brazil's claims that the EDC Corporate Account, Canada Account, the IQ programmes "as such" constitute prohibited export subsidies contrary to Article 3.1(a) of the SCM Agreement;**
- **rejected Brazil's claim that the EDC Corporate Account, Canada Account and the IQ programmes "as applied" constitute prohibited export subsidies contrary to Article 3.1(a) of the SCM Agreement;**
- **upheld Brazil's claim that the EDC Canada Account financing to Air Wisconsin, to Air Nostrum and to Comair constitutes a prohibited export subsidy contrary to Article 3.1(a) of the SCM Agreement;**

- **rejected Brazil's claim that the EDC Corporate Account financing to ASA, ACA, Kendell Air Nostrum and Comair in December 1996, March 1997 and March 1998 constitutes a prohibited export subsidy contrary to Article 3.1(a) of the SCM Agreement;**
- **rejected Brazil's claim that IQ equity guarantees to ACA, Air Littoral, Midway, Mesa Air group, Air Nostrum and Air Wisconsin constitute prohibited export subsidies contrary to Article 3.1(a) of the SCM Agreement; and**
- **rejected Brazil's claim that IQ loan guarantees to Mesa Air Group and Air Wisconsin constitute prohibited export subsidies contrary to Article 3.1(a) of the SCM Agreement.**

The Panel also recommended that Canada withdraw the subsidies identified within 90 days.

At its meeting on 19 February 2002, the DSB adopted the panel report.

WT/DS221 – United States – Section 129(c)(1) of the Uruguay Round Agreements Act.

Complaint by Canada. On 17 January 2001, Canada requested consultations with the US concerning Section 129(c)(1) of the Uruguay Round Agreements Act (the "URAA") and the Statement of Administrative Action accompanying the URAA. In Canada's view, in a situation in which the DSB has ruled that the US has, in an anti-dumping or countervailing duty proceeding, acted inconsistently with US obligations under the AD or SCM Agreements, the US law prohibits the US from complying fully with the DSB ruling. Under US law, determinations whether to levy anti-dumping or countervailing duties are made after the imports occur. With regard to imports that occurred prior to a date on which the US directs compliance with the DSB ruling, the measures require US authorities to disregard the DSB ruling in making such determinations, even where the determination whether to levy anti-dumping or countervailing duties is made after the date fixed by the DSB for compliance. In such circumstances, determinations by the US to levy anti-dumping or countervailing duties would be inconsistent with its obligations under the AD or SCM Agreements.

Canada considered that these measures are inconsistent with US obligations under Article21.3 of the DSU, in the context of Articles 3.1, 3.2, 3.7 and 21.1 of the DSU; Article VI of the GATT 1994; Articles 10 and note 36, 19.2, 19.4 and note 51, 21.1, 32.1, 32.2, 32.3, and 32.5 of the SCM Agreement; Articles 1, 9.3, 11.1, 18.1-4 and note 12 of the AD Agreement; and Article XVI:4 of the WTO Agreement.

Further to Canada's request, the DSB established a panel at its meeting of 23 August 2001. Chile, EC, India and Japan reserved their third-party rights. On 30 October 2001, the Panel was composed. On 30 April 2002, the Chairman of the Panel informed the DSB that the Panel would not be able to complete its work in six months due to the complexity of the matter and that the Panel expected to issue its final report to the parties by the end of June 2002. On 15 July 2002, the Panel circulated its report to Members. The Panel concluded that that Canada had failed to establish that section 129(c)(1) of the Uruguay Round Agreements Act was inconsistent with Articles VI:2, VI:3 and VI:6(a) of the GATT 1994; Articles 1, 9.3, 11.1 and 18.1 and 18.4 of the AD Agreement; Articles 10, 19.4, 21.1, 32.1 and 32.5 of the SCM Agreement; and Article XVI:4 of the WTO Agreement. In the light of its conclusion, the Panel made no recommendations to the DSB.

On 30 August 2002, the DSB adopted the Panel report.

WT/DS219 – European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil.

Complaint by Brazil. On 21 December 2000, Brazil requested consultations with the EC as regards definitive anti-dumping duties imposed by Council Regulation (EC) No. 1784/2000 concerning imports of malleable cast iron tube or pipe fittings originating, inter alia, in Brazil.

- **Brazil considered that the EC's establishment of the facts was not proper and that its evaluation of these facts was not unbiased and objective, both at the provisional and definitive stage, particularly in relation to the initiation and conduct of the investigation (including the evaluation, findings and determination of dumping, injury and causal link between them).**
- **Brazil also challenged the evaluation and findings made in relation to the "community interest".**
- **In sum, Brazil considered that the EC had infringed Article VI of GATT 1994 and Articles 1, 2, 3, 4 ,5 , 6, 7, 9, 11, 12 and 15 of the Anti-dumping Agreement.**

Further to Brazil's request, the DSB established a panel at its meeting of 24 July 2001. Chile, Japan, Mexico and the US reserved their third-party rights. The Panel was composed on 5 September 2001.

On 15 January 2002, both parties requested the Panel to suspend its work until 1 March 2002 with a view to reaching a mutually agreed solution. The Panel agreed to the request. On 28 February 2002, both parties requested the Panel to further suspend its work until 5 April 2002 with a view to reaching a mutually agreed solution. The Panel agreed to this request. On 22 April 2002, the Panel resumed its work, in accordance with Brazil's request. On 3 May 2002, the Chairman of the Panel notified the DSB that it would not be possible to complete its work in six months in light of, inter alia, scheduling conflicts. The Panel expects to complete its work in December 2002. On 7 March 2003, the Panel circulated its Report to the Members. The Panel concluded that the EC had acted inconsistently with its obligations under:

- **Article 2.4.2 of the Anti-Dumping Agreement in "zeroing" negative dumping margins in its dumping determination; and**
- **Article 12.2 and 12.2.2 in that it is not directly discernible from the published Provisional or Definitive Determination that the European Communities addressed or explained the lack of significance of certain injury factors listed in Article 3.4.**

The Panel ruled against Brazil on all other claims. On 23 April 2003, Brazil notified its decision to appeal certain issues of law as well as certain legal interpretations developed by the Panel.

On 22 July 2003, the Appellate Body Report was circulated to Members. Of the seven issues appealed by Brazil, the Appellate Body rejected Brazil's claims with respect to six issues. The Appellate Body upheld the Panel's findings that the European Communities did not act inconsistently with Article VI:2 of the GATT 1994 or with Articles 1, 2.2.2, 3.1, 3.2, 3.3, 3.4, or 3.5 of the Anti-Dumping Agreement. In the course of upholding these findings, the Appellate Body also rejected Brazil's claim that the Panel, contrary to its obligation under Article 17.6(i) of the Anti-Dumping Agreement, failed to assess properly the facts of the matter before it when admitting into evidence the document referred to as Exhibit EC-12. The Appellate Body reversed the Panel's finding with respect to one issue. The Appellate Body found, in contrast to the Panel, that the European Communities acted

inconsistently with Articles 6.2 and 6.4 of the Anti-Dumping Agreement by failing to disclose to interested parties during the anti-dumping investigation certain information related to the evaluation of the state of the domestic industry, which was contained in document Exhibit EC-12.

On 18 August 2003, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body Report.

WT/DS217, WT/DS234 – United States – Continued Dumping and Subsidy Offset Act of 2000.

Joint complaint by Australia, Brazil, Chile, European Communities, India, Indonesia, Japan, Korea and Thailand (WT/DS217), and Canada and Mexico (WT/DS234). On 21 December 2000 and 21 May 2001 respectively, the complainants requested consultations with the US concerning the amendment to the Tariff Act of 1930 signed on 28 October 2000 with the title of "Continued Dumping and Subsidy Offset Act of 2000" (the "Act") usually referred to as "the Byrd Amendment". According to the complainants the Act is inconsistent with the obligations of the United States under several provisions of the GATT, the AD Agreement, the SCM Agreement, and the WTO Agreement. In particular, the Act is alleged to be inconsistent with the obligations of the United States under: (i) Article 18.1 of the ADA in conjunction with Article VI:2 of the GATT and Article 1 of the ADA; (ii) Article 32.1 of the SCM Agreement, in conjunction with Article VI:3 of the GATT and Articles 4.10, 7.9 and 10 of the SCM Agreement; (iii) Article X(3)(a) of the GATT; (iv) Article 5.4 of the ADA and Article 11.4 of the SCM Agreement; (v) Article 8 of the ADA and Article 18 of the SCM Agreement; (vi) Article 5 of the SCM Agreement; and (vii) Article XVI:4 of the Marrakesh Agreement establishing the WTO, Article 18.4 of the ADA and Article 32.5 of the SCM Agreement.

On 12 July 2001, the complainants in dispute WT/DS217 requested the establishment of a panel. At its meeting on 24 July 2001, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the complainants, the DSB established a panel at its meeting on 23 August 2001. Argentina; Canada; Costa Rica; Hong Kong, China; Israel; Norway and Mexico reserved their third-party rights.

On 10 August 2001, Canada and Mexico requested the establishment of a panel. At its meeting on 23 August 2001, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Canada and Mexico, the DSB established a panel at its meeting on 10 September 2001. The DSB also agreed, in accordance with Article 9 of the DSU, that the panel established to examine the complaint by Australia, Brazil, Chile, EC, India, Indonesia, Japan, Korea and Thailand (WT/DS217) on 23 August 2001 would also examine the complaint by Canada and Mexico (WT/DS234).

On 15 October 2001, all 11 complainants requested the Director-General to determine the composition of the Panel. On 25 October 2001, the Panel was composed. On 17 April 2002, the Chairman of the Panel informed the DSB that the Panel would not be able to complete its work in six months since the parties were given the maximum amount of time for preparing submissions and oral statements. The Panel expected to complete its work by July 2002.

On 16 September 2002, the Panel Report was circulated to Members. The Panel concluded that the CDSOA was inconsistent with Articles 5.4, 18.1 and 18.4 of the Anti-Dumping Agreement, Articles 11.4, 32.1 and 32.5 of the Subsidies Agreement, Articles VI:2 and VI:3 of the GATT 1994, and Article XVI:4 of the WTO Agreement. The Panel rejected the complaining parties' claims that the CDSOA

was inconsistent with Articles 8.3 and 15 of the Anti-Dumping Agreement, Articles 4.10, 7.9 and 18.3 of the Subsidies Agreement, and Article X:3(a) of the GATT 1994. They also rejected Mexico's claim that the CDSOA violated SCM Article 5(b). The CDSOA is a new and complex measure, applied in a complex legal environment. In concluding that the CDSOA was in violation of the abovementioned provisions, the Panel had been confronted by sensitive issues regarding the use of subsidies as trade remedies. If Members were of the view that subsidisation is a permitted response to unfair trade practices, the Panel suggested that they clarify this matter through negotiation. Pursuant to Article 3.8 of the DSU, the Panel concluded that to the extent that the CDSOA was inconsistent with the provisions of the Anti Dumping Agreement, the SCM Agreement, and the GATT 1994, the CDSOA nullified or impaired benefits accruing to the complaining parties under those agreements. The Panel recommended that the DSB request the United States to bring the CDSOA into conformity with its obligations under the Anti Dumping Agreement, the SCM Agreement, and the GATT of 1994 by repealing the CDSOA.

On 18 October 2002, the United States notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel. On 13 December 2002, the Appellate Body informed the DSB that it was not able to circulate the Report within 60 days from the appeal and that the Report was to be circulated no later than 16 January 2003. On 16 January 2003, the Appellate Body circulated its Report. The Appellate Body:

- **upheld the finding of the Panel, in paragraphs 7.51 and 8.1 of the Panel Report, that the CDSOA is a non-permissible specific action against dumping or a subsidy, contrary to Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement;**
- **consequently upheld the Panel's finding, in paragraphs 7.93 and 8.1 of the Panel Report, that the CDSOA is inconsistent with certain provisions of the Anti-Dumping Agreement and the SCM Agreement and that, therefore, the United States has failed to comply with Article 18.4 of the Anti-Dumping Agreement, Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement;**
- **upheld the Panel's finding, in paragraph 8.4 of the Panel Report, that, pursuant to Article 3.8 of the DSU, to the extent that the CDSOA is inconsistent with provisions of the Anti-Dumping Agreement and the SCM Agreement, the CDSOA nullifies or impairs benefits accruing to the Complaining Parties under those Agreements;**
- **reversed the Panel's findings, in paragraphs 7.66 and 8.1 of the Panel Report, that the CDSOA is inconsistent with Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement;**
- **rejected the Panel's conclusion, in paragraph 7.63 of the Panel Report, that the United States may be regarded as not having acted in good faith with respect to its obligations under Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement; and**
- **rejected the claim of the United States that the Panel acted inconsistently with Article 9.2 of the DSU by not issuing a separate panel report in the dispute brought by Mexico.**

The Appellate Body recommended that the DSB request the United States bring the CDSOA into conformity with its obligations under the Anti-Dumping Agreement, the SCM Agreement, and the GATT 1994. Further to Canada's request, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body, at its meeting on 27 January 2003.

WT/DS213 – United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany.

Complaint by the European Communities. On 10 November 2000, the EC requested consultations with the US in respect of countervailing duties imposed by the US on imports of certain corrosion-resistant carbon steel flat products ("corrosion resistant steel"), dealt with under US case number C-428-817. This dispute related, in particular, to the final results of a full sunset review of the above measure, carried out by the US Department of Commerce ("DOC") and published in the US Federal Register No. 65 FR 47407 of 2 August 2000. In this decision, the DOC found that revocation of the countervailing duty order would be likely to lead to continuation or recurrence of a countervailable subsidy. The EC considered that this finding is inconsistent with the obligations of the US under the SCM Agreement and, in particular, in breach of Articles 10, 11.9 and 21 (notably 21.3) thereof.

On 5 February 2001, the EC requested further consultations. As the consultations failed, a panel was established by the DSB on 10 September 2001 further to the request of the EC. Japan and Norway reserved their third-party rights. On 18 October 2001, the EC requested the Director-General to determine the composition of the Panel. On 26 October 2001, the Director-General composed the Panel. On 12 April 2002, the Chairman of the Panel informed the DSB that the Panel would not be able to complete its work within six months due to the parties' wish to use the maximum time periods prescribed in Appendix 3 of the DSU. The Panel expected to complete its work by July 2002.

On 3 July 2002, the Panel circulated its report to Members. The Panel concluded that:

- **US CVD law and the accompanying regulations are consistent with Article 21, paragraphs 1 and 3, and Article 10 of the SCM Agreement in respect of the application of evidentiary standards to the self-initiation of sunset reviews;**
- **US CVD law and the accompanying regulations are inconsistent with Article 21.3 of the SCM Agreement in respect of the application of a 0.5 per cent de minimis standard to sunset reviews, and therefore violate Article 32.5 of the SCM Agreement and, consequently, also Article XVI:4 of the WTO Agreement;**
- **the United States, in applying a 0.5 per cent de minimis standard to the instant sunset review, acted in violation of Article 21.3 of the SCM Agreement;**
- **US CVD law and the accompanying regulations and statement of policy practices are consistent with Article 21.3 of the SCM Agreement in respect of the obligation to determine the likelihood of continuation or recurrence of subsidisation in sunset reviews; and**
- **the United States, in failing to determine properly the likelihood of continuation or recurrence of subsidisation in the sunset review on carbon steel, acted in violation of Article 21.3 of the SCM Agreement.**
- **The Panel recommended that the DSB request the United States to bring its measures mentioned in paragraphs (b), (c) and (e) into conformity with its obligations under the WTO Agreement.**

One member of the Panel dissociated himself from the Panel assessment relating to the US CVD law as such and as applied in the sunset review on carbon steel in respect of application of a de minimis standard to sunset reviews. This member did not share the view of the majority of the Panel that the silence in Article 21.3 of the SCM Agreement as to the applicability of a de minimis standard to sunset

reviews means that this standard applies to sunset reviews. Accordingly, and contrary to the panel's above findings, this member concluded that:

- **US CVD law and the accompanying regulations are consistent with Article 21.3 of the SCM Agreement in respect of the application of a 0.5 per cent de minimis standard to sunset reviews; and**
- **the United States, in applying a 0.5 per cent de minimis standard to the instant sunset review, did not act in violation of Article 21.3 of the SCM Agreement.**
- **On 30 August 2002, the US notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel report. The Report was circulated to Members on 28 November 2002. The Appellate Body:**
- **upheld Panel findings relating to the Panel's terms of reference; the consistency of United States law with obligations relating to the self-initiation of sunset reviews by domestic authorities; and the consistency of United States law with obligations relating to the determination to be made in a sunset review;**
- **reversed the Panel's interpretation of Article 21.3 of the Agreement on Subsidies and Countervailing Measures as regards de minimis subsidization in sunset reviews. Accordingly, the Appellate Body also reversed the related Panel findings that United States law, as such and as applied, were inconsistent with that provision.**

On 19 December 2002, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report.

WT/DS212 – United States – Countervailing Measures Concerning Certain Products from the European Communities.

Complaint by the European Communities. On 10 November 2000, the EC requested consultations with the US concerning the continued application by the United States of countervailing duties on a number of products. In particular, the EC claimed that the application of the "same person" methodology by the US, and the continued imposition of duties based on it, are in breach of Articles 10, 19 and 21 of the SCM Agreement, because there is no proper determination of a benefit to the producer of the goods under investigation, as required by Article 1.1(b) of the SCM Agreement. The EC included in this request for consultations 12 US countervailing duty orderswhere this "same person" methodology was applied. All these cases involve alleged non-recurring subsidies granted to firms prior to a change of ownership;

On 1 February 2001, the EC requested further consultations with the US. Failing consultations and further to the request of the EC, the DSB established a panel at its meeting of 10 September 2001. Brazil, India and Mexico reserved their third-party rights. On 25 October 2001, the EC requested the Director-General to determine the composition of the Panel. On 5 November 2001, the Panel was composed. On 18 April 2002, the Chairman of the Panel informed the DSB that it would not be able to complete its work in six months due to the complexity of the matter. The Panel expected to complete its work by mid July 2002.

On 31 July 2002, the Panel Report was circulated to the Members. The Panel concluded that where a privatization is at arm's length and for fair market value, the benefit from a prior non-recurring financial contribution bestowed upon the state-owned producer no longer accrues to the privatized

producer. Therefore, the Panel found that both the 12 countervailing duty determinations and Section 1677(5)(F) were inconsistent with WTO Law.

On 9 September 2002 the US notified its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel. The United States sought review by the Appellate Body of the conclusions of the Panel set forth in paragraphs 8.1(a) –(d) and 8.2 of the Panel Report.

On 9 December 2002, the Appellate Body Report was circulated to Members. The Appellate Body:

- **upheld the Panel's findings, in paragraphs 8.1 (a), (b) and (c) of the Panel Report, that the United States has acted inconsistently with Articles 10, 14, 19.1, 19.4, 21.1, 21.2 and 21.3 of the SCM Agreement, by imposing and maintaining countervailing duties without determining whether a "benefit" continues to exist in twelve countervailing duty determinations;**
- **reversed the Panel's finding, in paragraph 8.1(d), first sentence, of the Panel Report, that "[o]nce an importing Member has determined that a privatization has taken place at arm's-length and for fair market value, it must reach the conclusion that no "benefit" resulting from the prior financial contribution (or subsidization) continues to accrue to the privatized producer"; and**
- **reversed the Panel's conclusion, in paragraph 8.1(d), second sentence, of the Panel Report, that Section 771(5)(F) of the Tariff Act 1930, as amended, 19 U.S.C. § 1677(5)(F), is inconsistent with the SCM Agreement.**
- **upheld the Panel's conclusion, in paragraph 8.2 of the Panel Report, that, insofar as the United States has infringed its obligations under the SCM Agreement, as set out in paragraphs 8.1(a), (b), and (c) of the Panel Report, these actions of the United States constitute prima facie nullification or impairment of benefits accruing to the European Communities, pursuant to Article 3.8 of the DSU; and, because the United States has failed to rebut this presumption, the United States has in fact nullified or impaired benefits accruing to the European Communities under the SCM Agreement.**

The Appellate Body recommended that the DSB request the United States to bring its measures and administrative practice (the "same person" methodology) into conformity with its obligations under that Agreement. On 8 January 2003, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report.

<u>WT/DS211 – Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey.</u>

Complaint by Turkey. On 6 November 2000, Turkey requested consultations with Egypt concerning an anti-dumping investigation by the Egyptian Ministry of Trade and Supply with respect to imports of rebar from Turkey. The investigation was completed and the final report released on 21 October 1999. As a result of the investigation, anti-dumping duties were imposed, ranging from 22.63-61.00 per cent ad valorem.

Turkey considered that:

- **Egypt made determinations of injury and dumping in that investigation without a proper establishment of the facts and based on an evaluation of the facts that was neither unbiased nor objective;**

- **during the investigation of material injury or threat thereof and the causal link, Egypt acted inconsistently with Articles 3.1, 3.2, 3.4, 3.5, 6.1 and 6.2 of the Anti-Dumping Agreement; and**
- **during the investigation of sales at less than normal value, Egypt violated Article X:3 of the GATT 1994, as well as Articles 2.2, 2.4, 6.1, 6.2, 6.6, 6.7 and 6.8, and Annex II, Paragraphs 1, 3, 5, 6 and 7 and Annex I, Paragraph 7 of the Anti-Dumping Agreement.**

On 3 May 2001, Turkey requested the establishment of a panel. At its meeting on 16 May 2001, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Turkey, the DSB established a panel at its meeting of 20 June 2001. Chile, the EC, Japan and the US reserved their third party rights. On 18 July 2001, the Panel was composed.

On 8 August 2002, the Panel Report was circulated to WTO Members. The Panel concluded that Egypt did not act inconsistently with its obligations under:

- **Article 3.4 of the AD Agreement, as Turkey has not established that the Egyptian Investigating Authority was required to examine and evaluate the particular factors identified by Turkey as "relevant factors and indices having a bearing on the state of the domestic industry";**
- **Article 3.2 of the AD Agreement, as Turkey has not established that there was a legal obligation on the Egyptian Investigating Authority to perform the price undercutting analysis in the way asserted by Turkey;**
- **Article 3.1 of the AD Agreement, as Turkey has not established that the Egyptian Investigating Authority's price undercutting finding was not based on positive evidence;**
- **Articles 6.1 and 6.2 of the AD Agreement in respect of the alleged change in scope of the injury investigation from threat of material injury to present material injury and notice thereof to the Turkish exporters;**
- **Articles 3.1 and 3.5 of the AD Agreement, as Turkey has not established that the Egyptian Investigating Authority violated the positive evidence requirement of Article 3.1 by virtue of the Investigating Authority not developing certain specific kinds of evidence, nor has Turkey established that, as a consequence, Egypt violated the requirement of Article 3.5 to demonstrate a causal relationship between the dumped imports and the injury to the domestic industry;**
- **Article 3.5 of the AD Agreement, as Turkey has not established that the Egyptian Investigating Authority's evaluation of the possible causation of injury by factors other than the dumped imports was inconsistent with Article 3.5;**
- **Article 3.1 and 3.5 of the AD Agreement, as Turkey has not established that the Egyptian Investigating Authority was obligated by Articles 3.1 and 3.5 to perform an analysis and make a finding of the type asserted by Turkey in respect of whether the imports caused injury "through the effects of dumping";**
- **Article 6.8 of the AD Agreement and paragraph 5 of Annex II thereto, with regard to three of the Turkish exporters, as an unbiased and objective investigating authority could have found that these three exporters failed to provide necessary information and that resort to facts available was therefore justified in calculating the cost of production in respect of these three exporters;**
- **Article 6.1.1 of the AD Agreement, as the request for information at issue was not a "questionnaire" in the sense of this provision, and the minimum time-period provided for in Article 6.1.1 was therefore not applicable to this request for information;**
- **Article 6.2 of the AD Agreement, or paragraph 6 of Annex II thereto, with regard to the 19 August 1999 request for information, as Turkey has not established that the time-period**

allowed by the Egyptian Investigating Authority for submission of the requested information was unreasonable or, as a consequence, that the Egyptian Investigating Authority failed to provide the Turkish exporters with a full opportunity for the defence of their interests;

- **Article 6.2 of the AD Agreement, or paragraph 6 of Annex II thereto, with regard to the 23 September 1999 request for information, as Turkey has not established that the time-period allowed by the Egyptian Investigating Authority for the submission of the requested information was unreasonable or, as a consequence, that the Egyptian Investigating Authority failed to provide the Turkish exporters with a full opportunity for the defence of their interests;**
- **Paragraph 3 of Annex II to the AD Agreement, as this provision does not apply to the selection of particular information as "facts available";**
- **Paragraph 7 of Annex II to the AD Agreement, as Turkey has not established that the Egyptian Investigating Authority failed to use "special circumspection" in estimating the prevailing inflation rate in Turkey, which was applied to the data reported by one respondent, at 5 per cent per month;**
- **Article 6.7 of the AD Agreement, paragraph 7 of Annex I thereto, and paragraphs 1 and 6 of Annex II thereto, as Turkey has not established that these provisions contain the obligations asserted by Turkey, i.e., Turkey has not established that it is mandatory for investigating authorities to conduct "on-the-spot" verification of information submitted, that investigating authorities are precluded from requesting additional information during the course of the investigation, that the rights of the Turkish exporters were seriously prejudiced, or that the actions of the Egyptian Investigating Authority impaired their "opportunity to provide further explanations";**
- **Article 2.4 of the AD Agreement, as Turkey has not established that the burden of proof requirement of that provision is applicable to the request for certain cost information by the Egyptian Investigating Authority in its letter of 19 August 1999, nor, even if that requirement were applicable, that the request imposed an unreasonable burden of proof on the Turkish respondents;**
- **Article 6.2 of the AD Agreement and paragraph 6 of Annex II thereto, as Turkey has not established that the Egyptian Investigating Authority denied requests of Turkish exporters for meetings;**
- **Article 2.4 of the AD Agreement, as Turkey has not made a prima facie case that the Egyptian Investigating Authority violated this provision in failing to make an adjustment to normal value for differences in terms of sale;**
- **Articles 2.2.1.1 and 2.2.2 of the AD Agreement, as Turkey has not made a prima facie case that the Egyptian Investigating Authority violated these provisions in deciding not to make an interest income offset in calculating cost of production and constructed normal value; and**
- **Article X:3 of GATT 1994 as Turkey has not established that Egypt administered its relevant laws, regulations, decisions or rulings in a non-uniform, non-impartial or unreasonable manner in deciding not to accept an offer of certain respondents to travel to Cairo for a meeting with the Investigating Authority.**
- **The Panel concluded that Egypt acted inconsistently with its obligations under:**
- **Article 3.4 of the AD Agreement, in that while it gathered data on all of the factors listed in Article 3.4, the Egyptian Investigating Authority failed to evaluate all of the factors listed in Article 3.4 as it did not evaluate productivity, actual and potential negative effects on cash flow, employment, wages, and ability to raise capital or investments; and**
- **Article 6.8 of the AD Agreement, and paragraph 6 of Annex II thereto, with regard to two of the Turkish exporters, as the Egyptian Investigating Authority, having received the information that it had identified to these two respondents as being necessary, nevertheless**

found that they had failed to provide the necessary information, and further, did not inform these two exporters of this finding and did not give them the required opportunity to provide further explanations before resorting to facts available.

- **With respect to those of Turkey's claims not addressed above, the Panel concluded that:**
- **the claim was not within its terms of reference (claim under AD Article 17.6(i), claim under Article X:3 of GATT 1994 in respect of selection of particular facts available), or was abandoned by Turkey (claim under Article X:3 in respect of resort to facts available); or**
- **in the light of considerations of judicial economy, it was neither necessary nor appropriate to make findings. The Panel recommended Egypt to bring its definitive anti-dumping measures on imports of steel rebar from Turkey into conformity with the relevant provisions of the AD Agreement.**

On 1 October 2002, the DSB adopted the Panel Report.

WT/DS207 – Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products.

Complaint by Argentina. On 5 October 2000, Argentina requested consultations with Chile concerning:

- **the price band system established by Law 18.525 (as subsequently amended by Law 18.591 and Law 19.546), as well as implementing regulations and complementary and/or amending provisions; and**
- **the provisional safeguard measures adopted on 19 November 1999 by Decree No. 339 of the Ministry of Economy and the definitive safeguard measures imposed on 20 January 2000 by Decree No. 9 of the Ministry of Economy on the importation of various products, including wheat, wheat flour and edible vegetal oils.**

Argentina considered that these measures raised questions concerning the obligations of Chile under various agreements. According to Argentina, the provisions with which the measures relating to the said price band system are inconsistent, include, but are not limited to, the following: Article II of the GATT 1994, and Article 4 of the Agreement on Agriculture. According to Argentina, the provisions with which the safeguard measures are inconsistent, include, but are not limited to, the following: Articles 2, 3, 4, 5, 6 and 12 of the Safeguards Agreement, and Article XIX:1(a) of the GATT 1994.

On 19 January 2001, Argentina requested the establishment of a panel. At its meeting on 1 February 2001, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Argentina, the DSB established a panel at its meeting of 12 March 2001. Australia, Brazil, Colombia, Costa Rica, the EC, Ecuador, El Salvador, Guatemala, Honduras, Japan, Nicaragua, Paraguay, the US and Venezuela reserved their third party rights. On 7 May 2001, Argentina requested the Director-General to determine the composition of the Panel. On 17 May 2001, the Panel was composed.

- **On 23 November 2001, the Panel informed the DSB that it would not be able to complete its work in six months due to the scheduling requests of the parties. The Panel expected to complete its work by the end of March 2002. On 3 May 2002, the Panel circulated its report to Members. The Panel concluded that: the Chilean PBS is inconsistent with Article 4.2 of the Agreement on Agriculture and Article II:1(b) of GATT 1994; (b) as regards the Chilean safeguard measures on wheat, wheat flour and edible vegetable oils:**

- **Chile has acted inconsistently with Article 3.1 of the Agreement on Safeguards by not making available the relevant minutes of the sessions of the CDC through an appropriate medium so as to constitute a "published" report;**
- **Chile has acted inconsistently with Article XIX:1(a) of GATT 1994 because the CDC failed to demonstrate the existence of unforeseen developments, and Article 3.1 of the Agreement on Safeguards because the CDC's report did not set out findings and reasoned conclusions in this respect in its report;**
- **Chile has acted inconsistently with Article XIX:1(a) of GATT 1994 and Articles 2 and 4 of the Agreement on Safeguards because the CDC failed to demonstrate the likeness or direct competitiveness of the products produced by the domestic industry, and, consequently, failed to identify the domestic industry;**
- **Chile has acted inconsistently with Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards because the CDC failed to demonstrate the increase in imports of the products subject to the safeguard measures required by those provisions;**
- **Chile has acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 4.1(a), 4.1(b) and 4.2(a) of the Agreement on Safeguards because the CDC did not demonstrate the existence of a threat of serious injury;**
- **Chile has acted inconsistently with Articles 2.1 and 4.2(b) of the Agreement on Safeguards because the CDC did not demonstrate a causal link;**
- **Chile has acted inconsistently with Article XIX:1(a) of GATT 1994 and Article 5.1 of the Agreement on Safeguards because the CDC did not ensure that the measures were limited to the extent necessary to prevent or remedy injury and facilitate adjustment;**
- **Argentina failed to establish that Chile has acted inconsistently with the requirement of Articles 3.1 and 3.2 of the Agreement on Safeguards to conduct an "appropriate investigation" because Argentina allegedly did not have a full opportunity to participate in the investigation and did not have access to any public summary of the confidential information on which the Chilean authorities may have based their determination.**

On 24 June 2002, Chile notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel.

On 23 September 2002 the report of the Appellate Body was circulated. The Appellate Body:

(a) found that the Panel acted inconsistently with Article 11 of the DSU by making its finding, in paragraph 7.108 of the Panel Report, that the duties resulting from Chile's price band system are inconsistent with Article II:1(b) of the GATT 1994, on the basis of the second sentence of that provision, which was not before the Panel, and, therefore, reverses this finding;
(b) decided that the Panel did not err in choosing to examine Argentina's claim under Article 4.2 of the Agreement on Agriculture before examining Argentina's claim under Article II:1(b) of the GATT 1994;

(c) with respect to Article 4.2 of the Agreement on Agriculture:

- **upheld the Panel's finding, in paragraphs 7.47 and 7.65 of the Panel Report, that Chile's price band system is a border measure that is similar to variable import levies and minimum import prices;**
- **reversed the Panel's finding, in paragraphs 7.52 and 7.60 of the Panel Report, that an "ordinary customs duty" is to be understood as "referring to a customs duty which is not applied on the basis of factors of an exogenous nature";**

- **upheld the Panel's finding, in paragraphs 7.102 and 8.1(a) of the Panel Report, that Chile's price band system is inconsistent with Article 4.2 of the Agreement on Agriculture;**
- **decided, in the light of these findings, that it was not necessary to rule on whether Chile's price band system is consistent with the first sentence of Article II:1(b) of the GATT 1994.**

The Appellate Body recommended that the DSB request Chile to bring its price band system, as found, in its and in the Panel Report as modified by its Report, to be inconsistent with the Agreement on Agriculture, into conformity with its obligations under that Agreement.

At its meeting on 23 October 2002, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report.

WT/DS206 – United States – Anti-Dumping and Countervailing Measures on Steel Plate from India.

Complaint by India. On 4 October 2000, India requested consultations with the United States concerning:

- **final affirmative determinations of sales of certain cut-to-length carbon quality steel plate products from India at less than fair value by US Department of Commerce (DOC) on 13 December 1999 and affirmed on 10 February 2000;**
- **interpretation and use of provisions relating to facts available in the anti-dumping and countervailing duty investigations by DOC; and**
- **determination and interpretation by the US International Trade Commission (ITC) of negligibility, cumulation and material injury caused by the said Indian steel imports.**

India considered that these determinations are erroneous and based on deficient procedures contained in various provisions of US anti-dumping and countervailing duty law. According to India, these determinations and provisions raise questions concerning the obligations of the United States under the GATT 1994, the Anti-Dumping Agreement, the SCM Agreement, and the Agreement establishing the WTO (WTO Agreement). India considered that the provisions of these agreements with which these measures and determinations appear to be inconsistent, include, but are not limited to, the following: Articles VI and X of the GATT 1994; Articles 1, 2, 3 (especially 3.3), 5 (especially 5.8), 6 (especially 6.8), 12, 15, 18.4 and Annex II of the Anti-Dumping Agreement; Articles 10, 11 (especially 11.9), 15 (especially 15.3), 22 and 27 (especially 27.10) of the SCM Agreement; Article XVI of the WTO Agreement.

Further to India's request, the DSB established a Panel at its meeting of 24 July 2001. Chile, the EC and Japan reserved their third-rights. On 16 October 2001, India requested the Director-General to determine the composition of the Panel. On 26 October 2001, the Director-General composed the Panel. On 16 April 2002, the Chairman of the Panel informed the DSB that the Panel would not be able to complete its work in six months in light of scheduling conflicts. The Panel expected to complete its work in June 2002, depending on translation.
On 28 June 2002, the Panel circulated its report to Members. The Panel concluded that:

- **the United States statutory provisions governing the use of facts available, sections 776(a) and 782(d) and (e) of the Tariff Act of 1930, as amended, are not inconsistent with Articles 6.8 and paragraphs 3, 5, and 7 of Annex II of the AD Agreement.**
- **the United States did not act inconsistently with Article 15 of the AD Agreement with respect to India in the anti-dumping investigation underlying this dispute.**

The Panel also concluded that the "practice" of the USDOC concerning the application of "total facts available" was not a measure which can give rise to an independent claim of violation of the AD Agreement, and have therefore not ruled on India's claim in this regard.

With respect to India's claims not addressed above, the Panel concluded that:

- **it would not rule on India's abandoned claim; and**
- **in light of considerations of judicial economy, it was neither necessary nor appropriate to make findings with respect to the remainder of India's claims. The Panel therefore recommended that the DSB request the United States to bring its measure into conformity with its obligations under the AD Agreement.**

At its meeting on 29 July 2002, the DSB adopted the Panel report.

<u>WT/DS204 – Mexico – Measures Affecting Telecommunications Services.</u>

Complaint by the United States. On 17 August 2000, the US requested consultations with Mexico in respect of Mexico's commitments and obligations under the GATS with respect to basic and value-added telecommunications services. According to the United States, since the entry into force of the GATS, Mexico has adopted or maintained anti-competitive and discriminatory regulatory measures, tolerated certain privately-established market access barriers, and failed to take needed regulatory action in Mexico's basic and value-added telecommunications sectors. The US claimed that Mexico had, for example:

- **enacted and maintained laws, regulations, rules, and other measures that deny or limit market access, national treatment, and additional commitments for service suppliers seeking to provide basic and value-added telecommunications services into and within Mexico;**
- **failed to issue and enact regulations, permits, or other measures to ensure implementation of Mexico's market access, national treatment, and additional commitments for service suppliers seeking to provide basic and value-added telecommunications services into and within Mexico;**
- **failed to enforce regulations and other measures to ensure compliance with Mexico's market access, national treatment, and additional commitments for service suppliers seeking to provide basic and value-added telecommunications services into and within Mexico;**
- **failed to regulate, control and prevent its major supplier, Teléfonos de México ("Telmex"), from engaging in activity that denies or limits Mexico's market access, national treatment, and additional commitments for service suppliers seeking to provide basic and value-added telecommunications services into and within Mexico; and**
- **failed to administer measures of general application governing basic and value-added telecommunications services in a reasonable, objective, and impartial manner, ensure that decisions and procedures used by Mexico's telecommunications regulator are impartial with respect to all market participants, and ensure access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions for the supply of basic and value-added telecommunications services.**

The United States considered that the alleged action and inaction on the part of Mexico may be inconsistent with Mexico's GATS commitments and obligations, including Articles VI, XVI, and

XVII; Mexico's additional commitments under Article XVIII as set forth in the Reference Paper inscribed in Mexico's Schedule of Specific Commitments, including Sections 1, 2, 3, and 5; and the GATS Annex on Telecommunications, including Sections 4 and 5.

On 10 November 2000, the United States requested the establishment of a panel. On the same date, the United States notified to the DSB a request for consultations concerning several recent measures adopted by Mexico affecting trade in telecommunication services. At its meeting on 12 December 2000, the DSB deferred establishment of a panel. On 13 February 2002, the United States requested the establishment of a panel. In particular, the United States claimed that Mexico's measures had:

- **failed to ensure that Telmex provides interconnection to US cross-border basic telecom suppliers on reasonable rates, terms and conditions;**
- **failed to ensure US basic telecom suppliers reasonable and non-discriminatory access to and use of public telecom networks and services;**
- **did not provide national treatment to US-owned commercial agencies; and**
- **did not prevent Telmex from engaging in anti-competitive practices.**

At its meeting on 8 March 2002, the DSB deferred the establishment of a panel. Further to a second request by the US, the DSB established a panel at its meeting on 17 April 2002. Canada, Cuba, the EC, Guatemala, Japan and Nicaragua reserved their third-party rights to participate in the proceedings. On 18 April 2002, India joined as a third party to the dispute. On 19 April 2002, Honduras joined as a third party to the dispute. On 23 April 2002, Australia joined as a third party. On 24 April 2002, Brazil joined as a third party. On 16 August 2002, the US requested the Director General to determine the composition of the panel. On 26 August 2002, the panel was composed.

On 13 March 2003, the Chairman of the Panel informed the DSB that it would not be possible to complete its work in six months due to the time needed for translation into Spanish and English of all relevant documents and the complexity of the issues involved. The Panel expected to complete its work in August 2003. On 6 August 2003, the Chairman of the Panel informed the DSB that the Panel expected to complete its work in December 2003.

On 2 April 2004, the Panel report was circulated to Members. The Panel ruled that Mexico violated its GATS commitments because:

- **Mexico failed to ensure interconnection at cost-oriented rates for the cross-border supply of facilities-based basic telecom services, contrary to Article 2.2(b) of its Reference Paper;**
- **Mexico failed to maintain appropriate measures to prevent anti-competitive practices by firms that are a major telecom supplier, contrary to Article 1.1 of its Reference Paper; and**
- **Mexico failed to ensure reasonable and non-discriminatory access to and use of telecommunications networks, contrary to Article 5(a) and (b) of the GATS Annex on Telecommunications.**

In respect of cross-border telecom services supplied on a non-facilities basis in Mexico, however, the Panel ruled that Mexico did not violate its obligations because it had not taken commitments for these services.

On 1 June 2004, the DSB adopted the Panel Report.

WT/DS202 – United States – Definitive Safeguard Measures On Imports Of Circular Welded Carbon Quality Line Pipe From Korea.

Complaint by Korea. On 13 June 2000, Korea requested consultations with the United States in respect of concerns the definitive safeguard measure imposed by the United States on imports of circular welded carbon quality line pipe (line pipe). Korea noted that on 18 February 2000 the United States proclaimed a definitive safeguard measure on imports of line pipe (subheadings 7306.10.10 and 7306.10.50 of the Harmonized Tariff Schedule of the United States). In that proclamation, the United States announced that the proposed date of introduction of the measure was 1 March 2000 and that the measure was expected to remain in effect for 3 years and 1 day. Korea considered that the US procedures and determinations that led to the imposition of the safeguard measure as well as the measure itself contravened various provisions contained in the Safeguards Agreement and the GATT 1994. In particular, Korea considers that the measure is inconsistent with the United States' obligations under Articles 2, 3, 4, 5, 11 and 12 of the Safeguards Agreement; and Articles I, XIII and XIX of the GATT 1994.

Further to Korea's request, the DSB established a panel at its meeting of 23 October 2000. Australia, Canada, EC, Japan and Mexico reserved their third-party rights. On 12 January 2001, Korea requested the Director-General to determine the composition of the Panel. On 22 January 2001, the Panel was composed.

On 29 October 2001, the Panel circulated its report to the Members. The Panel concluded that the US line pipe measure was imposed inconsistently with certain provisions of GATT 1994 and/or the Safeguards Agreement, in particular:

- **the line pipe measure is not consistent with the general rule contained in the chapeau of Article XIII:2 because it has been applied without respecting traditional trade patterns;**
- **the line pipe measure is not consistent with Article XIII2:(a) because it has been applied without fixing the total amount of imports permitted at the lower tariff rate;**
- **the US acted inconsistently with Articles 3.1 and 4.2(c) by failing to include in its published report a finding or reasoned conclusion either (i) that increased imports have caused serious injury, or (ii) that increased imports are threatening to cause serious injury;**
- **the US acted inconsistently with Article 4.2(b) by failing to establish a causal link between the increased imports and the serious injury, or threat thereof;**
- **the US has not complied with its obligations under Article 9.1 by applying the measure to developing countries whose imports do not exceed the individual and collective thresholds in that provision;**
- **the US acted inconsistently with its obligations under Article XIX by failing to demonstrate the existence of unforeseen developments prior to the application of the line pipe measure;**
- **the US has acted inconsistently with its obligations under Article 12.3 by failing to provide an adequate opportunity for prior consultations with Members having a substantial interest as exporters of line pipe;**
- **the US has acted inconsistently with its obligations under Article 8.1 to endeavour to maintain a substantially equivalent level of concessions and other obligations;**

All other claims by Korea were rejected by the Panel. The Panel also declined Korea's request for the Panel to find that the US safeguard measure should be lifted immediately and the ITC safeguard investigation on line pipe terminated.

On 6 November 2001, the US notified its decision to appeal certain findings of law and legal interpretations contained in the Panel Report. However, on 13 November 2001, it withdrew its notice of appeal. Later, on 19 November 2001, the US notified its decision to re-file its appeal to the Appellate Body. On 18 January 2002, the Appellate Body informed the DSB that there would be a delay in the circulation of the report. Accordingly, the Appellate Body informed that the report would be circulated to the Members no later than 15 February 2002. On 15 February 2002, the Appellate Body circulated its report to the Members. The Appellate Body:

- **upheld, albeit for different reasons, the Panel's finding, in paragraph 8.1(7) of the Panel Report, that the United States acted inconsistently with its obligation under Article 12.3 of the Agreement on Safeguards by failing to provide an adequate opportunity for prior consultations with Korea, a Member having a substantial interest in exports of line pipe;**
- **upheld the Panel's finding, in paragraph 8.1(8) of the Panel Report, that the United States acted inconsistently with its obligation under Article 8.1 of the Agreement on Safeguards to endeavour to maintain a substantially equivalent level of concessions and other obligations;**
- **upheld the Panel's finding, in paragraph 8.1(5) of the Panel Report, that the United States did not comply with its obligation under Article 9.1 of the Agreement on Safeguards that safeguard measures shall not be applied against a product originating in a developing country Member as long as its imports do not exceed the individual and collective thresholds in that provision;**
- **reversed the Panel's finding, in paragraph 8.1(3) of the Panel Report, that the United States acted inconsistently with its obligations under Articles 3.1 and 4.2(c) of the Agreement on Safeguards by failing to include in its published report a finding or reasoned conclusion either (1) that increased imports have caused serious injury, or (2) that increased imports are threatening to cause serious injury;**
- **reversed the Panel's finding, in paragraph 8.2(9) of the Panel Report, that the United States did not violate its obligations under Articles 2 and 4 of the Agreement on Safeguards by exempting Canada and Mexico from the line pipe measure;**
- **modified the Panel's finding, in paragraph 8.2(1)) of the Panel Report, that the United States did not violate its obligations under Articles I, XIII:1 and XIX of GATT 1994 by exempting Canada and Mexico from the line pipe measures, declaring it moot and as having no legal effect;**
- **upheld the Panel's finding, in paragraph 8.1(4) of the Panel Report, that the United States acted inconsistently with its obligation under Article 4.2(b) of the Agreement on Safeguards by failing to establish a causal link between the increased imports and the serious injury or threat thereof;**
- **upheld the Panel's finding, in paragraph 7.81 of the Panel Report, that the United States was not required by Article 5.1, first sentence, of the Agreement on Safeguards to demonstrate, at the time of imposition, that the line pipe measure was necessary to prevent or remedy serious injury and to facilitate adjustment;**
- **reversed the Panel's finding, in paragraph 8.2(2) of the Panel Report, that Korea failed to make a prima facie case that the United States violated its obligation under Article 5.1, first sentence, of the Agreement on Safeguards, by imposing a measure that exceeds what is "necessary to prevent or remedy serious injury and to facilitate adjustment", and finds that the United States applied the line pipe measure beyond the "extent necessary to prevent or remedy serious injury and to facilitate adjustment".**

On 8 March 2002, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report.

WT/DS194 – United States – Measures Treating Export Restraints as Subsidies.

Complaint by Canada. On 19 May 2000, Canada requested consultations with the US regarding certain US measures that treat a restraint on exports of a product as a subsidy to other products made using or incorporating the restricted product if the domestic price of the restricted product is affected by the restraint. The measures at issue included provisions of the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA) (H.R. 5110, H.R. Doc. 316, Vol. 1, 103d Cong., 2d Sess., 656, in particular at 925-926 (1994)) and the Explanation of the Final Rules, US Department of Commerce, Countervailing Duties, Final Rule (63 Federal Register 65,348 at 65,349-51 (Nov. 25, 1998)) interpreting section 771(5) of the Tariff Act of 1930 (19 USC. § 1677(5)), as amended by the URAA. Canada's claims were as follows:

- **Canada considered that these measures were inconsistent with US obligations under Articles 1.1, 10, (as well as Articles 11, 17 and 19, as they relate to the requirements of Article 10), and 32.1 of the SCM Agreement because these measures provide that the US will impose countervailing duties against practices that are not subsidies within the meaning of Article 1.1 of the SCM Agreement.**
- **Canada also considered that the US has failed to ensure that its laws, regulations and administrative procedures are in conformity with its WTO obligations as required by Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.**
- **On 24 July 2000, Canada requested the establishment of a panel. At its meeting on 4 August 2000, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Canada, the DSB established a panel at its meeting on 11 September 2000. Australia, the EC and India reserved their third-party rights. On 23 October 2000, the Panel was composed. The Panel circulated its report on 29 June 2001. The Panel concluded that:**
- **an export restraint as defined in this dispute cannot constitute government-entrusted or government-directed provision of goods in the sense of subparagraph (iv) and hence does not constitute a financial contribution in the sense of Article 1.1(a) of the SCM Agreement; and**
- **Section 771(5)(B)(iii) read in light of the SAA and the Preamble to the US CVD Regulations is not inconsistent with Article 1.1 of the SCM Agreement by "requir[ing] the imposition of countervailing duties against practices that are not subsidies within the meaning of Article 1.1".**
- **with respect to those of Canada's claims not addressed above, the Panel concluded that in light of considerations of judicial economy, it was neither necessary nor appropriate to make findings thereon. The Panel therefore made no recommendations with respect to the US' obligations under the SCM and WTO Agreements.**

The DSB adopted the Panel Report on 23 August 2001.

WT/DS192 – United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan.

Complaint by Pakistan. On 3 April 2000, Pakistan requested consultations with the US in respect of a transitional safeguard measure applied by the United States, as of 17 March 1999, on combed cotton yarn (United States category 301) from Pakistan (see US Federal Register of 12 March 1999, document 99-6098). In accordance with Article 6.10 of the Agreement on Textiles and Clothing (ATC), the United States had notified the TMB on 5 March 1999 that it had decided to unilaterally impose a restraint, after consultations as to whether the situation called for a restraint had failed to produce a mutually satisfactory solution. In April 1999, the TMB examined the US restraint pursuant to Article 6.10 of the ATC and recommended that the US restraint should be rescinded. On 28 May

1999, in accordance with Article 8.10 of the ATC, the United States notified the TMB that it considered itself unable to conform to the recommendations issued by the TMB. Despite a further recommendation of the TMB pursuant to Article 8.10 of the ATC that the United States reconsider its position, the United States continued to maintain its unilateral restraint and thus the matter remained unresolved.

Pakistan claimed as follows:

- **the transitional safeguards applied by the United States are inconsistent with the United States' obligations under Articles 2.4 of the ATC and not justified by Article 6 of the ATC;**
- **the US restraint does not meet the requirements for transitional safeguards set out in paragraphs 2, 3, 4 and 7 of Article 6 of the ATC.**

On 3 April 2000, Pakistan requested the establishment of a panel. At its meeting on 18 May 2000, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Pakistan, the DSB established a panel at its meeting on 19 June 2000. India and the EC reserved their third-party rights. On 30 August 2000, the Panel was composed.

The Panel circulated its report on 31 May 2001. The Panel concluded that the transitional safeguard measure (quantitative restriction) imposed by the US on imports of combed cotton yarn from Pakistan as of 17 March 1999, and extended as of 17 March 2000 for a further year is inconsistent with the provisions of Article 6 of the ATC. Specifically, the Panel found that:

- **Inconsistently with its obligations under 6.2, the US excluded the production of combed cotton yarn by vertically integrated producers for their own use from the scope of the "domestic industry producing like and/or directly competitive products" with imported combed cotton yarn;**
- **Inconsistently with its obligations under Article 6.4, the US did not examine the effect of imports from Mexico (and possibly other appropriate Members) individually;**
- **Inconsistently with its obligations under Articles 6.2 and 6.4, the US did not demonstrate that the subject imports caused an "actual threat" of serious damage to the domestic industry.**

With respect to the other claims, the Panel found that Pakistan did not establish that the measure at issue was inconsistent with the US obligations under Article 6 of the ATC. Specifically, the Panel found that: (a) Pakistan did not establish that the US determination of serious damage was not justified based on the data used by the US investigating authority; (b) Pakistan did not establish that the US determination of serious damage was not justified regarding the evaluation by the US investigating authority of establishments that ceased producing combed cotton yarn; (c) Pakistan did not establish that the US determinations of serious damage and causation thereof were not justified based upon an inappropriately chosen period of investigation and period of incidence of serious damage and causation thereof.

The Panel recommended that the DSB request that the US bring the measure at issue into conformity with its obligations under the ATC, and suggested that this can best be achieved by prompt removal of the import restriction.

On 9 July 2001, the US notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel. On 5 September 2001, the Appellate Body informed the DSB that it would not be able to circulate its report within the 7 September deadline. The Report was circulated to Members on 8 October 2001. The Appellate Body

upheld the Panel's overall conclusion that the transitional safeguard measure taken by the United States with respect to imports of combed cotton yarn from Pakistan was inconsistent with the ATC. In particular, the Appellate Body upheld the Panel's findings that, in taking safeguard action with respect to imports of yarn from Pakistan, the US: (a) failed to define properly the relevant "domestic industry" producing yarn; and (b) failed to examine the effect of imports of yarn from other major suppliers individually when attributing serious damage to imports from Pakistan. Furthermore, the Appellate Body concluded that the Panel should not have considered data which were not in existence at the time when the US determined that serious damage had been caused to the domestic industry. It declined to rule on the broader issue of whether an importing Member must attribute serious damage to all Members whose exports contributed to that damage and concluded therefore that the Panel's interpretation of this broader issue was of no legal effect.

The DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, on 5 November 2001.

At the DSB meeting on 21 November 2001, the US stated that it had implemented the DSB's recommendations and rulings. Specifically, on 8 November 2001, the Committee for the Implementation of Textile Agreements, chaired by the Department of Commerce, had directed the US Customs Service to eliminate the limit on imports of combed cotton yarn from Pakistan. This action was effective from 9 November 2001.

WT/DS189 – Argentina – Definitive Anti-Dumping Measures on Carton-Board Imports from Germany and Definitive Anti-Dumping Measures on Imports of Ceramic Tiles from Italy.

Complaint by the European Communities. On 26 January 2000, the EC requested consultations with Argentina in respect of Argentina's definitive anti-dumping measures on imports of ceramic floor tiles from Italy imposed on 12 November 1999. The EC claimed that the Argentinian investigating authority without justification disregarded all the information on normal value and on export prices provided by the exporters included in the sample; failed to calculate an individual dumping margin for each of the exporters included in the sample; failed to make due allowance for the differences in physical characteristics between the models exported to Argentina and those sold in Italy; and failed to inform the Italian exporters of the essential facts concerning the existence of dumping which formed the basis for the decision whether to apply definitive measures. The EC considered that the anti-dumping measures in question were inconsistent with Articles 2.4, 6.8 in conjunction with Annex II, 6.9 and 6.10 of the Anti-Dumping Agreement.

On 7 November 2000, the EC requested the establishment of a panel. At its meeting on 26 September 2000, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the EC, the DSB established a panel at its meeting on 17 November 2000 on the basis of the EC's reduced complaint which relates only to definitive anti-dumping measures on imports of ceramic floor tiles from Italy. Japan, Turkey and the US reserved their third-party rights. On 12 January 2001, the Panel was composed.

The Panel circulated its report to Members on 28 September 2001. The Panel found that:

- **Argentina acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement by disregarding in large part the information provided by the exporter for the determination of the normal value and export price, and this without informing the exporters of the reasons for such a rejection;**

- **Argentina acted inconsistently with Article 6.10 of the Anti-Dumping Agreement by not determining an individual dumping margin for each sampled exporter;**
- **Argentina acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by failing to make due allowance for difference in physical characteristics affecting price comparability;**
- **Argentina acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by not disclosing to the exporters the essential facts under consideration which form the basis for the decision whether to apply definitive measures.**

On 5 November 2001, the DSB adopted the Panel Report.

WT/DS184 – United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan.

Complaint by Japan. On 18 November 1999, Japan requested consultations with the US in respect of the preliminary and final determinations of the US Department of Commerce and the US International Trade Commission on the anti-dumping investigation of Certain Hot Rolled Steel Products from Japan issued on 25 and 30 November 1998, 12 February 1999, 28 April 1999 and 23 June 1999. Japan considered that these determinations are erroneous and based on deficient procedures under the US Tariff Act of 1930 and related regulations. The Japanese complaint also concerned certain provisions of the Tariff Act of 1930 and related regulations. Japan claimed violations of Articles VI and X of the GATT 1994 and Articles 2, 3, 6 (including Annex II), 9 and 10 of the Anti-Dumping Agreement.

On 11 February 2000, Japan requested the establishment of a panel. At its meeting on 24 February 2000, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Japan, the DSB established a panel at its meeting on 20 March 2000. Brazil, Canada, Chile, the EC and Korea reserved their third-party rights. On 9 May 2000, Japan requested the Director-General to determine the composition of the Panel. On 24 May 2000, the Panel was composed. The Panel circulated its report on 28 February 2001. The Panel concluded as follows:

- **The US acted inconsistently with Articles 6.8 and Annex II of the AD Agreement in its application of "facts available" to Kawasaki Steel Corporation (KSC), Nippon Steel Corporation (NSC) and NKK Corporation;**
- **Section 735(c)(5)(A) of the Tariff Act of 1930, as amended, which mandates that USDOC exclude only margins based entirely on facts available in determining an all others rate, is inconsistent with Article 9.4 of the AD Agreement, and that therefore the US has acted inconsistently with its obligations under Article 18.4 of the AD Agreement and Article XVI:4 of the Marrakesh Agreement by failing to bring that provision into conformity with its obligations under the AD Agreement; and**
- **The US acted inconsistently with Article 2.1 of the AD Agreement in excluding certain home-market sales to affiliated parties from the calculation of normal value on the basis of the "arm's length" test. In addition, in light of the findings above, the panel concluded that the replacement of those sales with sales to unaffiliated downstream purchasers was inconsistent with Article 2.1 of the AD Agreement.**
- **With respect to those of Japan's claims not addressed above the panel concluded: (1) that the claim was not within its terms of reference ("general practice" concerning adverse facts available; "general practice" of excluding certain home-market sales from the calculation of**

normal value), or (2) that, in light of considerations of judicial economy, it is neither necessary nor appropriate to make findings.

On 25 April 2001, the US notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel. The Appellate Body circulated its Report on 24 July 2001. In this regard, the Appellate Body upheld the Panel's findings except for the following:

- **It reversed the Panel's finding regarding the inconsistency with Article 2.1 of the Anti-dumping Agreement of the US's methodology for calculating the normal value as regards the using of certain downstream sales made by an investigated exporters' affiliates to dependent purchasers;**
- **It found that there was insufficient factual record to allow completion of the analysis of Japan's claim under Article 2.4 of the Anti-dumping Agreement that the US did not make a fair comparison in its use of downstream sales when calculating normal value;**
- **It reversed the Panel's finding that the US did not act inconsistently with the Anti-dumping Agreement in its application of the captive production provision in its determination of injury sustained by the US hot-rolled steel industry;**
- **It reversed the Panel's finding that the USITC demonstrated the existence of a causal relationship, under Article 3.5 of the said agreement, between dumped imports and material injury to that industry; but found that there was insufficient factual record to allow completion of the analysis of Japan's claim on causation;**

The DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, on 23 August 2001.

WT/DS179 – United States – Anti-Dumping measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea.

Complaint by Korea. On 30 July 1999, Korea requested consultations with the US in respect of Preliminary and Final Determinations of the US's Department of Commerce (DOC) on Stainless Steel Plate in Coils from Korea dated 4 November 1998 and 31 March 1999 respectively, and Stainless Steel Sheet and Strip from Korea dated 20 January 1999 and 8 June 1999 respectively. Korea considered that several errors were made by the US in those determinations which resulted in erroneous findings and deficient conclusions as well as the imposition, calculation and collection of anti-dumping margins which are incompatible with the obligation of the US under the provisions of the Anti-Dumping Agreement and Article VI of GATT 1994 and in particular, but not necessarily exclusively, Article 2, Article 6 and Article 12 of the Anti-Dumping Agreement. Korea believed that the US did not act in conformity with the cited provisions, among others, in its treatment of the following: certain US sales made to a bankrupt company; the calculation of two distinct exchange rate periods for export sales; and currency conversion for certain normal value sales made in US dollars.

On 14 October 1999, Korea requested the establishment of a panel. At its meeting on 27 October 1999, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Korea, the DSB established a panel at its meeting on 19 November 1999. The EC and Japan reserved their third-party rights. On 24 March 2000, the Panel was composed. The panel circulated its report on 22 December 2000. The panel concluded that:

with respect to "local sales":

- **the US in the Plate investigation did not act inconsistently with its obligations under Article 2.4.1, Article 2.4 chapeau ("fair comparison"), and Article 12.2 of the AD Agreement nor with its obligations under Article X:3(a) of GATT 1994;**
- **the US in the Sheet investigation acted inconsistently with Article 2.4.1 of the AD Agreement by performing a currency conversion that was not required.**

with respect to the treatment of unpaid sales, the US:

- **acted inconsistently with its obligations under Article 2.4 chapeau of the AD Agreement in both the Plate and Sheet investigations by making allowances in respect of sales through unaffiliated importers which were not permissible allowances for differences affecting price comparability;**
- **acted inconsistently with its obligations under Article 2.4 chapeau of the AD Agreement in both the Plate and Sheet investigations by making allowances in respect of sales through an affiliated importer which were not permissible allowances in the construction of the export price for costs incurred between importation and resale. with respect to multiple averaging, the panel concluded that:**
- **the US's use of multiple averaging periods in the Plate and Sheet investigations was inconsistent with the requirement of Article 2.4.2 to compare "a weighted average normal value with a weighted average of all comparable export transactions";**
- **the US's use of multiple averaging periods in the Plate and Sheet investigations was not inconsistent with Article 2.4.1 of the AD Agreement;**
- **the US's use of multiple averaging periods in the Plate and Sheet investigations was not inconsistent with the first sentence of the chapeau of Article 2.4 of the AD Agreement ("fair comparison").**

to the extent that the US has acted inconsistently with the provisions of the AD Agreement, it has nullified or impaired benefits accruing to Korea under that Agreement.

At its meeting of 1 February 2001, the DSB adopted the panel report.

<u>WT/DS177, WT/DS178 – United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand.</u>

Complaints by New Zealand and Australia. On 16 July 1999, New Zealand requested consultations with the US in respect of a safeguard measure imposed by the US on imports of lamb meat from New Zealand (WT/DS177). New Zealand alleged that by Presidential Proclamation under Section 203 of the US Trade Act 1974, the US imposed a definitive safeguard measure in the form of a tariff-rate quota on imports fresh, chilled, or frozen lamb meat effective from 22 July 1999. New Zealand contended that this measure is inconsistent with Articles 2, 4, 5, 11 and 12 of the Agreement on Safeguards, and Articles I and XIX of GATT 1994.

On 23 July 1999, Australia requested consultations with the US in respect of a definitive safeguard measure imposed by the US on imports of lamb (WT/DS178). Australia alleged that by Presidential Proclamation under Section 203 of the US Trade Act 1974, the US imposed a definitive safeguard

measure in the form of a tariff-rate quota on imports of fresh, chilled, or frozen lamb meat from Australia effective from 22 July 1999. Australia contended that this measure is inconsistent with Articles 2, 3, 4, 5, 8, 11 and 12 of the Agreement on Safeguards, and Articles I, II and XIX of GATT 1994.

On 14 October 1999, New Zealand and Australia requested the establishment of a panel. At its meeting on 27 October 1999, the DSB deferred the establishment of the panels. Further to the second requests to establish a panel by New Zealand and Australia, at its meeting on 19 November 1999, the DSB established, pursuant to Article 9.1 of the DSU, a single panel to examine the complaints WT/DS177 and WT/DS178. Canada, the EC, Iceland and Japan reserved their third-party rights. Australia reserved its third-party rights in relation to the complaint by New Zealand, while New Zealand reserved its third-party rights in relation to the complaint by Australia. On 21 March 2000, the Panel was composed. The Panel circulated its report on 21 December 2000. The Panel concluded that:

- **the US has acted inconsistently with Article XIX:1(a) of GATT 1994 by failing to demonstrate as a matter of fact the existence of "unforeseen developments";**
- **the US has acted inconsistently with Article 4.1(c) of the Agreement on Safeguards because the USITC, in the lamb meat investigation, defined the domestic industry as including input producers as producers of the like product at issue (i.e. lamb meat);**
- **the complainants failed to establish that the USITC's analytical approach to determining the existence of a threat of serious injury, in particular with respect to the prospective analysis and the time-period used, is inconsistent with Article 4.1(b) of the Agreement on Safeguards;**
- **the complainants failed to establish that the USITC's analytical approach to evaluating all of the factors listed in Article 4.2(a) of the Agreement on Safeguards when determining whether increased imports threatened to cause serious injury with respect to the domestic industry as defined in the investigation is inconsistent with that provision;**
- **the US has acted inconsistently with Article 4.1(c) of the Agreement on Safeguards because the USITC failed to obtain data in respect of producers representing a major proportion of the total domestic production by the domestic industry as defined in the investigation;**
- **the US has acted inconsistently with Article 4.2(b) of the Agreement on Safeguards because the USITC's determination in the lamb meat investigation in respect of causation did not demonstrate the required causal link between increased imports and threat of serious injury, in that the determination did not establish that increased imports were by themselves a necessary and sufficient cause of threat of serious injury, and in that the determination did not ensure that threat of serious injury caused by "other factors" was not attributed to increased imports;**
- **by virtue of the above violations of Article 4 of the Agreement on Safeguards, the US also has acted inconsistently with Article 2.1 of the Agreement on Safeguards.**
- **On 31 January 2001, the US notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel. The Appellate Body circulated its report on 1 May 2001. The Appellate Body:**
- **upheld the Panel's finding that the US acted inconsistently with Article XIX:1(a) of the GATT 1994 by failing to demonstrate, as a matter of fact, the existence of "unforeseen developments";**
- **upheld the Panel's finding that the United States acted inconsistently with Articles 2.1 and 4.1(c) of the Agreement on Safeguards because the USITC defined the relevant "domestic industry" to include growers and feeders of live lambs;**

- **upheld the Panel's finding that the USITC made a determination regarding the "domestic industry" on the basis of data that was not sufficiently representative of that industry; but modified the Panel's ultimate finding that the US thereby acted inconsistently with Articles 2.1 and 4.1(c) of the Agreement on Safeguards by finding, instead, that the United States thereby acted inconsistently with Articles 2.1 and 4.2(a) of that Agreement;**
- **found that the Panel correctly interpreted the standard of review, set forth in Article 11 of the DSU, which is appropriate to its examination of claims made under Article 4.2 of the Agreement on Safeguards; but concluded that the Panel erred in applying that standard in examining the claims made concerning the USITC's determination that there existed a threat of serious injury; and found, moreover, that the US acted inconsistently with Articles 2.1 and 4.2(a) of the Agreement on Safeguards because the USITC Report did not explain adequately the determination that there existed a threat of serious injury to the domestic industry;**
- **reversed the Panel's interpretation of the causation requirements in the Agreement on Safeguards but, for different reasons, upheld the Panel's ultimate finding that the US acted inconsistently with Articles 2.1 and 4.2(b) of the Agreement because the USITC's determination that there existed a causal link between increased imports and a threat of serious injury did not ensure that injury caused to the domestic industry, by factors other than increased imports, was not attributed to those imports;**
- **upheld the Panel's exercise of judicial economy in declining to rule on the claim of New Zealand under Article 5.1 of the Agreement on Safeguards; and**
- **declined to rule on the respective conditional appeals of Australia and New Zealand relating to Articles I, II and XIX:1(a) of the GATT 1994, and to Articles 2.2, 3.1, 5.1, 8.1, 11.1(a) and 12.3 of the Agreement on Safeguards.**

The DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, on 16 May 2001.

WT/DS176 – United States – Section 211 Omnibus Appropriations Act of 1998.

Complaint by the European Communities and its Member States. On 8 July 1999, the EC requested consultations with the US in respect of Section 211 of the US Omnibus Appropriations Act. The EC and its member States alleged as follows:

- **Section 211, which was signed into law on 21 October 1998, did not allow the registration or renewal in the United States of a trademark, if it was previously abandoned by a trademark owner whose business and assets have been confiscated under Cuban law.**
- **This law provided that no US court shall recognize or enforce any assertion of such rights.**
- **Section 211 US Omnibus Appropriations Act was not in conformity with the US' obligations under the TRIPS Agreement, notably its Article 2 in conjunction with the Paris Convention, Article 3, Article 4, Articles 15 to 21, Article 41, Article 42 and Article 62.**

Further to the request of the EC and its member States, the DSB established a panel at its meeting on 26 September 2000. Canada, Japan and Nicaragua reserved their third-party rights. On 17 October 2000, the EC and its member States requested the Director-General to determine the composition of the Panel. On 26 October 2000, the Panel was composed.

The Panel circulated its Report on 6 August 2001. The Panel rejected most of the claims by the EC and their member States except that relating to the inconsistency of Section 211(a)(2) of the Omnibus Appropriations Act with Article 42 of the TRIPS Agreement. In this regard, the panel concluded that

this Section is inconsistent with the relevant TRIPs Article on the grounds that it limits, under certain circumstances, right holders' effective access to and availability of civil judicial procedures.

On 4 October 2001, the EC and its Member States notified their decision to appeal certain issues of law and legal interpretations developed by the panel report. The Appellate Body report was circulated to Members on 12 January 2002. The Appellate Body:

- **found, in respect of the protection of trademarks, that Sections 211(a)(2) and (b) of the Omnibus Appropriations Act violated the national treatment and most-favoured nation obligations under the TRIPS Agreement and the Paris Convention for the Protection of Industrial Property, thereby reversing the Panel's findings to the contrary;**
- **reversed the Panel's finding that Section 211(a)(2) is inconsistent with Article 42 of the TRIPS Agreement and concluded that Article 42 contains procedural obligations, while Section 211 affects substantive trademark rights;**
- **upheld the Panel's findings that Section 211 does not violate the US' obligations under Article 2.1 of the TRIPS Agreement in conjunction with Article 6quinquies A(1) of the Paris Convention, and Articles 15 and 16 of the TRIPS Agreement. It also upheld the Panel's finding under Article 42 of the TRIPS Agreement in respect of Section 211(b); and**
- **reversed the Panel's conclusion that trade names are not a category of intellectual property protected under the TRIPS Agreement and then completed the analysis reaching the same conclusions for trade names as with respect to trademarks. It also found that Sections 211(a)(2) and (b) are not inconsistent with Article 2.1 of the TRIPS Agreement in conjunction with Article 8 of the Paris Convention (1967).**

At its meeting on 2 January 2002, the DSB adopted the Appellate Body report and the Panel report, as upheld by the Appellate Body report.

<u>WT/DS174, WT/DS290 – European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs.</u>

Complaints by the United States (WT/DS174) and Australia (WT/DS290). On 1 June 1999, the US requested consultations with the EC in respect of the alleged lack of protection of trademarks and geographical indications (GIs) for agricultural products and foodstuffs in the EC. The US contended that EC Regulation 2081/92, as amended, does not provide national treatment with respect to geographical indications and does not provide sufficient protection to pre-existing trademarks that are similar or identical to a geographical indication. The US considered this situation to be inconsistent with the EC's obligations under the TRIPS Agreement, including but not necessarily limited to Articles 3, 16, 24, 63 and 65 of the TRIPS Agreement.

On 4 April 2003, the US sent an additional request for consultations concerning the protection of trademarks and GIs for agricultural products and foodstuffs in the EC. This request does not replace but rather supplements the 1999 request. The measures concerned are EC Regulation 2081/92, as amended, and its related implementing and enforcement measures (the "EC Regulation"). According to the US, the EC Regulation limits the GIs that the EC will protect and limits the access of nationals of other Members to the EC GI procedures and protections provided under the Regulation. The US claims that the EC Regulation appears to be inconsistent with Articles 2, 3, 4, 16, 22, 24, 63 and 65 of the TRIPS Agreement and Articles I and III:4 of the GATT 1994.

On 17 April 2003, Australia requested consultations with the EC concerning the protection of trademarks and to the registration and protection of geographical indications for foodstuffs and agricultural products in the EC. The measures at issue include Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs and related measures ("the EC measure").

According to Australia:

- **the EC measure seems not to accord immediately and unconditionally to the nationals and/or products of each WTO Member any advantage, favour, privilege of immunity granted to the nationals and/or like products of any other WTO Member,**
- **the EC measure seems not to accord to the nationals and/or products of each WTO Member treatment no less favourable than that it accords to its own nationals and/or like products of national origin,**
- **the EC measure may diminish the legal protection for trademarks,**
- **the EC measure may not be consistent with the EC's obligation to provide the legal means for interested parties to prevent misleading use of a geographical indication or any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967),**
- **the EC may not have met its transparency obligations in respect of the measure, and**
- **the EC measure may be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.**

Australia claims that the EC measure appears to be inconsistent with the EC's obligations pursuant to Articles 1, 2, 3, 4, 16, 20, 22, 24, 41, 42, 63 and 65 of the TRIPS Agreement, Articles I and III of GATT 1994, Article 2 of the TBT Agreement and Article XVI:4 of the WTO Agreement.

In dispute WT/DS174, Sri Lanka Australia, Hungary, India, Argentina, Bulgaria, Cyprus, the Czech Republic, Malta, Slovenia, Romania, the Slovak Republic and Turkey requested to join the additional consultations. The EC informed the DSB that it had accepted the requests of Argentina, Australia, Bulgaria, Cyprus, the Czech Republic, Hungary, India, Malta, Mexico, New Zealand, Romania, the Slovak Republic, Slovenia, Sri Lanka and Turkey to join the consultations.

In dispute WT/DS290, Bulgaria, Cyprus, the Czech Republic, Malta, the United States, Hungary and Slovenia, New Zealand, Romania, the Slovak Republic, Chinese Taipei and Turkey, Argentina, Colombia and Mexico requested to join the consultations. The EC informed the DSB that it has accepted the requests of Argentina, Bulgaria, Colombia, Cyprus, the Czech Republic, Hungary, Malta, Mexico, New Zealand, Romania, the Slovak Republic, Slovenia, Chinese Taipei, Turkey and the United States to join the consultations.

On 18 August 2003, the United States and Australia requested separately the establishment of a panel. At its meeting on 29 August 2003, the DSB deferred the establishment of the panels. Further to second requests to establish a panel from the US and Australia, the DSB established a single panel at its meeting on 2 October 2003. Australia, Colombia, Guatemala, India, Mexico, New Zealand, Norway, Chinese Taipei and Turkey reserved their third-party rights. On 6 October, China reserved its third-party right. On 10 October, Argentina and Canada reserved their third-party rights. On 13 October, Brazil reserved its third-party rights.

On 13 February 2004, the United States and Australia requested the Director-General to determine the composition of the Panel. On 23 February 2004, the Director-General composed the Panel.

On 17 August 2004, the Chairman of the Panel informed the DSB that it would not be able to complete its work in six months due to the complexity of the case and that the Panel expected to issue its final reports to the parties before the end of year 2004.

On 15 March 2005, the Panel reports were circulated to Members.

- **the Panel agreed with the United States and Australia that the EC's GI Regulation does not provide national treatment to other WTO Members' right holders and products, because: (i) registration of a GI from a country outside the European Union is contingent upon the government of that country adopting a system of GI protection equivalent to the EC's system and offering reciprocal protection to EC GIs; and (ii) the Regulation's procedures require applications and objections from other WTO Members to be examined and transmitted by the governments of those Members, and require those governments to operate systems of product inspection like EC member States. Therefore, foreign nationals do not have guaranteed access to the EC's system for their GIs, unlike EC nationals;**
- **otherwise, there is no finding that the substance of the EC system of GI protection, which requires product inspection, is inconsistent with WTO obligations; and**
- **the Panel agreed with the EC that, although its GI Regulation allows it to register GIs even when they conflict with a prior trademark, the Regulation, as written, is sufficiently constrained to qualify as a "limited exception" to trademark rights. However, the Panel agreed with the United States and Australia that the TRIPS Agreement does not allow unqualified coexistence of GIs with prior trademarks.**

The DSB adopted the Panel reports on 20 April 2005.

<u>WT/DS170 – Canada – Term of Patent Protection.</u>

Complaint by the United States. On 6 May 1999, the US requested consultations with Canada in respect of the term of protection granted to patents that were filed in Canada before 1 October 1989. The US contended that the TRIPS Agreement obligates Members to grant a term of protection for patents that runs at least until twenty years after the filing date of the underlying protection, and requires each Member to grant this minimum term to all patents existing as of the date of the application of the Agreement to that Member. The US alleged that under the Canadian Patent Act, the term granted to patents issued on the basis of applications filed before 1 October 1989 is 17 years from the date on which the patent is issued. The US contended that this situation is inconsistent with Articles 33, 65 and 70 of the TRIPS Agreement.

On 15 July 1999, the US requested the establishment of a panel. At its meeting on 26 July 1999, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the US, the DSB established a panel at its meeting on 22 September 1999. On 13 October 1999, the US requested the Director-General to determine the composition of the Panel. On 22 October 1999, the Panel was composed. The report of the panel was circulated to Members on 5 May 2000. The panel found that:

- **pursuant to Article 70.2 of the TRIPS Agreement, Canada was required to apply the relevant obligations of the TRIPS Agreement to inventions protected by patents that were in force on 1 January 1996, i.e. the date of entry into force for Canada of the TRIPS Agreement.**

- **Section 45 of Canada's Patent Act does not make available a term of protection that does not end before 20 years from the date of filing as mandated by Article 33 of the TRIPS Agreement, thus rejecting, inter alia, Canada's argument that the 17-year statutory protection under its Patent Act was effectively equivalent to the 20-year term prescribed by the TRIPS Agreement because of average pendency periods for patents, informal and statutory delays etc.**
- **On 19 June 2000, Canada notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The Appellate Body report was circulated to Members on 18 September 2000. The Appellate Body upheld all of the findings and conclusions of the panel that were appealed.**

The DSB adopted the Appellate Body report and the Panel report, as upheld by the Appellate Body report, on 12 October 2000.

WT/DS166 – United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities.

Complaint by the European Communities. On 17 March 1999, the EC requested consultations with the US in respect of definitive safeguard measures imposed by the US on imports of wheat gluten from the European Communities. The EC contended that by a Proclamation of 30 May 1998, and a Memorandum of the same date, by the US President, under which the US imposed definitive safeguard measures in the form of a quantitative limitation on imports of wheat gluten from the EC, effective as of 1 June 1998. The EC considered these measures to be in violation of Articles 2, 4, 5 and 12 of the Agreement on Safeguards; Article 4.2 of the Agreement on Agriculture; and Articles I and XIX of GATT 1994.

On 3 June 1999, the EC requested the establishment of a panel. At its meeting on 16 June 1999, the DSB deferred the establishment of a panel. Further to a second request to establish a panel, the DSB established a panel at its meeting on 26 July 1999. Australia, Canada and New Zealand reserved their third-party rights. On 11 October 1999, the Panel was composed. The report of the panel was circulated to Members on 31 July 2000. The panel found that:

(i) the United States had not acted inconsistently with Articles 2.1 and 4 of the Safeguards Agreement or with Article XIX:1(a) of the GATT 1994 in

- **redacting certain confidential information from the published USITC Report or**
- **determining the existence of imports in "increased quantities" and serious injury.**
- **(ii) the definitive safeguard measure imposed by the US on certain imports of wheat gluten based on the US investigation and determination was inconsistent with Articles 2.1 and 4 of the Safeguards Agreement in that**
- **the causation analysis applied by the USITC did not ensure that injury caused by other factors was not attributed to imports and**
- **imports from Canada (a NAFTA partner) were excluded from the application of the measure after imports from all sources were included in the investigation for the purposes of determining serious injury caused by increased imports (following a separate inquiry concerning whether imports from Canada accounted for a "substantial share" of total imports and whether they "contributed importantly" to the "serious injury" caused by total imports).**

(ii) The panel further concluded that the US failed to notify immediately the initiation of the investigation under Article 12.1(a) and the finding of serious injury under Article 12.1(b) of the Safeguards Agreement.

(iii) in notifying its decision to take the measure only after the measure was implemented, the US did not make timely notification under Article 12.1(c). For the same reason, the US violated the obligation of Article 12.3 to provide adequate opportunity for prior consultations on the measure.

(iv) the US therefore also violated its obligation under Article 8.1 of the Safeguards Agreement to endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under the GATT 1994 between it and the exporting Members which would be affected by such measures, in accordance with Article 12.3 of the Safeguards Agreement.

On 26 September 2000, the US notified its decision to appeal to the Appellate Body certain issues of law and legal interpretation covered in the Panel Report and certain legal interpretations developed by the Panel. The Appellate Body circulated its report on 22 December 2000. The Appellate Body:

- **upheld the Panel's conclusion that the US had not acted inconsistently with its obligations under Articles 4.2(a) and 4.2(b) of the Safeguards Agreement, but, in so doing, reversed the Panel's interpretation of Article 4.2(a) of the Safeguards Agreement that the competent authorities are required to evaluate only the "relevant factors" listed in Article 4.2(a) of that Agreement as well as any other "factors" which were clearly raised before the competent authorities as relevant by the interested parties in the domestic investigation;**
- **reversed the Panel's interpretation of Article 4.2(b) of the Safeguards Agreement that increased imports "alone", "in and of themselves", or "per se", must be capable of causing "serious injury", as well as the Panel's conclusions on the issue of causation;**
- **found, nonetheless, that the US had acted inconsistently with its obligations under Article 4.2(b) of the Safeguards Agreement;**
- **upheld the Panel's finding that the US had acted inconsistently with its obligations under Articles 2.1 and 4.2 of the Safeguards Agreement;**
- **upheld the Panel's findings that the US had acted inconsistently with its obligations under Articles 12.1(a) and 12.1(b) of the Safeguards Agreement;**
- **reversed the Panel's finding that the US had acted inconsistently with its obligations under Article 12.1(c) of the Safeguards Agreement; found that the US had acted consistently with its obligations under Article 12.1(c) of that Agreement to notify "immediately" its decision to apply a safeguard measure;**
- **upheld the Panel's finding that the US had acted inconsistently with its obligations under Article 12.3 of the Safeguards Agreement, and, in consequence, upheld the Panel's finding that the US had acted inconsistently with its obligations under Article 8.1 of the Safeguards Agreement;**
- **the Panel did not act inconsistently with Article 11 of the DSU in concluding that the USITC had "considered industry productivity as required by Article 4.2(a)" of the Safeguards Agreement;**
- **the Panel did not act inconsistently in finding that the USITC was not required to evaluate the overall relationship between the protein content of wheat and the price of wheat gluten as a "relevant factor", under Article 4.2(a) of the Safeguards Agreement, during the post-1994 period of investigation; and,**

- **the Panel did not act inconsistently in declining to draw "adverse" inferences from the refusal of the US to provide certain allegedly confidential information requested from it by the Panel under Article 13.1 of the DSU;**
- **the Panel acted inconsistently with Article 11 of the DSU in finding that "the USITC Report provides an adequate, reasoned and reasonable explanation with respect to 'profits and losses'" and, therefore, reversed this finding; and found no error in the Panel's exercise of judicial economy in not examining the claims of the EC under Article XIX:1(a) of the GATT 1994, and also under Article 5 of the Safeguards Agreement and Article I of the GATT 1994.**

At its meeting of 19 January 2001, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

WT/DS165 – United States – Import Measures on Certain Products from the European Communities.

Complaint by the European Communities. On 4 March 1999, the EC requested consultations with the US in respect of the US decision, effective as of 3 March 1999, to withhold liquidation on imports from the EC of a series of products together valued at over $500 million on an annual basis, and to impose a contingent liability for 100% duties on each individual importation of affected products. On 2 March 1999, the arbitrators charged with determining the level of suspension of concessions, requested by the United States in response to the failure by the EC to implement the recommendations of the DSB in respect of the EC's banana regime (WT/DS27), had asked for additional data from the parties and informed the parties that they were unable to issue their report within the 60-day period envisaged by the DSU. The EC contends that the measure made effective by the US as of 3 March 1999 deprives EC imports into the United States, of the products in question, of the right to a duty not in excess of the rate bound in the US Schedule. The EC further contended that, by requiring the deposit of a bond to cover the contingent liability for 100% duties, US Customs effectively impose 100% duties on each individual importation. The EC alleged violations of Articles 3, 21, 22 and 23 of the DSU, and Articles I, II, VIII and XI of GATT 1994. The EC also alleged nullification and impairment of benefits under GATT 1994, as well as the impediment of the objectives of the DSU and GATT 1994. The EC had requested urgent consultations pursuant to Article 4.8 of the DSU.

On 11 May 1999, the EC requested the establishment of a panel. At its meeting on 26 May 1999, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the EC, the DSB established a panel at its meeting on 16 June 1999. Dominica, Ecuador, India, Jamaica, Japan and St. Lucia reserved their third party rights. On 29 September 1999, the EC requested the Director-General to determine the composition of the Panel. On 8 October 1999, the Panel was composed. The report of the panel was circulated to Members on 17 July 2000. The panel found that:

- **the US measure of 3 March 1999 was seeking to redress a WTO violation and was thus covered by Article 23.1 of the DSU;**
- **by putting into place that measure prior to the time authorized by the DSB, the US made a unilateral determination that the revised EC bananas regime in respect of its bananas import, sales and distribution regime violated WTO rules, contrary to Articles 23.2(a) and 21.5, first sentence, of the DSU. In doing so, the United States did not abide by the DSU and thus also violated Article 23.1 together with Article 23.2(a) and 21.5 of the DSU;**
- **the increased bonding requirements of the measure of 3 March 1999 as such led to violations of Articles II:1(a) and II:1(b), first sentence (one panelist dissented, considering that those requirements rather violated Article XI:1 of the GATT 1994);**

- **the increased interest charges, costs and fees resulting from the 3 March Measure violated Article II:1(b), last sentence;**
- **the measure in question also violated Article I of the GATT 1994;**
- **in light of these conclusions, the measure of 3 March 1999 constituted a suspension of concessions or other obligations within the meaning of Articles 3.7, 22.6 and 23.2(c) of the DSU imposed without DSB authorization and during the ongoing Article 22.6 arbitration process; and**
- **in suspending concessions in those circumstances, the US did not abide by the DSU and thus violated Article 23.1 together with Articles 3.7, 22.6 and 23.2(c) of the DSU.**
- **On 12 September 2000, the EC notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The report of the Appellate Body was circulated on 11 December 2000.**
- **The Appellate Body:**

  - **concluded that the Panel erred by stating that the WTO-consistency of a measure taken by a Member to comply with recommendations and rulings of the DSB can be determined by arbitrators appointed under Article 22.6 of the DSU, and, thus, concluded that the Panel's statements on this issue have no legal effect.**
  - **concluded that the Panel erred by stating that "[o]nce a Member imposes DSB authorised suspensions of concessions or obligations, that Member's measure is WTO compatible (it was explicitly authorised by the DSB)", and, thus, concluded that this statement has no legal effect.**
  - **reversed the Panel's findings that the increased bonding requirements are inconsistent with Articles II:1(a) and II:2(b), first sentence, of the GATT 1994, and**
  - **reversed the Panel's finding that, by adopting the 3 March Measure, the US acted inconsistently with Article 23.2(a) of the DSU.**

As it upheld the Panel's finding that the 3 March Measure, the measure at issue in this dispute, is no longer in existence, the Appellate Body did not make any recommendation to the DSB pursuant to Article 19.1 of the DSU.

At its meeting of 10 January 2001, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

<u>WT/DS163 – Korea – Measures Affecting Government Procurement.</u>

Complaint by the United States. On 16 February 1999, the US requested consultations with Korea in respect of certain procurement practices of the Korean Airport Construction Authority (KOACA), and other entities concerned with the procurement of airport construction in Korea. The US claimed that such practices were inconsistent with Korea's obligations under the Agreement on Government Procurement (GPA). These include practices relating to qualification for bidding as a prime contractor, domestic partnering, and the absence of access to challenge procedures that are in breach of the GPA. The US contended that KOACA and the other entities are within the scope of Korea's list of central government entities as specified in Annex 1 of Korea's obligations in Appendix I of the GPA, and pursuant to Article I(1) of the GPA, apply to the procurement of airport construction.

On 11 May 1999, the US requested the establishment of a panel. At its meeting on 26 May 1999, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the US,

the DSB established a panel at its meeting on 16 June 1999. The EC and Japan reserved their third party rights. On 30 August 1999, the Panel was composed. The report of the panel was circulated to Members on 1 May 2000. The panel found that:

- **the entities conducting procurement for the project at issue were not covered entities under Korea's Appendix I of the GPA and were not otherwise covered by Korea's obligations under the GPA.**
- **based on less than complete Korean answers to certain US questions during negotiations for Korea's accession to the GPA, there had initially been an error on the part of the US as to which Korean authority was in charge of the project at issue. However, in light of all the facts the panel considered that there was notice of the error and the US should at least have conducted further inquiries in this regard before the negotiations were ended.**
- **the US had not demonstrated that benefits reasonably expected to accrue under the GPA, or in the negotiations resulting in Korea's accession to the GPA, were nullified or impaired by measures taken by Korea (whether or not in conflict with the provisions of the GPA), within the meaning of Article XXII:2 of the GPA.**

The DSB adopted the Panel Report at its meeting on 19 June 2000.

WT/DS162 – United States – Anti-Dumping Act of 1916.

Complaint by Japan. On 10 February 1999, Japan requested consultations with the US in respect of the US Anti-Dumping Act of 1916, 15 USC. 72 (1994), ("US 1916 Act"). Japan alleged that the US 1916 Act stipulates that the importation or sale of imported goods within the US market in certain circumstances is unlawful, constituting a criminal offence and inviting civil liability. Japan further alleged that judicial decisions under the US 1916 Act are made without the procedural safeguards provided for in the Anti-Dumping Agreement. Japan stated that a court action had been brought under the US 1916 Act against affiliates of Japanese companies. Japan contended that the US 1916 Act is inconsistent with Articles III, VI and XI of GATT 1994, and the Anti-Dumping Agreement.

On 3 June 1999, Japan requested the establishment of a panel. At its meeting on 16 June 1999, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Japan, the DSB established a panel at its meeting on 26 July 1999. The EC and India reserved their third-party rights. On 11 August 1999, the Panel was composed. The report of the panel was circulated to Members on 29 May 2000. The panel considered that Article VI:1 of GATT 1994 applies to any situation where a Member addresses the type of transnational price discrimination defined in that Article. The panel then found that, on the basis of the terms of the 1916 Act, its legislative history and its interpretation by US courts, the transnational price discrimination test found in the 1916 Act met the definition of Article VI:1 of GATT 1994. The panel next went on to find that:

- **by providing for the imposition of treble damages, fines or imprisonment, instead of anti-dumping duties, the 1916 Act violated Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement;**
- **by not providing for a number of procedural requirements found in Article VI:1 of the GATT 1994 and the Anti-Dumping Agreement, the 1916 Act violated Articles VI:1 of the GATT 1994 and Articles 1, 4.1, 5.1, 5.2, 5.4 and 18.1 of the Anti-Dumping Agreement; and**
- **by violating Articles VI:1 and VI:2 of the GATT 1994, and Articles 1, 4.1, 5.1, 5.2, 5.4 and 18.1 of the Anti-Dumping Agreement, the 1916 Act violated Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.**

On 29 May 2000, the US notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The Appellate Body examined this appeal with that of WT/DS136. The Appellate Body report was circulated to Members on 28 May 2000. The Appellate Body upheld all of the findings and conclusions of the panel that were appealed.

The DSB adopted the Appellate Body report and the Panel report, as upheld by the Appellate Body report, on 26 September 2000.

WT/DS161, WT/DS169 – Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef.

Complaints by the United States and Australia. On 1 February 1999, the US requested consultations with Korea in respect of a Korean regulatory scheme that allegedly discriminates against imported beef by inter alia, confining sales of imported beef to specialised stores (dual retail system), limiting the manner of its display, and otherwise constraining the opportunities for the sale of imported beef. The US alleged that Korea imposes a markup on sales of imported beef, limits import authority to certain so-called "super-groups" and the Livestock Producers Marketing Organization ("LPMO"), and provides domestic support to the cattle industry in Korea in amounts which cause Korea to exceed its aggregate measure of support as reflected in Korea's schedule. The US contended that these restrictions apply only to imported beef, thereby denying national treatment to beef imports, and that the support to the domestic industry amounts to domestic subsidies that contravene the Agreement on Agriculture. The US alleged violations of Articles II, III, XI, and XVII of GATT 1994; Articles 3, 4, 6, and 7 of the Agreement on Agriculture; and Articles 1 and 3 of the Import Licensing Agreement.

On 13 April 1999, Australia requested consultations with Korea on the same basis as the US request. On 15 April 1999, the US requested the establishment of a panel in respect of WT/DS161. At its meeting on 28 April 1999, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the US, the DSB established a panel at its meeting on 26 May 1999. Australia, Canada and New Zealand reserved their third-party rights. Further to Australia's request to establish a panel in respect of WT/DS169, the DSB established a panel at its meeting on 26 July 1999. Canada, New Zealand and the US reserved their third-party rights. At the request of Korea, the DSB agreed that, pursuant to DSU Article 9.1, this complaint would be examined by the same panel established in respect of WT/DS161. On 4 August 1999, the Panel was composed. The report of the panel was circulated to Members on 31 July 2000. The panel found that:

On 11 September 2000, Korea notified its intention to appeal certain issues of law and legal interpretations developed by the panel. On 11 December 2000, the report of the Appellate Body was circulated. The Appellate Body reversed the Panel's finding on recalculated amounts of Korea's domestic support for beef in 1997 and 1998, as the Panel used, for these recalculations, a methodology inconsistent with Article 1(a)(ii) and Annex 3 of the Agreement on Agriculture; and reversed, therefore, the Panel's following conclusions, based on these recalculated amounts:

- **that Korea's domestic support for beef in 1997 and 1998 exceeded the de minimis level contrary to Article 6 of the Agreement on Agriculture;**
- **that Korea's failure to include Current AMS for beef in Korea's Current Total AMS was contrary to Article 7.2(a) of that Agreement; and**
- **that Korea's total domestic support for 1997 and 1998 exceeded Korea's commitment levels contrary to Article 3.2 of the Agreement on Agriculture.**

The Appellate Body was unable, in view of the insufficient factual findings made by the Panel, to complete the legal analysis of:

- **whether Korea's domestic support for beef exceeds the de minimis level contrary to Article 6 of the Agreement on Agriculture;**
- **whether the failure to include Current AMS for beef in Korea's Current Total AMS was contrary to Article 7.2(a) of that Agreement; and**
- **whether Korea's total domestic support for 1997 and 1998 exceeded Korea's commitment levels contrary to Article 3.2 of the Agreement on Agriculture.**

At its meeting of 10 January 2001, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

WT/DS160 – United States – Section 110(5) of US Copyright Act.

Complaint by the European Communities and their member States. On 26 January 1999, the EC requested consultations with the US in respect of Section 110(5) of the US Copyright Act, as amended by the Fairness in Music Licensing Act, which was enacted on 27 October 1998. The EC contended that Section 110(5) of the US Copyright Act permits, under certain conditions, the playing of radio and television music in public places (bars, shops, restaurants, etc.) without the payment of a royalty fee. The EC considered that this statute is inconsistent with US obligations under Article 9(1) of the TRIPS Agreement, which requires Members to comply with Articles 1-21 of the Berne Convention. The dispute centered on the compatibility of two exemptions provided for in Section 110(5) of the US Copyright Act with Article 13 of the TRIPS Agreement, which allows certain limitations or exceptions to exclusive rights of copyright holders, subject to the condition that such limitations are confined to certain special cases, do not conflict with a normal exploitation of the work in question and do not unreasonably prejudice the legitimate interests of the right holder:

- **The so-called "business" exemption, provided for in sub-paragraph (B) of Section 110(5), essentially allows the amplification of music broadcasts, without an authorization and a payment of a fee, by food service and drinking establishments and by retail establishments, provided that their size does not exceed a certain square footage limit. It also allows such amplification of music broadcasts by establishments above this square footage limit, provided that certain equipment limitations are met.**
- **The so-called "homestyle" exemption, provided for in sub-paragraph (A) of Section 110(5), allows small restaurants and retail outlets to amplify music broadcasts without an authorization of the right holders and without the payment of a fee, provided that they use only homestyle equipment (i.e. equipment of a kind commonly used in private homes).**

On 15 April 1999, the EC requested the establishment of a panel. At its meeting on 28 April 1999, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the EC, the DSB established a panel at its meeting on 26 May 1999. Brazil, Australia, Canada, Japan and Switzerland reserved their third-party rights. On 27 July 1999, the EC made a request to the Director-in-Charge to determine the composition of the Panel. On 6 August 1999, the Panel was composed. The report of the panel was circulated to Members on 15 June 2000. The panel found that:

- **the "business" exemption provided for in sub-paragraph (B) of Section 110(5) of the US Copyright Act did not meet the requirements of Article 13 of the TRIPS Agreement and was thus inconsistent with Articles 11bis(1)(iii) and 11(1)(ii) of the Berne Convention (1971)**

as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement. The panel noted, inter alia, that a substantial majority of eating and drinking establishments and close to half of retail establishments were covered by the business exemption.

- **the "homestyle" exemption provided for in sub-paragraph (A) of Section 110(5) of the US Copyright Act met the requirements of Article 13 of the TRIPS Agreement and was thus consistent with Articles 11bis(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement. Here, the panel noted certain limits imposed on the beneficiaries of the exemption, permissible equipment and categories of works as well as the practice by US courts.**

The DSB adopted the Panel Report at its meeting on 27 July 2000.

WT/DS156 – Guatemala – Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico.

Complaint by Mexico. On 5 January 1999, Mexico requested consultations with Guatemala concerning definitive anti-dumping duties imposed by the authorities of Guatemala on imports of grey Portland cement from Mexico and the proceedings leading thereto. Mexico alleged that the definitive anti-dumping measure is inconsistent with Articles 1, 2, 3, 5, 6, 7, 12 and 18 of the Antidumping Agreement and its Annexes I and II, as well as with Article VI of GATT 1994. See also WT/DS60.

On 15 July 1999, Mexico requested the establishment of a panel. At its meeting on 26 July 1999, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Mexico, the DSB established a panel at its meeting on 22 September 1999. Ecuador, El Salvador, the EC, Honduras and the US reserved their third-party rights. On 12 October 1999, Mexico requested the Director-General to determine the composition of the panel. On 2 November 1999, the Panel was composed. The panel report was circulated on 24 October 2000. The panel concluded that Guatemala's initiation of an investigation, the conduct of the investigation and imposition of a definitive measure on imports of grey Portland cement from Mexico's Cruz Azul is inconsistent with the requirements in the AD Agreement in that:

- **Guatemala's determination that there was sufficient evidence of dumping and threat of injury to initiate an investigation, is inconsistent with Article 5.3 of the AD Agreement;**
- **Guatemala's determination that there was sufficient evidence of dumping and threat of injury to initiate an investigation and consequent failure to reject the application for anti-dumping duties by Cementos Progreso is inconsistent with Article 5.8 of the AD Agreement;**
- **Guatemala's failure to timely notify Mexico under Article 5.5 of the AD Agreement is inconsistent with that provision;**
- **Guatemala's failure to meet the requirements for a public notice of the initiation of an investigation is inconsistent with Article 12.1.1 of the AD Agreement;**
- **Guatemala's failure to timely provide the full text of the application to Mexico and Cruz Azul is inconsistent with Article 6.1.3 of the AD Agreement;**
- **Guatemala's failure to grant Mexico access to the file of the investigation is inconsistent with Articles 6.1.2 and 6.4 of the AD Agreement;**
- **Guatemala's failure to timely make Cementos Progreso's 19 December 1996 submission available to Cruz Azul until 8 January 1997 is inconsistent with Article 6.1.2 of the AD Agreement;**

- **Guatemala's failure to provide two copies of the file of the investigation as requested by Cruz Azul is inconsistent with Article 6.1.2 of the AD Agreement;**
- **Guatemala's extension of the period of investigation requested by Cementos Progreso without providing Cruz Azul with a full opportunity for the defence of its interest is inconsistent with Article 6.2 of the AD Agreement;**
- **Guatemala's failure to inform Mexico of the inclusion of non–governmental experts in the verification team is inconsistent with paragraph 2 of Annex I of the AD Agreement;**
- **Guatemala's failure to require Cementos Progreso's to provide a statement of the reasons why summarization of the information submitted during verification was not possible is inconsistent with Article 6.5.1 of the AD Agreement;**
- **Guatemala's decision to grant Cementos Progreso's 19 December submission confidential treatment on its own initiative is inconsistent with Article 6.5 of the AD Agreement;**
- **Guatemala's failure to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures" is inconsistent with Article 6.9 of the AD Agreement;**
- **Guatemala's recourse to "best information available" for the purpose of making its final dumping determination is inconsistent with Article 6.8 of the AD Agreement;**
- **Guatemala's failure to take into account imports by MATINSA in its determination of injury and causality is inconsistent with Articles 3.1, 3.2 and 3.5 of the AD Agreement; and**
- **Guatemala's failure to evaluate all relevant factors for the examination of the impact of the allegedly dumped imports on the domestic industry is inconsistent with Article 3.4.**

The DSB adopted the Panel Report on 17 November 2000.

WT/DS155 – Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather.

Complaint by the European Communities. On 24 December 1998, the EC requested consultations with Argentina concerning certain measures taken by Argentina on the export of bovine hides and the import of finished leather. The EC alleged that the de facto export prohibition on raw and semi-tanned bovine hides (which is implemented in part through the authorization granted by the Argentinian authorities to the Argentinian tanning industry to participate in customs control procedures of hides before export) is in violation of GATT Articles; XI:1 (which outlaws de jure export prohibitions and measures of equivalent effect); and X:3(a) (which requires uniform and impartial administration of laws and regulations) to the extent that personnel of the Argentinian Chamber for the tanning industry are authorized to assist Argentinian customs authorities. The EC also claimed that the "additional value added tax" of 9 per cent on imports of products into Argentina and the "advance turnover tax" of 3 per cent based on the price of imported goods imposed on operators when importing goods into Argentina are in violation of GATT Article III:2 (which prohibits tax discrimination of foreign products which are like, directly competitive or substitutable to domestic products).

On 31 May 1999, the EC requested the establishment of a panel. At its meeting on 16 June 1999, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the EC, the DSB established a panel at its meeting on 26 July 1999. On 31 January 2000, the Panel was composed. The Panel circulated its report on 19 December 2000. The Panel concluded that:

- **it has not been proved that Resolution (ANA) No. 2235/96 is inconsistent with Argentina's obligations under Article XI:1 of the GATT 1994;**

- **Resolution (ANA) No. 2235/96 is inconsistent with Argentina's obligations under Article X:3(a) of the GATT 1994;**
- **General Resolution (DGI) No. 3431/91 is inconsistent with Article III:2, first sentence, of the GATT 1994;**
- **General Resolution (DGI) No. 3543/92 is inconsistent with Article III:2, first sentence, of the GATT 1994;**
- **General Resolutions (DGI) No. 3431/91 and 3543/92, although they fall within the terms of paragraph (d) of Article XX of the GATT 1994, fail to meet the requirements of the chapeau of Article XX and are therefore not justified under Article XX as a whole;**
- **there is nullification or impairment of the benefits accruing to the European Communities under the GATT 1994.**

The DSB adopted the Panel Report on 16 February 2001.

WT/DS152 – United States – Sections 301 – 310 of the Trade Act 1974.

Complaint by the European Communities. On 25 November 1998, the EC requested consultations with the US in respect of Title III, chapter 1 (sections 301-310) of the US Trade Act of 1974 (the Trade Act), as amended, and in particular sections 306 and 305 of this Act. The EC alleged that:

- **by imposing strict time limits within which unilateral determinations must be made and trade sanctions taken, sections 306 and 305 of the Trade Act do not allow the US to comply with the rules of the DSU in situations where a prior multilateral ruling under the DSU on conformity of measures taken pursuant to implementation of DSB recommendations has not been adopted by the DSB.**
- **the DSU procedure resulting in a multilateral finding, even if initiated immediately after the end of the reasonable period of time for implementation, cannot be finalised, nor can subsequent DSU procedure for seeking compensation or suspension of concessions be complied with, within the time limits of sections 306 and 305.**
- **Title III, chapter 1(sections 301-310) of the Trade Act, as amended, and in particular sections 306 and 305 of the Act, are inconsistent with Articles 3, 21, 22 and 23 of the DSU; Article XVI:4 of the WTO Agreement; and Articles I, II, III, VIII and XI of GATT 1994.**
- **the Trade Act nullifies and impairs benefits accruing, directly or indirectly, to it under GATT 1994, and also impedes the objectives of GATT 1994 and of the WTO.**

On 26 January 1999, the EC requested the establishment of a panel. At its meeting on 17 February 1999, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the EC, the DSB established a panel at its meeting on 2 March 1999. Brazil, Canada, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, Hong Kong, India, Israel, Jamaica, Japan, Korea, St. Lucia and Thailand reserved their third-party rights. On 24 March 1999, the EC requested the Director-General to determine the composition of the Panel. On 31 March 1999, the Panel was composed. The report of the panel was circulated to Members on 22 December 1999. The Panel found that Sections 304(a)(2)(A), 305(a) and 306(b) of the US Trade Act of 1974 were not inconsistent with Article 23.2(a) or (c) of the DSU or with any of the GATT 1994 provisions cited. The panel noted that its findings were based in full or in part on US undertakings articulated in the Statement of Administrative Action approved by the US Congress at the time it implemented the Uruguay Round agreements and confirmed in the statements by the US to the panel. The panel stated therefore that should those undertakings be repudiated or in any other way removed, its findings of

conformity would no longer be warranted. The DSB adopted the panel report at its meeting on 27 January 2000.

WT/DS146, WT/DS175 – India – Measures Affecting the Automotive Sector.

Complaint by the European Communities (WT/DS146). On 6 October 1998, the EC requested consultations with India concerning certain measures affecting the automotive sector being applied by India. The EC stated that the measures include the documents entitled "Export and Import Policy, 1997-2002", "ITC (HS Classification) Export and Import Policy 1997-2002" ("Classification"), and "Public Notice No. 60 (PN/97-02) of 12 December 1997, Export and Import Policy April 1997-March 2002", and any other legislative or administrative provision implemented or consolidated by these policies, as well as MoUs signed by the Indian Government with certain manufacturers of automobiles. The EC contended that:

- **under these measures, imports of complete automobiles and of certain parts and components were subject to a system of non-automatic import licenses.**
- **in accordance with Public Notice No. 60, import licenses might be granted only to local joint venture manufacturers that had signed an MoU with the Indian Government, whereby they undertook, inter alia, to comply with certain local content and export balancing requirements.**
- **The EC alleged violations of Articles III and XI of GATT 1994, and Article 2 of the TRIMs Agreement.**

On 1 May 1999, the United States requested consultations (WT/DS175) with India in respect of certain Indian measures affecting trade and investment in the motor vehicle sector. The United States contended that the measures in question required manufacturing firms in the motor vehicle sector to:

- **achieve specified levels of local content; (ii) achieve a neutralization of foreign exchange by balancing the value of certain imports with the value of exports of cars and components over a stated period; and (iii) limit imports to a value based on the previous year's exports.**

According to the United States, these measures were enforceable under Indian law and rulings, and manufacturing firms in the motor vehicle sector must comply with these requirements in order to obtain Indian import licenses for certain motor vehicle parts and components. The United States considered that these measures violate the obligations of India under Articles III and XI of GATT 1994, and Article 2 of the TRIMS Agreement.

On 15 May 2000, the US requested the establishment of a panel. At its meeting on 19 June 2000, the DSB deferred the establishment of a Panel. Further to a second request to establish a panel by the US, the DSB established a panel at its meeting on 27 July 2000. The EC, Japan and Korea reserved their third-party rights.

On 12 October 2000, the EC also requested the establishment of a panel. At its meeting on 23 October 2000, the DSB deferred the establishment of a Panel. Further to a second request by the EC, the DSB established a panel at its meeting of 17 November 2000. Since a panel had already been established with a similar mandate in the framework of the abovementioned case WT/DS175 , the DSB decided to join the panel with the already established panel in that case pursuant to Article 9.1 of the DSU. Japan reserved its third-party rights. On 14 November 2000, the US requested the Director-General to determine the composition of the Panel. On 24 November 2000, the Panel was composed.

On 21 December 2001, the Panel circulated its report to the Members. The Panel concluded that:

India had acted inconsistently with its obligations under Article III:4 of the GATT 1994 by imposing on automotive manufacturers an obligation to use a certain proportion of local parts and components in the manufacture of cars and automotive vehicles ("indigenization" condition);

- **India had acted inconsistently with its obligations under Article XI of the GATT 1994 by imposing on automotive manufacturers an obligation to balance any importation of certain kits and components with exports of equivalent value ("trade balancing" condition); and,**
- **India had acted inconsistently with its obligations under Article III:4 of the GATT 1994 by imposing, in the context of the trade balancing condition, an obligation to offset the amount of any purchases of previously imported restricted kits and components on the Indian market, by exports of equivalent value.**

The Panel recommended that the DSB requests India to bring its measures into conformity with its obligations under the WTO Agreements.

On 31 January 2002, India appealed the above Panel Report. In particular, India sought review of the following Panel's conclusion on the grounds that they are in error and based upon erroneous findings on issues of law and related legal instruments:

- **Articles 11 and 19.1 of the DSU required it to address the question of whether the measures found to be inconsistent with Articles III:4 and XI:1 of the GATT had been brought into conformity with the GATT as a result of measures taken by India during the course of the proceedings, and**
- **the enforcement of the export obligations that automobile manufacturers incurred until 1 April 2001 under India's former import licensing scheme is inconsistent with Articles III:4 and XI:1 of the GATT.**

On 14 March 2002, India withdrew its appeal. Further to India's withdrawal of its appeal, the Appellate Body issued a short Report outlining the procedural history of the case. At the DSB meeting on 5 April 2002, the US commended India's decision to withdraw its appeal and shared some of India's reservations with regard to Section VIII of the Panel Report. The EC considered that the Panel's findings were justified. Despite its decision to withdraw its appeal as a result of the introduction of its new auto policy, India indicated that the findings contained in Section VIII were outside of the Panel's terms of reference and were both factually and legally incorrect. India requested that the DSB adopt only a part of the Panel Report and consider the adoption of Section VIII only at its next meeting. The EC responded that the Reports should be adopted unconditionally by the parties, thus there was no justification for India's request. The DSB proceeded with the adoption in full of the Appellate Body and Panel reports.

<u>WT/DS141 – European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India.</u>

Complaint by India. On 3 August 1998, India requested consultations with the EC in respect of Council Regulation (EC) No 2398/97 of 28 November 1997 on imports of cotton-type bed-linen from India. India asserted that the EC initiated anti-dumping proceedings against imports of cotton- type bed-linen from India by publishing a notice of initiation in September 1996. Provisional anti-dumping duties were imposed by EC Council Regulation No 1069/97 of 12 June 1997. This was followed by the

imposition of definitive duties in accordance with the above-mentioned EC Council Regulation No 2398/97 of 28 November 1997. India contended that:

- **the determination of standing, the initiation, the determination of dumping and injury as well as the explanations of the EC authorities' findings are inconsistent with WTO law.**
- **the EC authorities' establishment of the facts was not proper and that the EC's evaluation of facts was not unbiased and objective.**
- **the EC has not taken into account the special situation of India as a developing country.**
- **there were violations of Articles 2.2.2, 3.1, 3.2, 3.4, 3.5, 5.2, 5.3, 5.4, 5.8, 6, 12.2.2, and 15 of the Anti-Dumping Agreement, and Articles I and VI of the GATT 1994.**

On 7 September 1999, India requested the establishment of a panel. At its meeting on 22 September 1999, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by India, the DSB established a panel at its meeting on 27 October 1999. Egypt, Japan and the US reserved their third-party rights. On 12 January 2000, India requested the Director-General to determine the composition of the Panel. On 24 January 2000, the Panel was composed. The panel report was circulated on 30 October 2000. The panel concluded that:

(i) the EC did not act inconsistently with its obligations under Articles 2.2, 2.2.2, 3.1, 3.4, 3.5, 5.3, 5.4, and 12.2.2 of the AD Agreement in:

- **calculating the amount for profit in constructing normal value;**
- **considering all imports from India (and Egypt and Pakistan) as dumped in the analysis of injury caused by dumped imports;**
- **considering information for producers comprising the domestic industry but not among the sampled producers in analyzing the state of the industry;**
- **examining the accuracy and adequacy of the evidence prior to initiation;**
- **establishing industry support for the application; and**
- **providing public notice of its final determination.**
- **(ii) The panel, however, also concluded that the EC acted inconsistently with its obligations under Articles 2.4.2, 3.4, and 15 of the AD Agreement in:**
- **determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing;**
- **failing to evaluate all relevant factors having a bearing on the state of the domestic industry, and specifically all the factors set forth in Article 3.4;**
- **considering information for producers not part of the domestic industry as defined by the investigating authority in analyzing the state of the industry; and**
- **failing to explore possibilities of constructive remedies before applying anti-dumping duties.**

On 1 December 2000, the EC notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel. The Appellate Body circulated its report on 1 March 2001. The Appellate Body:

- **upheld the finding of the Panel that the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the EC in the anti-dumping investigation at issue in this dispute, is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement;**
- **reversed the findings of the Panel that:**
  - **the method for calculating amounts for administrative, selling and general costs and profits provided for in Article 2.2.2(ii) of the Anti-Dumping Agreement may be applied**

where there is data on administrative, selling and general costs and profits for only one other exporter or producer; and

- **in calculating the amount for profits under Article 2.2.2(ii) of the Anti-Dumping Agreement, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade; and**
- **as a consequence, concluded that the EC, in calculating amounts for administrative, selling and general costs and profits in the anti-dumping investigation at issue in this dispute, acted inconsistently with Article 2.2.2(ii) of the Anti-Dumping Agreement.**

The DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report, on 12 March 2001.

WT/DS139, WT/DS142 – Canada – Certain Measures Affecting the Automotive Industry.

Complaints by Japan and the European Communities. On 3 July 1998, Japan requested consultations with Canada in respect of measures being taken by Canada in the automotive industry. Japan contended that under Canadian legislation implementing an automotive products agreement (Auto Pact) between the US and Canada, only a limited number of motor vehicle manufacturers are eligible to import vehicles into Canada duty free and to distribute the motor vehicles in Canada at the wholesale and retail distribution levels. Japan further contended that this duty-free treatment is contingent on two requirements:

- **a Canadian value-added (CVA) content requirement that applies to both goods and services; and**
- **a manufacturing and sales requirement. Japan alleges that these measures are inconsistent with Articles I:1, III:4 and XXIV of GATT 1994, Article 2 of the TRIMs Agreement, Article 3 of the SCM Agreement, and Articles II, VI and XVII of GATS.**
- **On 17 August 1998, the EC requested consultations with Canada in respect of the same measures raised by Japan in WT/DS139 and cites the same provisions alleged to be in violation, except for Article XXIV of GATT 1994, which was cited by Japan but is not cited by the EC.**

On 12 November 1998, Japan requested the establishment of a panel in respect of WT/DS139. At is meeting on 25 November 1998, the DSB deferred the establishment of a panel. Further to requests to establish a panel by Japan and the EC, at its meeting on 1 February 1999, the DSB established a single panel, pursuant to Article 9.1 of the DSU, to examine the complaints WT/DS139 and WT/DS142. India, Korea, and the US reserved their third-party rights. On 15 March 1999, the EC and Japan requested the Director-General to determine the composition of the Panel. On 25 March 1999, the Panel was composed. The report of the panel was circulated to Members on 11 February 2000. The panel found that:

- **the conditions under which Canada granted its import duty exemption were inconsistent with Article I of GATT 1994 and not justified under Article XXIV of GATT 1994.**
- **the application of the CVA requirements to be inconsistent with Article III:4 of GATT 1994.**
- **the import duty exemption constitutes a prohibited export subsidy in violation of Article 3.1(a) of the SCM Agreement.**
- **the manner in which Canada conditioned access to the import duty exemption is inconsistent with Article II of GATS and could not justified under Article V of GATS.**
- **the application of the CVA requirements constitutes a violation of Article XVII of the GATS.**

On 2 March 2000, Canada notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The Appellate Body report was circulated to Members on 31 May 2000. The Appellate Body:

- **reversed the panel's conclusion that Article 3.1(b) of the Subsidies Agreement did not extend to contingency "in fact".**
- **considered that the panel had failed to examine whether the measure at issue affected trade in services as required under Article I:1 of the GATS.**
- **reversed the panel's conclusion that the import duty exemption was inconsistent with the requirements of Article II:1 of the GATS as well as the panel's findings leading to that conclusion.**

The DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report, on 19 June 2000.

WT/DS138 – United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom.

Complaint by the European Communities. On 30 June 1998, the EC requested consultations with the US in respect of the alleged imposition of countervailing duties on certain hot-rolled lead and bismuth carbon steel (leaded bars) from the UK. The EC asserted that the US imposed countervailing duties of 1.69 per cent on United Engineering Steels Ltd (UES) for the review period 1 January 1994 to 31 December 1994, and of 2.4 per cent for the review period 1 January 1995 to 20 March 1995, on the basis of subsidies which had been granted to British Steel Corporation (BSC). The EC also contended that the US imposed countervailing duties on British Steel plc (BSplc) / British Steel Engineering Steels LTD (BSES) for the review period 1 January 1996 to 31 December 1996 on the basis of subsidies granted to BSC before its privatization in 1988. The EC alleged that these impositions of countervailing duties constitute a violation of Articles 1.1(b), 10, 14 and 19.4 of the Subsidies Agreement.

On 14 January 1999, the EC requested the establishment of a panel. At its meeting on 1 February 1999, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the EC, the DSB established a panel at its meeting on 17 February 1999. Brazil and Mexico reserved their third-party rights. On 16 March 1999, the Panel was composed. The report of the panel was circulated to Members on 23 December 1999. The panel found that by imposing countervailing duties on 1994, 1995 and 1996 imports of leaded bars produced by UES and BSES respectively, the US violated Article 10 of the Subsidies Agreement. In reaching this conclusion, the panel noted that the presumption of "benefit" flowing from untied, non-recurring "financial contributions" even after changes in ownership was rebutted in the circumstances surrounding the changes in ownership leading to the creation of UES and BSplc/BSES respectively, inter alia, because the change in ownership involved the payment of consideration for the productive assets etc. acquired by those entities from BSC. According to the panel, the US should therefore have examined whether the production of leaded bars by UES and BSplc/BSES respectively, and not BSC, was subsidised.

On 27 January 2000, the US notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The report of the Appellate Body was circulated to Members on 10 May 2000. The Appellate Body upheld all of the findings of the panel that were appealed but on one point corrected the reasoning of the panel.

The DSB adopted the Appellate Body report and the panel report, as upheld by the Appellate Body report, on 7 June 2000.

WT/DS136 – United States – Anti-Dumping Act of 1916.

Complaint by the European Communities. On 9 June 1998, the EC requested consultations with the US in respect of the alleged failure of the US to repeal its Anti-Dumping Act of 1916. The EC contended that the US Anti-Dumping Act of 1916 is still in force and is applicable to the import and internal sale of any foreign product irrespective of its origin, including products originating in countries which are WTO Members. The EC also alleged that the 1916 Act exists in the US statute books in parallel with the Tariff Act of 1930, as amended, which includes the US implementing legislation of multilateral Anti-Dumping provisions. The EC alleged violations of Articles III:4, VI:1, and VI:2 of GATT 1994, Article XVI:4 of the WTO Agreement, and Articles 1, 2, 3, 4 and 5 of the Anti-Dumping Agreement.

On 1 November 1998, the EC requested the establishment of a panel. At its meeting on 25 November 1998, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the EC, the DSB established a panel at its meeting on 1 February 1999. India, Japan and Mexico reserved their third-party rights. On 1 April 1999, the Panel was composed. The report of the panel was circulated to Members on 31 March 2000. The panel considered that:

- **Article VI:1 of GATT 1994 applies to any situation where a Member addresses the type of transnational price discrimination defined in that Article.**
- **on the basis of the terms of the 1916 Act, its legislative history and its interpretation by US courts, the transnational price discrimination test found in the 1916 Act met the definition of Article VI:1 of GATT 1994.**
- **by not providing exclusively for the injury test set out in Article VI, the 1916 Act violated Article VI:1 of the GATT 1994;**
- **by providing for the imposition of treble damages, fines or imprisonment, instead of anti-dumping duties, the 1916 Act violated Article VI:2 of the GATT 1994;**
- **by not providing for a number of procedural requirements found in the Anti-Dumping Agreement, the 1916 Act violated Articles 1, 4 and 5.5 of the Anti-Dumping Agreement; and**
- **by violating Articles VI:1 and VI:2 of the GATT 1994, the 1916 Act violated Article XVI:4 of the WTO Agreement.**

On 29 May 2000, the US notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The Appellate Body examined this appeal with that of WT/DS162. The Appellate Body report was circulated to Members on 28 May 2000. The Appellate Body upheld all of the findings and conclusions of the panel that were appealed.

The DSB adopted the Appellate Body report and the Panel report, as upheld by the Appellate Body report, on 26 September 2000.

WT/DS135 – European Communities – Measures Affecting Asbestos and Products Containing Asbestos.

Complaint by Canada. On 28 May 1998, Canada requested consultations with the EC in respect of measures imposed by France, in particular Decree of 24 December 1996, with respect to the

prohibition of asbestos and products containing asbestos, including a ban on imports of such goods. Canada alleged that these measures violate Articles 2, 3 and 5 of the SPS Agreement, Article 2 of the TBT Agreement, and Articles III, XI and XIII of GATT 1994. Canada also alleged nullification and impairment of benefits accruing to it under the various agreements cited.

On 8 October 1998, Canada requested the establishment of a panel. At its meetings on 21 October 1998, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Canada, the DSB established a panel at its meeting on 25 November 1998. The US reserved its third-party rights. The report of the panel was circulated to Members on 18 September 2000. The Panel found that:

- **the "prohibition" part of the Decree of 24 December 1996 does not fall within the scope of the TBT Agreement;**
- **the part of the Decree relating to "exceptions" does fall within the scope of the TBT Agreement. However, as Canada had not made any claim concerning the compatibility with the TBT Agreement of the part of the Decree relating to exceptions, the Panel refrained from reaching any conclusion with regard to the latter;**
- **chrysotile asbestos fibres as such and fibres that can be substituted for them as such are like products within the meaning of Article III:4 of the GATT 1994;**
- **the asbestos-cement products and the fibro-cement products for which sufficient information had been submitted to the Panel are like products within the meaning of Article III:4 of the GATT 1994;**
- **with respect to the products found to be like, the Decree violates Article III:4 of the GATT 1994;**
- **insofar as it introduces a treatment of these products that is discriminatory under Article III:4, the Decree is justified as such and in its implementation by the provisions of paragraph (b) and the introductory clause of Article XX of the GATT 1994;**
- **Canada has not established that it suffered non-violation nullification or impairment of a benefit within the meaning of Article XXIII:1(b) of the GATT 1994.**

On 23 October 2000, Canada notified the Dispute Settlement Body of its decision to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel. The Appellate Body circulated its report on 12 March 2001. The Appellate Body:

- **ruled that the French Decree, prohibiting asbestos and asbestos-containing products had not been shown to be inconsistent with the European Communities' obligations under the WTO agreements;**
- **reversed the Panel's finding that the TBT Agreement does not apply to the prohibitions in the measure concerning asbestos and asbestos-containing products and found that the TBT Agreement applies to the measure viewed as an integrated whole. The Appellate Body concluded that it was unable to examine Canada's claims that the measure was inconsistent with the TBT Agreement;**
- **reversed the Panel's findings with respect to "like products", under Article III:4 of the GATT 1994. The Appellate Body ruled, in particular, that the Panel erred in excluding the health risks associated with asbestos from its examination of "likeness".**
- **reversed the Panel's conclusion that the measure is inconsistent with Article III:4 of the GATT 1994. The Appellate Body itself examined Canada's claims under Article III:4 of the**

GATT 1994 and ruled that Canada has not satisfied its burden of proving the existence of "like products" under that provision; and

- **upheld the Panel's conclusion, under Article XX(b) of the GATT 1994, that the French Decree is "necessary to protect human … life or health".**

In this appeal, the Appellate Body adopted an additional procedure "for the purposes of this appeal only" to deal with amicus curiae submissions. The Appellate Body received, and refused, 17 applications to file such a submission. The Appellate Body also refused to accept 14 unsolicited submissions from non-governmental organizations that were not submitted under the additional procedure.

At its meeting of 5 April 2001, the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report.

WT/DS132 – Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States.

Complaint by the United States. On 8 May 1998, the US requested consultations with Mexico in respect of an anti-dumping investigation of high-fructose corn syrup (HFCS) grades 42 and 55 from the US, conducted by Mexico. The US alleged that on 27 February 1997, the Government of Mexico published a notice initiating this anti-dumping investigation on the basis of an application dated 14 January 1997 from the Mexican National Chamber of Sugar and Alcohol Producers. The US further alleged that on 23 January 1998, Mexico issued a notice of final determination of dumping and injury in that investigation, and consequently imposed definitive anti-dumping measures on these imports from the United States. The US contended that the manner in which the application for an anti-dumping investigation was made, as well as the manner in which a determination of threat of injury was made, is inconsistent with Articles 2, 3, 4, 5, 6, 7, 9, 10 and 12 of the Anti-Dumping Agreement.

On 8 October 1998, the US requested the establishment of a panel. At its meeting on 21 October 1998, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the US, the DSB established a panel at its meeting on 25 November 1998. Jamaica and Mauritius reserved their third-party rights. On 13 January 1999, the Panel was composed. The report of the panel was circulated to Members on 28 January 2000. The Panel found that:

- **Mexico's initiation of the anti-dumping investigation on imports of HFCS from the US was consistent with the requirements of Articles 5.2, 5.3, 5.8, 12.1 and 12.1.1(iv) of the Anti Dumping Agreement.**
- **Mexico's imposition of the definitive anti-dumping measure on imports of HFCS from the US was inconsistent with the following provisions of the Anti-Dumping Agreement: Articles 3.1, 3.2, 3.4, 3.7 and 3.7(i); Article 7.4; Article 10.2; Article 10.4; and Articles 12.2 and 12.2.2.**

The DSB adopted the panel report at its meeting on 24 February 2000.

WT/DS126 – Australia – Subsidies Provided to Producers and Exporters of Automotive Leather.

Complaint by the United States. On 4 May 1998, the US requested consultations with Australia in respect of prohibited subsidies allegedly provided to Australian producers and exporters of automotive leather, including subsidies provided to Howe and Company Proprietary Ltd. (or any of its affiliated and/or parent companies), which allegedly involve preferential government loans of

about A$25 million and non-commercial terms and grants of about A$30 million. The US contended that these measures violate the obligations of Australia under Article 3 of the Subsidies Agreement.

Further to the US's request, the DSB established a panel at its meeting on 22 June 1998 (see also WT/DS106). On 27 October 1998, the US requested the Director-General to determine the composition of the Panel. On 2 November 1998, the Panel was composed. The report of the Panel was circulated to Members on 25 May 1999. The Panel found that the loan from the Australian Government to Howe/ALH is not a subsidy contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement, but that the payments under the grant contract are subsidies within the meaning of Article 1 of the SCM Agreement, which are contingent upon export performance within the meaning of Article 3.1(a) of that Agreement. At its meeting on 16 June 1999, the DSB adopted the Panel report.

WT/DS122 – Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland.

Complaint by Poland. On 6 April 1998, Poland requested consultations with Thailand concerning the imposition of final anti-dumping duties on imports of angles, shapes and sections of iron or non alloy steel and H-beams. Poland asserted that provisional anti dumping duties were imposed by Thailand on 27 December 1996, and a final anti dumping duty of 27.78% of CIF value for these products, produced or exported by any Polish producer or exporter, was imposed on 26 May 1997. Poland further asserted that Thailand refused two requests by Poland for disclosure of findings. Poland contended that these actions by Thailand violate Articles 2, 3, 5 and 6 of the Anti-Dumping Agreement.

On 13 October 1999, Poland requested the establishment of a panel. At its meeting on 27 October 1999, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Poland, the DSB established a panel at its meeting on 19 November 1999. The EC, Japan and the US reserved their third-party rights. On 20 December 1999, the Panel was composed. The report was circulated to Members on 28 September 2000. The Panel concluded that:

(i) Poland failed to establish that Thailand had acted inconsistently with its obligations under Article 2 of the Anti-Dumping Agreement or Article VI of the GATT 1994 in the calculation of the amount for profit in constructing normal value.

(ii) Thailand's imposition of the definitive anti-dumping measure on imports of H-beams from Poland was inconsistent with the requirements of Article 3 of the Anti-Dumping Agreement in that:

- **inconsistently with the second sentence of Article 3.2 and Article 3.1, the Thai authorities did not consider, on the basis of an "objective examination" of "positive evidence" in the disclosed factual basis, the price effects of dumped imports;**
- **inconsistently with Articles 3.4 and 3.1, the Thai investigating authorities failed to consider certain factors listed in Article 3.4, and failed to provide an adequate explanation of how the determination of injury could be reached on the basis of an "unbiased or objective evaluation" or an "objective examination" of "positive evidence" in the disclosed factual basis; and**
- **inconsistently with Articles 3.5 and 3.1, the Thai authorities made a determination of a causal relationship between dumped imports and any possible injury on the basis of (a) their findings concerning the price effects of dumped imports, which the Panel had already found**

to be inconsistent with the second sentence of Article 3.2 and Article 3.1; and (b) their findings concerning injury, which the Panel had already found to be inconsistent with Article 3.4 and 3.1.

(iii) under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement, and that, accordingly, to the extent Thailand has acted inconsistently with the provisions of the AD Agreement, it has nullified or impaired benefits accruing to Poland under that Agreement.

On 23 October 2000, Thailand notified the DSB of its decision to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel. The Appellate Body circulated its report on 12 March 2001. The Appellate Body:

- **upheld the Panel's conclusion that with respect to the claims under Articles 2, 3 and 5 of the AD Agreement, the request for the establishment of a panel submitted by Poland in this case was sufficient to meet the requirements of Article 6.2 of the DSU;**
- **reversed the finding of the Panel that the AD Agreement requires a panel reviewing the imposition of an anti-dumping duty to consider only the facts, evidence and reasoning that were disclosed to, or discernible by, Polish firms at the time of the final determination of dumping. The Appellate Body was of the view that there was no basis for the Panel's reasoning, either in Article 3.1 of the AD Agreement, which lays down the obligations of Members with respect to the determination of injury, or in Article 17.6 of the AD Agreement, which sets out the standard of review for panels.**
- **Although having reversed the reasoning of the Panel on this issue, it left undisturbed the Panel's main findings of violation;**
- **upheld the Panel's conclusion under Article 3.4 of the AD Agreement. The Appellate Body agreed with the Panel that Article 3.4 requires a mandatory evaluation of all the factors listed in that provision,**
- **concluded that the Panel did not err in its application of the burden of proof, or in the application of the standard of review under Article 17.6(i) of the AD Agreement.**

At its meeting of 5 April 2001,the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report.

<u>WT/DS121 – Argentina – Safeguard Measures on Imports of Footwear.</u>

Complaint by the European Communities. On 3 April 1998, the EC requested consultations with Argentina in respect of provisional and definitive safeguard measures imposed by Argentina on imports of footwear. The EC asserted that by Resolution 226/97 of 24 February 1997, Argentina imposed a provisional safeguard measure in the form of specific duties on imports of footwear effective from 25 February 1997, which was followed by Resolution 987/97, which imposed a definitive safeguard measure on these imports effective from 13 September 1997. The EC alleged that the above measures violate Articles 2, 4, 5, 6 and 12 of the Agreement on Safeguards, and Article XIX of GATT 1994.

On 10 June 1998, the EC requested the establishment of a panel. At its meeting on 22 June 1998, the DSB deferred the establishment of a panel. Further to a second request to establish a panel, the DSB established a panel at its meeting on 23 July 1998. Brazil, Indonesia, Paraguay, the US and Uruguay

reserved their third-parties rights. On 15 September 1998, the Panel was composed. The report of the panel was circulated on 25 June 1999. The panel found that Argentina's measure is inconsistent with Articles 2 and 4 of the Agreement on Safeguards.

On 15 September 1999, Argentina notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 14 December 1999. The Appellate Body upheld the panel's finding that Argentina's measure is inconsistent with Articles 2 and 4 of the Agreement on Safeguards, but reversed certain findings and conclusions of the panel in respect of the relationship between the Agreement on Safeguards and Article XIX of GATT 1994 and the justification of imposing safeguard measures only on non-MERCOSUR third country sources of supply.

The DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, on 12 January 2000.

WT/DS114 – Canada – Patent Protection of Pharmaceutical Products.

Complaint by the European Communities and their member States. On 19 December 1997, the EC requested consultations with Canada in respect of the alleged lack of protection of inventions by Canada in the area of pharmaceuticals under the relevant provisions of the Canadian implementing legislation, in particular the Patent Act. The EC alleged that Canada's legislation is not compatible with its obligations under the TRIPS Agreement, because it does not provide for the full protection of patented pharmaceutical inventions for the entire duration of the term of protection envisaged by Articles 27.1, 28 and 33 of the TRIPS Agreement.

On 11 November 1998, the EC requested the establishment of a panel. At its meeting on 25 November 1998, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the EC, the DSB established a panel at its meeting on 1 February 1999. Australia, Brazil, Colombia, Cuba, India, Israel, Japan, Poland, Switzerland, Thailand and the United States reserved their third-party rights. On 15 March 1999, the EC and their member States requested the Director-General to determine the composition of the Panel. On 25 March 1999, the Panel was composed. The report of the panel was circulated to Members on 17 March 2000. The panel found that:

- **the so-called regulatory review exception provided for in Canada's Patent Act (Section 55.2(1)) – the first aspect of the Patent Act challenged by the EC – was not inconsistent with Article 27.1 of the TRIPS Agreement and was covered by the exception in Article 30 of the TRIPS Agreement and therefore not inconsistent with Article 28.1 of the TRIPS Agreement. Under the regulatory review exception, potential competitors of a patent owner are permitted to use the patented invention, without the authorization of the patent owner during the term of the patent, for the purposes of obtaining government marketing approval, so that they will have regulatory permission to sell in competition with the patent owner by the date on which the patent expires.**
- **the so-called stockpiling exception (Section 55.2(2)) –the second aspect of the Patent Act challenged by the EC, was inconsistent with Article 28.1 of the TRIPS Agreement and was not covered by the exception in Article 30 of the TRIPS Agreement. Under the stockpiling exception, competitors are allowed to manufacture and stockpile patented goods during a certain period before the patent expires, but the goods cannot be sold until after the patent expires. The panel considered that, unlike the regulatory review exception, the stockpiling exception constituted a substantial curtailment of the exclusionary rights required to be**

granted to patent owners under Article 28.1 to such an extent that it could not be considered to be a limited exception within the meaning of Article 30 of the TRIPS Agreement.

The DSB adopted the panel report at its meeting on 7 April 2000.

WT/DS108 – United States – Tax Treatment for "Foreign Sales Corporations."

Complaint by the European Communities. On 18 November 1997, the EC requested consultations with the US in respect of Sections 921-927 of the US Internal Revenue Code and related measures, establishing special tax treatment for "Foreign Sales Corporations" (FSC). The EC contended that these provisions were inconsistent with US obligations under Articles III:4 and XVI of the GATT 1994, Articles 3.1(a) and (b) of the Subsidies Agreement, and Articles 3 and 8 of the Agreement on Agriculture.

On 1 July 1998, the EC requested the establishment of a Panel. In the request for a panel, the EC invoked Article 3.1(a) and (b) of the Subsidies Agreement, and Articles 3 and 8, 9 and 10 of the Agreement on Agriculture, and did not pursue the claims under the GATT 1994. At its meeting on 23 July 1998, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the EC, the DSB established a panel at its meeting on 22 September 1998. Barbados, Canada and Japan reserved their third-parties rights. On 9 November 1998, the Panel was composed. The report of the panel was circulated to Members on 8 October 1999. The panel found that, through the FSC scheme, the United States had acted inconsistently with its obligations under Article 3.1(a) of the Subsidies Agreement as well as with its obligations under Article 3.3 of the Agreement on Agriculture (and consequently with its obligations under Article 8 of that Agreement).

On 28 October 1999, the US notified its intention to appeal certain issues of law and legal interpretations developed by the panel. On 2 November 1999, the US withdrew its notice of appeal pursuant to Rule 30 of the Working Procedures for Appellate Review, stating that the withdrawal was conditional on its right to file a new notice of appeal pursuant to Rule 20 of the Working Procedures. On 26 November 1999, the US notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The report of the Appellate Body was circulated to Members on 24 February 2000. The Appellate Body ruled as follows:

- **it upheld the panel's finding that the FSC measure constituted a prohibited subsidy under Article 3.1(a) of the SCM Agreement.**
- **it reversed the panel's finding that the FSC measure involved "the provision of subsidies to reduce the costs of marketing exports" of agricultural products under Article 9.1(d) of the Agriculture Agreement and, in consequence, reversed the panel's findings that the US had acted inconsistently with its obligations under Article 3.3 of the Agriculture Agreement.**
- **it found that the US acted inconsistently with its obligations under Articles 10.1 and 8 of the Agriculture Agreement by applying export subsidies, through the FSC measure, in a manner which results in, or threatens to lead to, circumvention of its export subsidy commitments with respect to agricultural products.**
- **it also emphasized that it was not ruling that a Member must choose one kind of tax system over another so as to be consistent with that Member's WTO obligations.**

The DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report, at its meeting on 20 March 2000.

WT/DS103, WT/DS113 – Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products.

Complaints by the United States and New Zealand. On 8 October 1997, the US requested consultations with Canada in respect of export subsidies allegedly granted by Canada on dairy products and the administration by Canada of the tariff-rate quota on milk. The US contended that these export subsidies by Canada distort markets for dairy products and adversely affect US sales of dairy products. The US alleged violations of Article II, X and X1 of GATT 1994, Articles 3, 4, 8, 9 and 10 of the Agreement on Agriculture, Article 3 of the Subsidies Agreement, and Articles 1, 2 and 3 of the Import Licensing Agreement.

On 29 December 1997, New Zealand requested consultations with Canada in respect of an alleged dairy export subsidy scheme commonly referred to as the "special milk classes" scheme. New Zealand contended that the Canadian "special milk classes" scheme is inconsistent with Article XI of GATT, and Articles 3, 8, 9 and 10 of the Agreement on Agriculture.

On 2 February 1998, the US requested the establishment of a panel in respect of WT/DS103. At its meeting on 13 February 1998, the DSB deferred the establishment of a panel. On 25 March 1998, further to requests from the US and New Zealand, the DSB established, pursuant to Article 9.1 of the DSU, a single panel to examine the disputes WT/DS103 and WT/DS113. Australia and Japan reserved their third-party rights. On 12 August 1998, the Panel was composed. The report of the Panel was circulated to Members on 17 May 1999. The Panel found that the measures complained against were inconsistent with Canada's obligations under Article II:1(b) of GATT 1994, and Articles 3.3 and 8 of the Agreement on Agriculture by providing export subsidies as listed in Article 9.1(a) and 9.1(c) of the Agreement on Agriculture.
On 15 July 1999, Canada notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated on 13 October 1999. The Appellate Body ruled as follows:

- **it reversed the Panel's interpretation of Article 9.1(a) and, in consequence, reversed the Panel's finding that Canada acted inconsistently with its obligations under Article 3.3 and 8 of the Agreement on Agriculture.**
- **it upheld the Panel's finding that Canada was in violation of Article 3.3 and 8 of the Agreement on Agriculture in respect of export subsidies listed in Article 9.1(c) of the Agreement on Agriculture.**
- **it partly reversed the Panel's finding that Canada acted inconsistently with its obligations under Article II:1(b) of GATT 1994.**

At its meeting on 27 October 1999, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

WT/DS99 – United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea.

Complaint by Korea. On 14 August 1997, Korea requested consultations with the US in respect of a decision of the US Department of Commerce (DoC) not to revoke the anti-dumping duty on dynamic random access memory semi-conductors (DRAMS) of one megabyte or above originating from Korea. Korea contended that the DoC's decision was made despite the finding that the Korean DRAM producers have not dumped their products for a period of more than three and a half

consecutive years, and despite the existence of evidence demonstrating conclusively that Korean DRAM producers will not engage in dumping DRAMS in the future. Korea considered that these measures are in violation of Articles 6 and 11 of the Anti-Dumping Agreement.

On 6 November 1997, Korea requested the establishment of a panel. At its meeting on 18 November 1997, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Korea, the DSB established a panel at its meeting on 16 January 1998. On 10 March 1998, Korea requested the Director-General to determine the composition of the Panel. On 19 March 1998, the Panel was composed. The report of the Panel was circulated on 29 January 1999. The Panel found the measures complained of to be in violation of Article 11.2 of the Anti-Dumping Agreement. At its meeting on 19 March 1999, the DSB adopted the Panel Report.

WT/DS98 – Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products.

Complaint by the European Communities. On 12 August 1997, the EC requested consultations with Korea in respect of a definitive safeguard measure imposed by Korea on imports of certain dairy products. The EC contended that under the provisions of different governmental measures, Korea has imposed a safeguard measure in the form of an import quota on imports of certain dairy products. The EC considered that this measure is in violation of Articles 2, 4, 5 and 12 of the Agreement on Safeguard Measures, as well as a violation of Article XIX of GATT 1994.

On 9 January 1998, the EC requested the establishment of a panel. At the DSB meeting on 22 January 1998, the EC informed the DSB that it was, for the time being, not pursuing the panel request. On 10 June 1998, the EC made a another request to establish a panel. At its meeting on 22 June 1998, the DSB deferred the establishment of a panel. Further to another request to establish a panel by the EC, the DSB established a panel at its meeting on 23 July 1998. The US reserved its third party rights. On 20 August 1998, the Panel was composed. The report of the panel was circulated to Members on 21 June 1999. The panel found that Korea's measure is inconsistent with Articles 4.2(a), and 5 of the Agreement on Safeguards, but rejected the EC claims under Article XIX of GATT 1994, Articles 2.1, 12.1 (although it found that Korea's notifications to the Committee on Safeguards were not timely, and to that extent were inconsistent with Article 12.1), 12.2 and 12.3 of the Agreement on Safeguards.

On 15 September 1999, Korea notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 14 December 1999. The Appellate Body reversed one of the panel's conclusions on the interpretation of Article XIX of GATT 1994 and its relationship with the Agreement on Safeguards; upheld one, but reversed another of the panel's interpretations of Article 5.1 of the Agreement on Safeguards; and concluded that Korea violated Article 12.2 of the Agreement on Safeguards, thereby reversing in part the panel's finding.

The DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, on 12 January 2000.

WT/DS90 – India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products.

Complaint by the United States. On 15 July 1997, the US requested consultations with India in respect of quantitative restrictions maintained by India on importation of a large number of

agricultural, textile and industrial products. The US contended that these quantitative restrictions, including the more than 2,700 agricultural and industrial product tariff lines notified to the WTO, are inconsistent with India's obligations under Articles XI:1 and XVIII:11 of GATT 1994, Article 4.2 of the Agreement on Agriculture, and Article 3 of the Agreement on Import Licensing Procedures.

On 3 October 1997, the US requested the establishment of a panel. At its meeting on 16 October 1997, the DSB deferred the establishment of a panel. Further to a second request to establish a panel, the DSB established a panel at its meeting on 18 November 1997. On 10 February 1998, the US requested the Director-General to determine the composition of the Panel. On 20 February 1998, the Panel was composed. The report of the Panel was circulated to Members on 6 April 1999. The panel found that the measures at issue were inconsistent with India's obligations under Articles XI and XVIII11 of GATT 1994, and to the extent that the measures apply to products subject to the Agreement on Agriculture, are inconsistent with Article 4.2 of the Agreement on Agriculture. The panel also found the measures to be nullifying or impairing benefits accruing to the United States under GATT 1994, and the Agreement on Agriculture.

On 26 May 1999, India notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 23 August 1999. The Appellate Body upheld all of the findings of the panel that were appealed from.

The DSB adopted the Panel and Appellate Body reports at its meeting on 22 September 1999.

WT/DS87, WT/DS110 – Chile – Taxes on Alcoholic Beverages.

Complaints by the European Communities. On 4 June 1997 and 15 December 1997, the EC requested consultations with Chile in respect of Chile's Special Sales Tax on spirits, which allegedly imposes a higher tax on imported spirits than on Pisco, a locally brewed spirit. The EC's second request (WT/DS110), takes issue with the modification to the law on taxation on alcoholic beverages passed by Chile to address the concerns of the EC in WT/DS87. The EC contended that this differential treatment of imported spirits violates Article III:2 of GATT 1994.

On 3 October 1997, the EC requested the establishment of a panel in respect of the complaint WT/DS87. At its meeting on 16 October 1997, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the EC, the DSB established a panel at its meeting on 18 November 1997. Canada, Mexico, Peru and the US reserved their third-party rights.

Further to the EC's complaint with respect to WT/DS110, the DSB established a panel at its meeting on 25 March 1998. The DSB also agreed that a single panel be established to examine the two complaints. Peru, Canada and the US reserved their third-party rights. On 10 and 11 June 1998, the EC and Chile, respectively, requested the Director-General to determine the composition of the Panel. On 1 July 1998, the Panel was composed. The report of the panel was circulated to Members on 15 June 1999. The panel found that Chile's Transitional System and its New System for taxation of distilled alcoholic beverages was inconsistent with Article III:2 of GATT 1994.

On 13 September 1999, Chile notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 13 December 1999. The Appellate Body upheld the panel's interpretation and application of Article III:2 of GATT 1994, subject to exclusion of certain considerations relied upon by the panel.

The DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, on 12 January 2000.

WT/DS79 – India – Patent Protection for Pharmaceutical and Agricultural Chemical Products.

Complaint by the European Communities. On 28 April 1997, the EC requested consultations with India in respect of the alleged absence in India of patent protection for pharmaceutical and agricultural chemical products, and the absence of formal systems that permit the filing of patent applications of and provide exclusive marketing rights for such products. The EC contended that this is inconsistent with India's obligations under Article 70, paragraphs 8 and 9, of the TRIPS Agreement (see similar US complaint in WT/DS50, where the Panel and Appellate Body reports were adopted on 16 January 1998).

On 9 September 1997, the EC requested the establishment of a panel. At its meeting on 25 September 1997, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the EC, the DSB established a panel at its meeting on 16 October 1997. The US reserved its third-party rights. The report of the Panel was circulated to Members on 24 August 1998. The Panel found that India has not complied with its obligations under Article 70.8(a) of the TRIPS Agreement by failing to establish a legal basis that adequately preserves novelty and priority in respect of applications for product patents for pharmaceutical and agricultural chemical inventions, and was also not in compliance with Article 70.9 of the TRIPS Agreement by failing to establish a system for the grant of exclusive marketing rights. At its meeting on 22 September 1998, the DSB adopted the Panel Report.

WT/DS76 – Japan – Measures Affecting Agricultural Products.

Complaint by the United States. On 7 April 1997, the US requested consultations with Japan in respect of the latter's prohibition, under quarantine measures, of imports of certain agricultural products. The US alleged that Japan prohibits the importation of each variety of a product requiring quarantine treatment until the quarantine treatment has been tested for that variety, even if the treatment has proved to be effective for other varieties of the same product. The US alleged violations of Articles 2, 5 and 8 of the SPS Agreement, Article XI of GATT 1994, and Article 4 of the Agreement on Agriculture. In addition, the US made a claim for nullification and impairment of benefits.

On 3 October 1997, the US requested the establishment of a panel. At its meeting on 16 October 1997, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the US, the DSB established a panel at its meeting on 18 November 1997. The EC, Hungary and Brazil reserved their third-party rights. The report of the Panel was circulated to Members on 27 October 1998. The Panel found that Japan acted inconsistently with Articles 2.2 and 5.6 of the SPS Agreement, and Annex B and, consequently, Article 7 of the SPS Agreement.

On 24 November 1998, Japan notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 22 February 1999. The Appellate Body upheld the basic finding that Japan's varietal testing of apples, cherries, nectarines and walnuts is inconsistent with the requirements of the SPS Agreement.

The DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, on 19 March 1999.

WT/DS75, WT/DS84 – Korea – Taxes on Alcoholic Beverages.

Complaints by the European Communities and the United States. On 4 April 1997, the EC requested consultations with Korea in respect of internal taxes imposed by Korea on certain alcoholic beverages pursuant to its Liquor Tax Law and Education Tax Law. The EC contended that the Korean Liquor Tax Law and Education Tax Law appear to be inconsistent with Korea's obligations under Article III:2 of GATT 1994. On 23 May 1997, the US requested consultations with Korea in respect of the same measures complained of by the EC. The US also alleged violations of Article III:2.

On 10 September 1997, the EC and the US requested the establishment of a panel. At its meeting on 25 September 1997, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the EC and the US, the DSB established a panel at its meeting on 16 October 1997. Canada and Mexico reserved their third-party rights. On 26 November 1997, the EC and the US requested the Director-General to determine the composition of the Panel. On 5 December 1997, the Panel was composed. The report of the Panel was circulated to Members on 17 September 1998. The Panel found that:

- **soju (both diluted and distilled), is directly competitive and substitutable with the imported distilled alcoholic beverages that were in issue, namely, whisky, brandy, rum, gin, vodka, tequila, liqueurs and ad-mixtures.**
- **Korea has taxed the imported products in a dissimilar manner and that the tax differential was more than de minimis, and is applied so as to afford protection to domestic production.**
- **The Panel therefore concluded that Korea had violated Article III:2 of GATT 1994. On 20 October 1998, Korea notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 18 January 1999. The Appellate Body upheld the panel's findings on all points.**

The DSB adopted the Panel and Appellate Body Reports on 17 February 1999.

WT/DS70 – Canada – Measures Affecting the Export of Civilian Aircraft.

Complaint by Brazil. On 10 March 1997, Brazil requested consultations with Canada in respect of certain subsidies granted by the Government of Canada or its provinces intended to support the export of civilian aircraft. The request was made pursuant to Article 4 of the Subsidies Agreement. Brazil contended that these measures are inconsistent with Article 3 of the Subsidies Agreement.

At its meeting on 23 July 1998, the DSB established a panel. The US reserved its third party rights. On 16 October 1998, Brazil requested the Director-General to determine the composition of the Panel. On 22 October 1998, the Panel was composed. The report of the panel was circulated to Members on 14 April 1999. The Panel found that certain of Canada's measures were inconsistent with Articles 3.1(a) and 3.2 of the Subsidies Agreement, but rejected Brazil's claim that EDC assistance to the Canadian regional aircraft industry constitutes export subsidies.

On 3 May 1999, Canada notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 2 August 1999. The Appellate Body upheld the findings of the panel.

The DSB adopted the Appellate Body and Panel Reports on 20 August 1999.

WT/DS69 – European Communities – Measures Affecting Importation of Certain Poultry Products.

Complaint by Brazil. On 24 February 1997, Brazil requested consultations with the EC in respect of the EC regime for the importation of certain poultry products and the implementation by the EC of the Tariff Rate Quota for these products. Brazil contended that the EC measures are inconsistent with Articles X and XXVII of GATT 1994 and Articles 1 and 3 of the Agreement on Import Licensing Procedures. Brazil also contended that the measures nullify or impair benefits accruing to it directly or indirectly under GATT 1994.

On 12 June 1997, Brazil requested the establishment of a panel. At its meeting on 25 June 1997, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Brazil, the DSB established a panel at its meeting on 30 July 1997. Thailand and the US reserved their third-party rights. On 11 August 1997, the Panel was composed. The report of the Panel was circulated to Members on 12 March 1998. The panel found that Brazil had not demonstrated that the EC had failed to implement and administer the tariff rate quota for poultry in line with its obligations under the cited agreements.

On 29 April 1998, Brazil notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 13 July 1998. The Appellate Body upheld most of the Panel's findings and conclusions, but reversed the Panel's finding that the EC had acted inconsistently with Article 5.1(b) of the Agreement on Agriculture. The Appellate Body, however, concluded that the EC had acted inconsistently with Article 5.5 of the Agreement on Agriculture.

At its meeting on 23 July 1998, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

WT/DS62, WT/DS67, WT/DS68 – European Communities – Customs Classification of Certain Computer Equipment.

Complaints by the United States. These are in respect of the alleged reclassification by the European Communities, for tariff purposes, of certain Local Area Network (LAN) adapter equipment and personal computers with multimedia capability. The US alleged that these measures violate Article II of GATT 1994.

At its meeting on 25 February 1997, the DSB established a panel in respect of the complaint WT/DS62. Japan, Korea, India and Singapore reserved their third-party rights.
At its meeting on 20 March 1997, the DSB established a panel in respect of the complaints WT/DS67 and WT/DS68. In accordance with Article 9.1 of the DSU, the DSB agreed to establish a single panel to examine the complaints WT/DS62, WT/DS67 and WT/DS68.

The report of the Panel was circulated to Members on 5 February 1998. The Panel found that the EC failed to accord imports of LAN equipment from the US treatment no less favourable than that provided for in the EC Schedule of commitments, thereby acting inconsistently with Article II:1 of GATT 1994.

On 24 March 1998, the EC notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 5 June 1998. The Appellate Body reversed the Panel's conclusion that the EC tariff treatment of LAN equipment is inconsistent with Article II:1 of GATT 1994.

At its meeting on 22 June 1998, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

WT/DS60 – Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico.

Complaint by Mexico. On 15 October 1996, Mexico requested consultations with Guatemala in respect of an anti-dumping investigation commenced by Guatemala with regard to imports of portland cement from Mexico. Mexico alleged that this investigation was in violation of Guatemala's obligations under Articles 2, 3, 5 and 7.1 of the Anti-Dumping Agreement.

On 4 February 1997, Mexico requested the establishment of a panel. At its meeting on 25 February 1997, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Mexico, the DSB established a panel at its meeting on 20 March 1997. The US, Canada, Honduras and El Salvador reserved their third-party rights. On 21 April 1997, Mexico requested the Director-General to determine the composition of the Panel. On 1 May 1997, the Panel was composed. The report of the Panel was circulated to Members on 19 June 1998. The Panel found that Guatemala had failed to comply with the requirements of Article 5.3 of the Anti-Dumping Agreement by initiating the investigation on the basis of evidence of dumping, injury and casual link that was not "sufficient" as a justification for initiation.

On 4 August 1998, Guatemala notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 2 November 1998. The Appellate Body reversed the Panel's finding that the dispute was properly before the Panel, on the ground that Mexico did not comply with Article 6.2 of the DSU in its request for a panel since it did not identify the measure it was complaining against. Having found that the dispute was not properly before the Panel, the Appellate Body could not make any conclusions on the findings by the Panel on the substantive issues that were also the subject of the appeal. The Appellate Body stressed that its decision was without prejudice to Mexico's right to pursue new dispute settlement proceedings on this matter.

At the DSB meeting on 25 November 1998, the DSB adopted the Appellate Body Report and the Panel Report, as reversed by the Appellate Body Report.

WT/DS58 – United States – Import Prohibition of Certain Shrimp and Shrimp Products.

Complaint by India, Malaysia, Pakistan and Thailand. On 8 October 1996, India, Malaysia, Pakistan and Thailand requested consultations with the US concerning a ban on importation of shrimp and shrimp products from these complainants imposed by the US under Section 609 of US Public Law 101-162. Violations of Articles I, XI and XIII of GATT 1994, as well nullification and impairment of benefits, were alleged.

On 9 January 1997, Malaysia and Thailand requested the establishment of a panel. At its meeting on 22 January 1997, the DSB deferred the establishment of a panel. On 30 January 1997, Pakistan also

requested the establishment of a panel. Further to Malaysia's, Pakistan's and Thailand's requests, the DSB established a panel at its meeting on 25 February 1997. Australia, Colombia, Costa Rica, Ecuador, the EC, Guatemala, Hong Kong, India, Japan, Mexico, Nigeria, the Philippines, Senegal, Singapore and Sri Lanka reserved their third-party rights.

On 25 February 1997, India also requested the establishment of a panel on the same matter. At its meeting on 20 March 1997, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by India, the DSB agreed to establish a panel at its meeting on 10 April 1997. It was also agreed to incorporate this panel with that already established in respect of the other complainants. El Salvador and Venezuela reserved their third party rights, in addition to those delegations who had reserved their third-party rights to the panel established at the requests of Malaysia, Pakistan and Thailand.

On 15 April 1997, the Panel was composed.

The report of the Panel was circulated to Members on 15 May 1998. The Panel found that the import ban in shrimp and shrimp products as applied by the United States is inconsistent with Article XI:1 of GATT 1994, and cannot be justified under Article XX of GATT 1994.

On 13 July 1998, the US notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 12 October 1998. The Appellate Body reversed the Panel's finding that the US measure at issue is not within the scope of measures permitted under the chapeau of Article XX of GATT 1994, but concluded that the US measure, while qualifying for provisional justification under Article XX(g), fails to meet the requirements of the chapeau of Article XX.

The DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, on 6 November 1998.

<u>WT/DS56 – Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items.</u>

Complaint by the United States. On 4 October 1996, the US requested consultations with Argentina concerning the imposition of specific duties on these items in excess of the bound rate and other measures by Argentina. The US contended that these measures violate Articles II, VII, VIII and X of GATT 1994, Article 2 of the TBT Agreement, Article 1 to 8 of the Agreement on the Implementation of Article VII of GATT 1994, and Article 7 of the Agreement on Textiles and Clothing.

On 9 January 1997, the US requested the establishment of a panel. At its meeting on 22 January 1997, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the US, the DSB established a panel at its meeting on 25 February 1997. The EC and India reserved their third-party rights. On 4 April 1997, the Panel was composed. The report of the Panel was circulated on 25 November 1997. The Panel found that the minimum specific duties imposed by Argentina on textiles and apparel are inconsistent with the requirements of Article II of GATT, and that the statistical tax of three per cent ad valorem imposed by Argentina on imports is inconsistent with the requirements of Article VIII of GATT.

On 21 January 1998, Argentina notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members

on 27 March 1998. The Appellate Body upheld, with some modification, the Panel's findings and conclusions.

The Appellate Body report and the Panel report, as modified by the Appellate Body, were adopted by the DSB on 22 April 1998.

WT/DS54, WT/DS55, WT/DS59, WT/DS64 – Indonesia – Certain Measures Affecting the Automobile Industry.

Complaints by the European Communities (WT/DS54), Japan (WT/DS55 and WT/DS64), and the United States (WT/DS59). On 3 October 1996, the EC requested consultations with Indonesia, on 4 October 1996 and 29 November 1996, Japan requested consultations with Indonesia, and on 8 October 1996, the US requested consultations with Indonesia concerning Indonesia's National Car Programme. The EC alleged that the exemption from customs duties and luxury taxes on imports of "national vehicles" and components thereof, and related measures were in violation of Indonesia's obligations under Articles I and III of GATT 1994, Article 2 of the TRIMs Agreement and Article 3 of the SCM Agreement. Japan contended that these measures were in violation of Indonesia's obligations under Articles I:1, III:2, III:4 and X:3(a) of GATT 1994, as well as Articles 2 and 5.4 of the TRIMs Agreement. The US contended that the measures were in violation of Indonesia's obligations under Article I and III of GATT 1994, Article 2 of the TRIMs Agreement, Article 3, 6 and 28 of the SCM Agreement and Articles 3, 20 and 65 of the TRIPS Agreement.

On 17 April 1997, Japan requested the establishment of a panel with respect to complaints WT/DS55 and WT/DS64. At its meeting on 30 April 1997, the DSB deferred the establishment of a panel. On 12 May 1997, the EC requested the establishment of a panel with respect to WT/DS54. At its meeting on 23 May 1997, the DSB deferred the establishment of a panel. Further to the EC's and Japan's second requests, the DSB established a panel at its meeting on 12 June 1997. In accordance with Article 9.1 of the DSU, the DSB decided that a single panel will examine the disputes WT/DS54, WT/DS55 and WT/DS64. India, Korea and the US reserved their third party rights.

On 12 June 1997, the US requested the establishment of a panel. At its meeting on 25 June 1997, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the US, the DSB established a Panel at its meeting on 30 July 1997. In accordance with Article 9.1 of the DSU, the DSB decided that a single panel will examine this dispute together with WT/DS54, WT/DS55 and WT/DS64. India and Korea reserved their third party rights.

On 25 July 1997, the EC and Japan requested the Director-General to determine the composition of the Panel. On 29 July 1997, the Panel was composed.

The report of the Panel was circulated to Members on 2 July 1998. The Panel found that Indonesia was in violation of Articles I and II:2 of GATT 1994, Article 2 of the TRIMs Agreement, Article 5(c) of the SCM Agreement, but was not in violation of Article 28.2 of the SCM Agreement. The Panel however, found that the complainants had not demonstrated that Indonesia was in violation of Articles 3 and 65.5 of the TRIPS Agreement. At its meeting on 23 July 1998, the DSB adopted the Panel report.

WT/DS50 – India – Patent Protection for Pharmaceutical and Agricultural Chemical Products.

Complaint by the United States. On 2 July 1996, the US requested consultations with India concerning the alleged absence of patent protection for pharmaceutical and agricultural chemical products in India. Violations of the TRIPS Agreement Articles 27, 65 and 70 are claimed.

The DSB established a panel at its meeting on 20 November 1996. The EC reserved their third party rights. On 29 January 1997, the Panel was composed. The report of the Panel was circulated on 5 September 1997. The Panel found that India has not complied with its obligations under Article 70.8(a) or Article 63(1) and (2) of the TRIPS Agreement by failing to establish a mechanism that adequately preserves novelty and priority in respect of applications for product patents for pharmaceutical and agricultural chemical inventions, and was also not in compliance with Article 70.9 of the TRIPS Agreement by failing to establish a system for the grant of exclusive marketing rights.

On 15 October 1997, India notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 19 December 1997. The Appellate Body upheld, with modifications, the Panel's findings on Articles 70.8 and 70.9, but ruled that Article 63(1) was not within the Panel's terms of reference.

The Appellate Body report and the Panel report, as modified by the Appellate Body, were adopted by the DSB on 16 January 1998.

WT/DS48 – European Communities – Measures Affecting Livestock and Meat (Hormones).

Complaint by Canada. On 28 June 1996, Canada requested consultations with the EC regarding the importation of livestock and meat from livestock that have been treated with certain substances having a hormonal action under GATT Article XXII and the corresponding provisions in the SPS, TBT and Agriculture Agreements. Violations SPS Articles 2, 3 and 5; GATT Article III or XI; TBT Article 2; and Agriculture Article 4 are alleged. The Canadian claim was essentially the same as the US claim (WT/DS26), for which a panel was established earlier.

On 16 September 1996, Canada requested the establishment of a panel. At its meeting on 27 September 1996, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Canada, the DSB established a panel at its meeting on 16 October 1996. On 4 November 1996, the Panel was composed. The report of the Panel was circulated to Members on 18 August 1997. The Panel found that the EC ban on imports of meat and meat products from cattle treated with any of six specific hormones for growth promotion purposes was inconsistent with Articles 3.1, 5.1 and 5.5 of the SPS Agreement.

On 24 September 1997, the EC notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The Appellate Body examined this appeal with that of WT/DS26. The report of the Appellate Body was circulated to Members on 16 January 1998. The Appellate Body upheld the Panel's finding that the EC import prohibition was inconsistent with Articles 3.3 and 5.1 of the SPS Agreement, but reversed the Panel's finding that the EC import prohibition was inconsistent with Articles 3.1 and 5.5 of the SPS Agreement. On the general and

procedural issues, the Appellate Body upheld most of the findings and conclusions of the Panel, except with respect to the burden of proof in proceedings under the SPS Agreement.

The Appellate Body report and the Panel report, as modified by the Appellate Body, were adopted by the DSB on 13 February 1998.

WT/DS46 – Brazil – Export Financing Programme for Aircraft.

Complaint by Canada. On 19 June 1996, Canada requested consultations with Brazil based on Article 4 of the Subsidies Agreement, which provides for special procedures for export subsidies. Canada claimed that export subsidies granted under the Brazilian Programa de Financiamento às Exportações (PROEX), to foreign purchasers of Brazil's Embraer aircraft are inconsistent with the Subsidies Agreement Articles 3, 27.4 and 27.5.

Canada requested the establishment of a panel on 16 September 1996, alleging violations of both the Subsidies Agreement and GATT 1994. The DSB considered this request at its meeting on 27 September 1996. Due to Brazil's objection to the establishment of a panel, Canada agreed to modify its request, limiting the scope of the request to the Subsidies Agreement. The modified request was submitted by Canada on 3 October 1996 but was subsequently withdrawn prior to a DSB meeting at which it was to be considered.

On 10 July 1998, Canada again requested the establishment of a panel. At its meeting on 23 July 1998, the DSB established a Panel. The EC and the US reserved their third-party rights. On 16 October 1998, Canada requested the Director-General to determine the composition of the Panel. On 22 October 1998, the Panel was composed. The report of the Panel was circulated to Members on 14 April 1999. The Panel found that Brazil's measures were inconsistent with Articles 3.1(a) and 27.4 of the Subsidies Agreement.

On 3 May 1999, Brazil notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 2 August 1999. The Appellate Body upheld all the findings of the panel, but reversed and modified the panel's interpretation of the "material advantage" clause in item (k) of the Illustrative List of Export Subsidies in Annex I of the SCM Agreement.

The DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, on 20 August 1999.

WT/DS44 – Japan – Measures Affecting Consumer Photographic Film and Paper.

Complaint by the United States. On 13 June 1996, the United States requested consultations with Japan concerning Japan's laws, regulations and requirements affecting the distribution, offering for sale and internal sale of imported consumer photographic film and paper. The US alleged that:

- **the Japanese Government treated imported film and paper less favourably through these measures, in violation of GATT Articles III and X.**
- **these measures nullify or impair benefits accruing to the US (a non-violation claim).**

On 20 September 1996, the US requested the establishment of a panel. At its meeting on 3 October 1996, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the US, the DSB established a panel at its meeting on 16 October 1996. The EC and Mexico reserved their third party rights. On 12 December 1996, the US requested the Director-General to determine the composition of the Panel. On 17 December 1996, the Panel was composed. The report of the Panel was circulated to Members on 31 March 1998. The Panel found:

- **that the US had not demonstrated that the Japanese 'measures' cited by the US nullified or impaired, either individually or collectively, benefits accruing to the US within the meaning of GATT Article XXIII:1(b);**
- **that the US had not demonstrated that the Japanese distribution 'measures' cited by the US accord less favourable treatment to imported photographic film and paper within the meaning of GATT Article III:4; and**
- **that the US did not demonstrate that Japan failed to publish administrative rulings of general application in violation of GATT Article X:1.**

The Panel report was adopted by the DSB on 22 April 1998.

<u>WT/DS34 – Turkey – Restrictions on Imports of Textile and Clothing Products.</u>

Complaint by India. On 21 March 1996, India requested consultations with Turkey concerning Turkey's imposition of quantitative restrictions on imports of a broad range of textile and clothing products. India claimed that those measures are inconsistent with Articles XI and XIII of GATT 1994, as well as ATC Article 2. Earlier, India had requested to be joined in the consultations between Hong Kong and Turkey on the same subject matter (WT/DS29).

On 2 February 1998, India requested the establishment of a panel. At its meeting on 13 February 1998, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by India, the DSB established a panel at its meeting on 13 March 1998. Japan, the Philippines, Thailand, the US and Hong Kong, China reserved their third-party rights. On 11 June 1998, the Panel was composed. The report of the Panel was circulated to Members on 31 May 1999. The Panel found that Turkey's measures are inconsistent with Articles XI and XIII of GATT 1994, and consequently inconsistent also with Article 2.4 of the ATC. The Panel also rejected Turkey's assertion that its measures are justified by Article XXIV of GATT 1994.

On 26 July 1999, Turkey notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated on 21 October 1999. The Appellate Body upheld the Panel's conclusion that Article XXIV of GATT 1994 does not allow Turkey to adopt, upon the formation of a customs union with the EC, quantitative restrictions which were found to be inconsistent with Articles XI and XIII of GATT 1994 and Article 2.4 of the ATC. However, the Appellate Body concluded that the Panel erred in its legal reasoning in interpreting Article XXIV of GATT 1994.

At its meeting on 19 November 1999, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

WT/DS33 – United States – Measures Affecting Imports of Woven Wool Shirts and Blouses.

Complaint by India. On 30 December 1994, India requested consultations with the United States concerning the transitional safeguard measure imposed by the United States. India claimed that the safeguard measure is inconsistent with Articles 2, 6 and 8 of the ATC.

On 14 March 1996, India requested the establishment of a panel. At its meeting on 27 March 1996, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by India, the DSB meeting established a panel at its meeting on 17 April 1996. Canada, the EC, Norway, Pakistan and Turkey reserved their third party rights. On 24 June 1996, the Panel was composed. The report of the Panel was circulated to Members on 6 January 1997. The Panel found that the safeguard measure imposed by the United States violated the provisions of the ATC.

On 24 February 1997, India notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 25 April 1997. The Appellate Body upheld the Panel's decisions on those issues of law and legal interpretations that were appealed against.

The Appellate Body report and the Panel report, as upheld by the Appellate Body, were adopted by the DSB on 23 May 1997.

WT/DS31 – Canada – Certain Measures Concerning Periodicals.

Complaint by the United States. On 11 March 1996, the United States requested consultations with Canada concerning certain measures prohibiting or restricting the importation into Canada of certain periodicals. The US claimed that the measures are in contravention of GATT Article XI. The US further alleged that the tax treatment of so-called "split-run" periodicals and the application of favourable postage rates to certain Canadian periodicals are inconsistent with GATT Article III.

On 24 May 1996, the US requested the establishment of a panel. At its meeting on 6 June 1996, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the US, the DSB established a panel on 19 June 1996. On 25 July 1996, the Panel was composed. The report of the Panel was circulated to Members on 14 March 1997. The Panel found the measures applied by Canada to be in violation of GATT rules.

On 29 April 1997, Canada notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 30 June 1997. The Appellate Body upheld the Panel's findings and conclusions on the applicability of GATT 1994 to Part V.1 of Canada's Excise Tax Act, but reversed the Panel's finding that Part V.1 of the Excise Act is inconsistent with the first sentence of Article III:2 of GATT 1994. The Appellate Body further concluded that Part V.1 of the Excise Act is inconsistent with the second sentence of Article III:2 of GATT 1994. The Appellate Body also reversed the Panel's conclusion that Canada's "funded" postal rate scheme is justified by Article III:8(b) of GATT 1994.

At its meeting on 30 July 1997, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body.

WT/DS27 – European Communities – Regime for the Importation, Sale and Distribution of Bananas.

Complaints by Ecuador, Guatemala, Honduras, Mexico and the United States. The complainants in this case other than Ecuador had requested consultations with the EC on the same issue on 28 September 1995 (WT/DS16). After Ecuador's accession to the WTO, the current complainants again requested consultations with the EC on 5 February 1996. The complainants alleged that the EC's regime for importation, sale and distribution of bananas is inconsistent with GATT Articles I, II, III, X, XI and XIII as well as provisions of the Import Licensing Agreement, the Agreement on Agriculture, the TRIMs Agreement and the GATS.

On 11 April 1996, the five complainants requested the establishment of a panel. At its meeting on 24 April 1996, the DSB deferred the establishment of a panel. Further to a second request by the five complainants, a panel was established at the DSB meeting on 8 May 1996. On 29 May 1996, the five complainants requested the Director-General to determine the composition of the Panel. On 7 June 1996, the Panel was composed. The report of the Panel was circulated to Members on 22 May 1997. The Panel found that the EC's banana import regime, and the licensing procedures for the importation of bananas in this regime, are inconsistent with the GATT. The Panel further found that the Lomé waiver waives the inconsistency with GATT Article XIII, but not inconsistencies arising from the licensing system.

On 11 June 1997, the European Communities notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 9 September 1997. The Appellate Body mostly upheld the Panel's findings, but reversed the Panel's findings that the inconsistency with GATT Article XIII is waived by the Lomé waiver, and that certain aspects of the licensing regime violated Article X of GATT and the Import Licensing Agreement.

At its meeting on 25 September 1997, the Appellate Body report and the Panel report, as modified by the Appellate Body, were adopted by the DSB.

WT/DS26 – European Communities – Measures Concerning Meat and Meat Products (Hormones).

Complaint by the United States. On 26 January 1996, the United States requested consultations with the European Communities claiming that measures taken by the EC under the Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action restrict or prohibit imports of meat and meat products from the United States, and are apparently inconsistent with GATT Articles III or XI, SPS Agreement Articles 2, 3 and 5, TBT Agreement Article 2 and the Agreement on Agriculture Article 4.

On 25 April 1996, the US requested the establishment of a panel. At its meetings on 8 May 1996, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the US, a panel was established at the DSB meeting on 20 May 1996. On 2 July 1996, the Panel was composed. The report of the Panel was circulated to Members on 18 August 1997. The Panel found that the EC ban on imports of meat and meat products from cattle treated with any of six specific hormones for growth promotion purposes was inconsistent with Articles 3.1, 5.1 and 5.5 of the SPS Agreement.

On 24 September 1997, the EC notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The Appellate Body examined this appeal with that of

WT/DS48. The report of the Appellate Body was circulated to Members on 16 January 1998. The Appellate Body upheld the Panel's finding that the EC import prohibition was inconsistent with Articles 3.3 and 5.1 of the SPS Agreement, but reversed the Panel's finding that the EC import prohibition was inconsistent with Articles 3.1 and 5.5 of the SPS Agreement. On the general and procedural issues, the Appellate Body upheld most of the findings and conclusions of the Panel, except with respect to the burden of proof in proceedings under the SPS Agreement.

The Appellate Body report and the Panel report, as modified by the Appellate Body, were adopted by the DSB on 13 February 1998.

WT/DS24 – United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear.

Complaint by Costa Rica. On 22 December 1995, Costa Rica requested consultations with the United States concerning US restrictions on textile imports from Costa Rica. Costa Rica alleged that these restrictions were in violation of the ATC agreement.

Further to Costa Rica's request, the DSB established a panel at its meeting on 5 March 1996. India reserved its third-party rights. On 4 April 1996, the Panel was composed. The report of the panel was circulated to members on 8 November 1996. The Panel found that the US restraints were not valid.

On 11 November 1996, Costa Rica notified its decision to appeal against one aspect of the Panel report. The report of the Appellate Body was circulated to Members on 10 February 1997. The Appellate Body upheld the appeal by Costa Rica on that particular point.

The Appellate Body report and the Panel report as modified by the Appellate Body report, were adopted by the DSB on 25 February 1997.

WT/DS22 – Brazil – Measures Affecting Desiccated Coconut.

Complaint by the Philippines. On 27 November 1995, the Philippines requested consultations with Brazil in respect of a countervailing duty imposed by Brazil on the Philippine's exports of desiccated coconut. The Philippines claimed that this duty was inconsistent with WTO and GATT rules.

On 5 February 1996, the Philippines requested the establishment of a panel. At its meeting on 21 February 1996, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the Philippines, the DSB established a panel at its meeting on 5 March 1996. Canada, the EC, Indonesia, Malaysia, Sri Lanka and the US reserved their third-party rights. On 16 April 1996, the Panel was composed. The report was circulated to Members on 17 October 1996. The report of the Panel concluded that the provisions of the agreements relied on by the claimant were inapplicable to the dispute.

On 16 December 1996, the Philippines notified its decision to appeal against certain issues of law and legal interpretations developed by the panel. The report of the Appellate Body was circulated to Members on 21 February 1997. The Appellate Body upheld the findings and legal interpretations of the Panel.

The Appellate Body report and the Panel report, as modified by the Appellate Body report, were adopted by the DSB on 20 March 1997.

WT/DS18 – Australia – Measures Affecting the Importation of Salmon.

Complaint by Canada. On 5 October 1995, Canada requested consultations with Australia in respect of Australia's prohibition of imports of salmon from Canada based on a quarantine regulation. Canada alleged that the prohibition is inconsistent with GATT Articles XI and XIII, and also inconsistent with the SPS Agreement.

On 7 march 1997, Canada requested the establishment of a panel. At its meeting on 20 March 1997, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Canada, the DSB established a panel at its meeting on 10 April 1997. The EC, India, Norway and the US reserved their third-party rights. On 28 May 1997, the Panel was composed. The report of the Panel was circulated to Members on 12 June 1998. The Panel found that Australia's measures complained against were inconsistent with Articles 2.2, 2.3, 5.1, 5.5, and 5.6 of the SPS Agreement, and also nullified or impaired benefits accruing to Canada under the SPS Agreement.

On 22 July 1998, Australia notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 20 October 1998. The Appellate Body reversed the Panel's reasoning with respect to Articles 5.1 and 2.2 of the SPS Agreement but nevertheless found that:

- **Australia had acted inconsistently with Articles 5.1 and 2.2 of the SPS Agreement;**
- **broadened the Panel's finding that Australia had acted inconsistently with Articles 5.5 and 2.3 of the SPS Agreement;**
- **reversed the Panel's finding that Australia had acted inconsistently with Article 5.6 of the SPS Agreement but was unable to come to a conclusion whether or not Australia's measure was consistent with Article 5.6 due to insufficient factual findings by the Panel.**

The DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, on 6 November 1998.

WT/DS8, WT/DS10, WT/DS11 – Japan – Taxes on Alcoholic Beverages.

Complaints by the European Communities, Canada and the United States. The EC requested consultations on 21 June 1995, and Canada and the US on 7 July 1995. The complainants claimed that spirits exported to Japan were discriminated against under the Japanese liquor tax system which, in their view, levies a substantially lower tax on "shochu" than on whisky, cognac and white spirits.

A joint panel was established at the DSB meeting on 27 September 1995. On 30 October 1995, the Panel was composed. The report of the panel, which found the Japanese tax system to be inconsistent with GATT Article III:2, was circulated to Members on 11 July 1996.

On 8 August 1996 Japan filed an appeal. The report of the Appellate Body was circulated to Members on 4 October 1996. The Appellate Body's Report affirmed the Panel's conclusion that the Japanese Liquor Tax Law is inconsistent with GATT Article III:2, but pointed out several areas where the Panel had erred in its legal reasoning. The Appellate Report, together with the panel report as modified by the Appellate Report, was adopted on 1 November 1996.

WT/DS2, WT/DS4 – United States – Standards for Reformulated and Conventional Gasoline.

Complaints by Venezuela and Brazil. Venezuela requested consultations on 24 January 1995 and Brazil on 10 April 1995. Complainants alleged that a US gasoline regulation discriminated against complainants' gasoline in violation of GATT Articles I and III and Article 2 of the Agreement on Technical Barriers to Trade (TBT).

Further to Venezuela's request, the DSB established a Panel at its meeting on 10 April 1995. On 26 April 1995 the Panel was composed. Further to Brazil's request, the DSB established a Panel at its meeting on 19 June 1995. On 31 May 1995, in accordance with Article 9 of the DSU, it was agreed that a single panel would consider the complaints of Venezuela and Brazil. The report of the panel was circulated to Members on 29 January 1996. The report of the panel found the regulation to be inconsistent with GATT Article III:4 and not to benefit from an Article XX exception.

The US appealed on 21 February 1996. On 22 April, the Appellate Body issued its report, modifying the panel report on the interpretation of GATT Article XX(g), but concluding that Article XX(g) was not applicable in this case. The Appellate Report, together with the panel report as modified by the Appellate Report, was adopted by the DSB on 20 May 1996.

Appellate Body And Panel Compliance Reports (Article 21.5) Adopted.

WT/DS245 – Japan – Measures Affecting the Importation of Apples

Complaint by the United States. On 30 June 2004, Japan and the United States sent to the DSB the confirmed procedures between the parties under Articles 21 and 22 of the DSU. Considering that Japan had failed to implement the DSB's recommendations and rulings before the expiration of the reasonable period of time, on 19 July 2004 the United States requested the DSB of the establishment of a panel under Article 21.5 of the DSU. The United States considers that Japan's phytosanitary measures on imported US apples are inconsistent with its obligations under the SPS Agreement, the GATT 1994, and the Agreement on Agriculture. The provisions of these agreements with which Japan's measures appear to be inconsistent include:

- **Articles 2.2, 2.3, 5.1, 5.2, 5.3, 5.5, 5.6, 6.1 and 6.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures;**
- **Article XI of the General Agreement on Tariffs and Trade 1994; and**
- **Article 4.2 of the Agreement on Agriculture.**

At its meeting on 30 July 2004 the DSB decided to refer the matter raised by the United States to the original panel. Australia, Brazil, China, the European Communities, New Zealand and Chinese Taipei reserved their third party rights.

On 29 October 2004, the Panel under DSU Article 21.5 informed the DSB that due in particular to the need to consult scientific experts the Panel was not able to issue its report within 90 days, and that the Panel expected to circulate its final report to Members during the second half of the month of May 2005.

On 23 June 2005, the Article 21.5 Panel circulated its Report to Members. The Panel report found that Japan's phytosanitary measure imposed on imports of apples from the United States is contrary to Articles 2.2 and 5.1 of the SPS Agreement and if the United States only exports mature, symptomless apples, the alternative measure proposed by the United States meets the requirement of Article 5.6 of the SPS Agreement. At the DSB meeting on 30 July 2005, the Panel Report was adopted.

WT/DS212 – United States – Countervailing Measures Concerning Certain Products from the European Communities

Complaint by the European Communities. On 17 March 2004, the EC, considering that the measures taken by the US to comply with its WTO obligations were unsatisfactory, requested the US to enter into consultations under Articles 4 and 21.5 of the DSU and Article 30 of the SCM Agreement. On 16 September 2004, pursuant to Articles 6 and 21.5 of the DSU, Article 30 of the SCM Agreement and Article XXIII of GATT 1994, the EC requested that the panel be established, as it disagrees with the US as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB. In particular, the EC claims and requests the Panel to find the following:

1. **That in the sunset review Certain Corrosion-Resistant Carbon Steel Flat Products from France (C 427 810) (Case No. 9), the United States failed to properly examine the existence, continuation or likelihood of recurrence of subsidization. In particular, with regard to the privatization concerned, it improperly analysed whether the price for employees and retirees' shares constituted a subsidy or that it led to any continuation of a countervailable subsidy. This is inconsistent with Articles 10, 14, 19.4, 21.1and 21.3 of the SCM Agreement and Article VI: 3 of GATT 1994.**
2. **That in the following sunset reviews:**

    - **Cut-to-Length Carbon Steel Plate from United Kingdom (C–412–815) (Case No. 8);**
    - **Cut-to-Length Carbon Steel Plate from Spain (C–469–804) (Case No. 11),**

The EC considers that the United States failed to properly determine whether, in these cases, there was continuation or recurrence of subsidization and injury, because it did not examine the nature of the privatizations in question and their impact on the continuation of the alleged subsidization. This is inconsistent with Articles 10, 14, 19.4, 21.1, and 21.3 of the SCM Agreement and Article VI:3 of GATT 1994, according to the EC.

At its meeting of 27 September 2004, the DSB established the panel. Brazil, Korea and China reserved their rights as third parties. On 8 October 2004, the Panel was composed.

On 4 January 2005, the Chairman of the Panel informed the DSB that the Panel expected to complete its work in May 2005.

0n 17 August 2005, the Panel Report was circulated to Members. In the Panel Report, the European Communities prevailed only on its claims regarding (i) the US failure to examine the privatizations of BS plc (UK) and Aceralia (Spain); and (ii) the treatment of new evidence in the UK Section 129 proceedings. All other EC claims were either dismissed or rejected. On 27 September 2005, the Panel Report was adopted by the DSB.

WT/DS141 – European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India

(See WT/DS141 for precedents) On 8 March 2002, India sought recourse to Article 21.5 of the DSU (request for consultations), stating that there was disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings. On 4 April 2002, India requested the establishment of a compliance panel. In particular, India claimed that the EC had violated Articles 2, 3, 5.7, 6, 9, 12 and 15 of the Anti-Dumping Agreement.

Accordingly, India requested the Panel to conclude that:

- **The re-determination, as amended, and the subsequent actions as identified above, are inconsistent with the above provisions of the Anti-Dumping Agreement and GATT 1994; and**
- **By failing to withdraw the measures found to be inconsistent with the Anti-Dumping Agreement and to bring its measures into conformity with its obligations under the Anti-Dumping Agreement and GATT 1994, the EC has failed to comply with the DSB recommendations and rulings in this dispute.**

At the DSB meeting on 17 April 2002, India informed the DSB that pursuant to an understanding reached between the EC and India, it was requesting the withdrawal of the item from the agenda in accordance with Rule 6 of the Rules of Procedure for WTO meetings. The DSB agreed to India's request.

On 7 May 2002, India again requested the establishment of a compliance panel. At the DSB meeting on 22 May 2002, it was agreed that, if possible, the matter would be referred to the original panel. Japan and the United States reserved their third party rights to participate in the proceedings. On 27 May 2002, Korea reserved its third party rights. On 25 June 2002, the compliance panel was composed. On 19 August 2002, the Chairman of the Panel informed the DSB that it expected to complete its work in November 2002. On 29 November 2002, the report was circulated to Members. The Panel concluded that the EC's definitive anti-dumping measure on imports of bed linen from India, EC Regulation 1644/2001, is not inconsistent with the AD Agreement or the DSU and that, therefore, the EC had implemented the recommendation of the original Panel, the Appellate Body, and the DSB to bring its measure into conformity with its obligations under the AD Agreement.

On 8 January 2003, India informed the DSB that it intended to appeal certain issues of law and legal interpretations developed by the Panel in its Report. On 6 March 2003, the Appellate Body informed the DSB that it was not able to circulate its report within the 60-day deadline and that it intended to do so no later than 8 April 2003. On 8 April 2003, the Appellate Body circulated its Report. The Appellate Body:

- **upheld the Panel's finding that India's claim under Article 3.5 was not properly before the Panel and, consequently, declined to rule on it,**
- **reversed the Panel's finding that the EC did not act inconsistently with paragraphs 1 and 2 of Article 3 of the Anti-Dumping Agreement,**
- **declined to rule on the Panel's finding that the EC applied the second alternative in the second sentence of Article 6.10 for limiting its examination in this investigation; and**
- **found that the Panel properly discharged its duties under Article 17.6 of the Anti Dumping Agreement and Article 11 of the DSU and, therefore, upheld the Panel's finding that the EC had information before it on the relevant economic factors listed in Article 3.4 of the Anti-Dumping Agreement when making its injury determination.**

The Appellate Body recommended that the DSB request the EC to bring its measure into conformity with the Anti-Dumping Agreement. At its meeting on 24 April 2003, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report.

WT/DS132 – Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States

On 12 October 2000, the US requested that the DSB refer the matter to the original panel, pursuant to Article 21.5 of the DSU, in order to establish whether Mexico had correctly implemented the DSB's recommendations. At its meeting of 23 October 2000, the DSB referred the matter to the original panel pursuant to Article 21.5 of the DSU. The EC, Jamaica and Mauritius reserved their third-party rights. The US and Mexico informed the DSB that they were discussing mutually agreeable procedures under Articles 21 and 22 of the DSU in relation to this matter. On 13 November 2000, the Panel was composed.

The Article 21.5 Panel circulated its report on 22 June 2001. The Panel concluded that Mexico's imposition of definitive anti-dumping duties on imports of HFCS from the US on the basis of the SECOFI redetermination was inconsistent with the requirements of the AD Agreement in that Mexico's inadequate consideration of the impact of dumped imports on the domestic industry, and its inadequate consideration of the potential effect of the alleged restraint agreement in its determination of likelihood of substantially increased importation, are not consistent with the provisions of Articles 3.1, 3.4, 3.7 and 3.7(i) of the AD Agreement. The Panel therefore considered that Mexico has failed to implement the recommendation of the original Panel and the DSU to bring its measure into conformity with its obligations under the AD Agreement.

On 24 July 2001, Mexico appealed the above Panel report. In particular, Mexico requested the Appellate Body to examine and reverse the Panel's conclusions that Mexico's imposition of definitive anti-dumping duties on imports of HFCS from the United States, on the basis of SECOFI's redetermination, was inconsistent with the requirements of the Anti-Dumping Agreement, in that

- **Mexico's inadequate consideration of the impact of dumped imports on the domestic industry, and its inadequate consideration of the potential effect of the alleged restraint agreement in its determination of likelihood of substantially increased importation, are not consistent with the provisions of Article 3.1, 3.4, 3.7 and 3.7(i) of the Anti-Dumping Agreement, and**
- **Mexico therefore failed to implement the recommendation of the original Panel and of the DSB to bring its measure into conformity with its obligations under the Anti-Dumping Agreement;**
- **and that it has nullified or impaired benefits accruing to the United States under that Agreement.**

According to Mexico, these conclusions are based on erroneous matters of law and legal interpretations of various provisions of the Anti-Dumping Agreement and the DSU. On 20 September 2001, the Appellate Body informed that the issuance of the report would be delayed. The Report was circulated to the Members on 22 October 2001. The Appellate Body upheld the contested findings of the Panel and therefore recommended the DSB to request Mexico to bring its anti-dumping measure

into conformity with its obligations under that Agreement. On 21 November 2001, the DSB adopted the Appellate Body Report and the Panel Report, as upheld by the Appellate Body Report.

WT/DS126 – Australia – Subsidies Provided to Producers and Exporters of Automotive Leather

(See WT/DS126 for precedents) On 4 October 1999, the United States informed the DSB that it believed that the measures taken by Australia to comply with the rulings and recommendations of the DSB were not consistent with the Subsidies Agreement and the DSU, and therefore requested that the original panel be reconvened pursuant to Article 21.5 of the DSU. At its meeting on 14 October 1999, the DSB agreed to reconvene the original panel pursuant to Article 21.5 of the DSU. The EC and Mexico reserved their third-party rights. On 1 November 1999, the Compliance Panel was composed.

The report of the panel was circulated to Members on 21 January 2000. The panel determined that Australia had failed to comply with the DSB's recommendations within 90 days. The DSB adopted the review panel's report on 11 February 2000. On 24 July 2000, the parties notified the DSB that they had reached a mutually satisfactory solution in regard to implementation of the findings of the review panel.

WT/DS108 – United States – Tax Treatment for "Foreign Sales Corporations"

(See WT/DS108 for precedents) On 7 December 2000, the EC notified the DSB that consultations had failed to settle the dispute and that it was requesting the establishment of a panel pursuant to Article 21.5 of the DSU. At its meeting of 20 December 2000, the DSB agreed to refer the matter to the original panel. Australia, Canada, India, Jamaica and Japan reserved their third party rights. On 5 January 2001, the Panel was composed. On 21 December 2000, pursuant to an agreement between the parties, the US and the EC jointly requested the Article 22.6 DSU arbitrator to suspend the arbitration proceeding until adoption of the panel report or, if there is an appeal, adoption of the Appellate Body report. The arbitration was accordingly suspended.

On 20 August 2001, the compliance panel report was circulated to the Members. The Panel concluded that the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (the amended FSC legislation) was still inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement, with 10.1 and 8 of the Agreement on Agriculture and with Article III:4 of the GATT 1994.

On 15 October 2001, the US notified its decision to appeal certain issues of law and legal interpretations developed by the panel report. On 14 January 2002, the Appellate Body circulated its Report to the Members. The Appellate Body:

- **upheld the Panel's findings that the US acted inconsistently with its obligations under the SCM Agreement, the Agreement on Agriculture, and the GATT 1994 through the FSC amended legislation, a measure taken by the United States to implement the recommendations and rulings made by the DSB in the original proceedings in the United States – FSC dispute;**
- **with respect to third party rights, found that the Panel erred in its interpretation of Article 10.3 of the DSU in declining to rule that all written submissions of the parties filed prior to the first meeting of the Panel must be provided to the third parties.**

At its meeting on 29 January 2002, the DSB adopted the Appellate Body Report and the Panel Report, as upheld by the Appellate Body Report.

WT/DS103/RW, WT/DS113/RW – Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products

(See WT/DS103 for precedents and WT/DS103/RW/2 for follow-up). On 16 February 2001, the US and New Zealand requested the DSB to refer the problems with the implementation of the original report to the original panel pursuant to Article 21.5 DSU. At its meeting of 1 March 2001, the DSB referred the matter to the original panel. Australia, the EC and Mexico reserved their third party rights. On 12 April 2001, the compliance Panel was composed.

The compliance Panel circulated its report on 11 July 2001. It concluded that Canada, through the CEM scheme and the continued operation of Special Milk Class 5(d), has acted inconsistently with its obligations under Articles 3.3 and 8 of the Agreement on Agriculture, by providing export subsidies within the meaning of Article 9.1(c) of the Agreement on Agriculture in excess of its quantity commitment levels specified in its Schedule for exports of cheese, for the marketing year 2000/2001.

On 4 September 2001, Canada appealed the compliance Panel report before the Appellate Body. In particular, Canada appealed the Panel's finding that the Canadian measures in question constitute an export subsidy within the meaning of Article 9.1(c)of the Agreement on Agriculture. Canada considered that the Panel's finding that commercial export sales constitute payments that are financed by virtue of governmental action is based on erroneous findings on issues of law and on related legal interpretations with respect to the interpretation and application of the said Article 9.1(c).

The report of the Appellate Body was circulated to Members on 3 December 2001. The Appellate Body reversed the compliance Panel's findings to the effect that the supply of CEM by domestic milk producers to domestic dairy processors involves "payments" on the export of milk "that are financed by virtue of governmental action" under Article 9.1(c) of the Agreement on Agriculture. The Appellate Body concluded that, in the light of the factual findings made by the Panel and the uncontested facts in the Panel record, it was unable to complete the analysis of the claims made by New Zealand and the United States under Articles 9.1(c) or 10.1 of the Agreement on Agriculture, or the claim made by the United States under Article 3.1 of the SCM Agreement. At its meeting on 18 December 2001, the DSB adopted the Appellate Body Report and the Panel Report, as reversed by the Appellate Body Report.

WT/DS103/RW/2, WT/DS113/RW/2 – Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products

See WT/DS103, WT/DS103/RW for precedents). On 6 December 2001, the US submitted to the DSB a second recourse for the establishment of a panel pursuant to Article 21.5 of the DSU. The US submits that, since the Appellate Body's 21.5 Report did not make any findings on the consistency of Canada's new measures, the US continues to believe that Canada had failed to comply with the original recommendations and rulings of the DSB. On the same date, New Zealand made a similar request.

At its meeting on 18 December 2001, the DSB agreed, pursuant to Article 21.5 of the DSU, to refer to the original Panel, for the second time, the matter raised by New Zealand and the US. At the meeting, the EC and Australia reserved third-party rights to participate in the Panel's proceedings. On 28

December 2001, Argentina also reserved its third-party rights to participate in the Panel's proceedings.

On 18 December 2001, Canada concluded with New Zealand and the US respectively, additional understandings regarding procedures under Article 21 and 22 of the DSU. Pursuant to both understandings, Canada and the respective party agree to request that the arbitration requested by Canada under Article 22.6 of the DSU remain suspended pending the work of the compliance Panel.

On 17 January 2002, the Panel was composed. On 26 July 2002, the Report was circulated to the Members. The Panel concluded that Canada, through the CEM scheme and the continued operation of Special Milk Class 5(d), had acted inconsistently with its obligations under Articles 3.3 and 8 of the Agreement on Agriculture, by providing export subsidies within the meaning of Article 9.1(c) of the Agreement on Agriculture in excess of its quantity commitment levels specified in its Schedule for exports of cheese and "other dairy products". It also concluded that Canada had acted inconsistently with its obligations under Article 10.1 of the Agreement on Agriculture and that therefore Canada had acted inconsistently with its obligations under Article 8 of the Agreement on Agriculture. Accordingly, the Panel recommended that the DSB request Canada to bring its dairy products marketing regime into conformity with its obligations in respect of export subsidies under the Agreement on Agriculture.

On 23 September 2002, Canada notified its intention to appeal certain issues of law and legal interpretations developed by the compliance panel. On 20 December 2002, the Appellate Body circulated its report. The Appellate Body upheld the Panel's finding that the measure at issue—the supply of "commercial export milk" ("CEM") by Canadian milk producers to Canadian dairy processors—involves export subsidies in the form of "payments" on the export of milk that are "financed by virtue of governmental action" within the meaning of Article 9.1(c) of the Agreement on Agriculture. It reversed the Panel's interpretation of the rules on burden of proof in Article 10.3 of the Agreement on Agriculture. However, the Appellate Body held that this error did not affect any of the Panel's other findings under the Agreement on Agriculture. In view of its conclusion under Article 9.1(c) of the Agreement on Agriculture, the Appellate Body declined to rule on the Panel's alternative finding under Article 10.1 of that Agreement.

On 17 January 2003, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report.

WT/DS99 – United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea

(See WT/DS99 for precedents) On 9 March 2000, Korea informed the DSB that it believed that the measures taken by the United States to comply with the rulings and recommendations of the DSB were not consistent with the Anti-Dumping Agreement and Article X:1 of GATT 1994. Korea therefore requested that this matter be referred to the original panel pursuant to Article 21.5 of the DSU. On 6 April 2000, Korea submitted a new request to the effect that the matter be referred to the original panel pursuant to Article 21.5 of the DSU. At its meeting on 25 April 2000, the DSB agreed to reconvene the original panel pursuant to Article 21.5 of the DSU. The EC reserved its reserved its third-party rights. On 11 May 2000, the Compliance Panel was composed.

On 19 September 2000, Korea requested the Panel to suspend its work, including the issuance of the interim report, "until further notification" pursuant to Article 12.12 of the DSU. The Panel, in a letter

sent to the parties on 21 September 2000, agreed to this request. On 20 October 2000, the parties notified the DSB of a mutually satisfactory solution to the matter, involving the revocation of the antidumping order at issue as the result of a five-year "sunset" review by the US Department of Commerce.

WT/DS70 – Canada – Measures Affecting the Export of Civilian Aircraft

(See WT/DS70 for precedents) On 23 November 1999, Brazil requested the establishment of a panel under Article 21.5 because it believed that Canada had not taken measures to comply fully with the rulings and recommendations of the DSB. Brazil and Canada reached an agreement concerning the procedures to be applicable pursuant to Articles 21 and 22 of the DSU and Article 4 of the Subsidies Agreement. At its meeting on 9 December 1999, the DSB agreed to reconvene the original panel pursuant to Article 21.5 of the DSU. Australia, the EC and the US reserved their third-party rights. On 17 December 1999, the Compliance Panel was composed.

The report of the compliance panel was circulated to Members on 9 May 2000. The panel found:

- **that Canada had implemented the recommendation of the DSB that Canada withdraw Technology Partnership Canada (TPC) assistance to the Canadian regional aircraft industry within 90 days,**
- **but that Canada had failed to implement the recommendation that it withdraw the Canada Account assistance to the Canadian regional aircraft industry within 90 days.**

With regard to the latter finding, the panel considered that the measures taken by Canada were not sufficient to ensure that future Canada Account transactions in the Canadian regional aircraft sector would be in conformity with the interest rate provisions of the OECD Arrangement and would thereby qualify for the safe haven in item (k) of Annex I of the Subsidies Agreement. The panel therefore concluded that Canada's measures did not ensure that such Canada Account transactions would not be prohibited export subsidies.

On 22 May 2000, Brazil notified its intention to appeal certain issues of law and legal interpretations developed by the compliance panel. The report of the Appellate Body was circulated to Members on 21 July 2000. The Appellate Body found that the review panel erred in declining to examine one of Brazil's arguments to the effect that the revised TPC programme is inconsistent with Article 3.1(a) of the Subsidies Agreement. The Appellate Body also found, however, that Brazil had failed to establish that the revised TPC programme is inconsistent with Article 3.1(a) of the Subsidies Agreement and, accordingly, that Brazil had failed to establish that Canada has not implemented the recommendations of the DSB. The DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report, at its meeting on 4 August 2000. Canada stated its intention to implement the recommendations of the DSB in respect of the Canada Account Programme.

WT/DS58 – United States – Import Prohibition of Certain Shrimp and Shrimp Products

(See WT/DS58 for precedents) On the grounds that the US had not implemented appropriately the recommendations of the DSB, on 12 October 2000, Malaysia requested that the matter be referred to the original panel pursuant to Article 21.5 of the DSU. In particular, Malaysia considered that by not lifting the import prohibition and not taking the necessary measures to allow the importation of certain shrimp and shrimp products in an unrestrictive manner, the United States had failed to comply with the recommendations and rulings of the DSB. At its meeting of 23 October 2000, the DSB

referred the matter to the original panel pursuant to Article 21.5 DSU. Australia, Canada, the EC, Ecuador, India, Japan, Mexico, Pakistan, Thailand and Hong Kong, China reserved their third-party rights. On 8 November 2000, the Panel was composed.

The Panel circulated its report on 15 June 2001. The Panel concluded that:

- **the measure adopted by the US in order to comply with the recommendations and rulings of the DSB violated Article XI.1 of the GATT 1994;**
- **in light of the recommendations and rulings of the DSB, Section 609 of Public Law 101-162, as implemented by the Revised Guidelines of 8 July 1999 and as applied so far by the US authorities, was justified under Article XX of the GATT 1994 as long as the conditions stated in the findings of this Report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied.**
- **should any one of the conditions referred above cease to be met in the future, the recommendations of the DSB may no longer be complied with. In such a case, any complaining party in the original case may be entitled to have further recourse to Article 21.5 of the DSU.**

On 23 July 2001, Malaysia notified the DSB its intention to appeal the above report. In particular, Malaysia sought review by the Appellate Body of the Panel's finding that the US measure at issue does not constitute unjustifiable or arbitrary discrimination between countries where the same conditions prevail and that it is therefore within the scope of the measures permitted under Article XX of the GATT 1994 as long as the conditions stated in the findings of the Panel Report, in particular the ongoing serious good faith efforts to reach a multilateral agreement, remain satisfied.

On 19 September, the Appellate Body informed the DSB of a delay in the circulation of its Report in this appeal. The Report was circulated to the Members on 22 October 2001. The Appellate Body upheld the contested findings of the Panel: Since it had upheld the Panel's findings that the US measure was now applied in a manner that met the requirements of Article XX of the GATT 1994, the Appellate Body refrained from making any recommendations. On 21 November 2001, the DSB adopted the Appellate Body Report and the Panel Report, as upheld by the Appellate Body Report.

<u>WT/DS46 – Brazil – Export Financing Programme for Aircraft</u>

(See WT/DS46 for precedents) On 23 November 1999, Canada requested the establishment of a panel under Article 21.5 of the DSU, requesting that the panel find that Brazil had not taken measures to comply fully with the rulings and recommendations of the DSB. Canada and Brazil reached an agreement concerning the procedures to be applicable pursuant to Articles 21 and 22 of the DSU and Article 4 of the Subsidies Agreement. At its meeting on 9 December 1999, the DSB agreed to reconvene the original panel pursuant to Article 21.5 of the DSU. Australia, the EC and the US reserved their third-party rights. On 17 December 1999, the compliance panel was composed.

The report of the compliance panel was circulated to Members on 9 May 2000. The panel found that Brazil's measures to comply with the recommendations and rulings of the DSB either did not exist or were not consistent with the Subsidies Agreement. In reaching this conclusion, the panel notably rejected Brazil's defence that PROEX payments were permitted under item (k) of Annex I of the Subsidies Agreement, adding that, if a WTO Member encountered an export credit that had been provided on terms that it could not meet consistent with the SCM Agreement, the proper response was to challenge that export credit in WTO dispute settlement. On 22 May 2000, Brazil notified its

intention to appeal certain issues of law and legal interpretations developed by the review panel. The report of the Appellate Body was circulated to Members on 21 July 2000. The Appellate Body upheld the review panel's conclusion that Brazil has failed to implement the recommendation of the DSB because of the continued issuance by Brazil of NTN-I bonds, after 18 November 1999, pursuant to letters of commitment issued before 18 November 1999. The Appellate Body also upheld the review panel's findings that payments made under the revised PROEX are prohibited by Article 3 of the Subsidies Agreement and are not justified under item (k) of the Illustrative List of the same Agreement. The Appellate Body therefore upheld the review panel's conclusion that Brazil has failed to implement the recommendations of the DSB. The DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report, at its meeting on 4 August 2000.

On 22 January 2001, Canada requested the DSB to refer the matter again to the original panel, pursuant to Article 21.5 of the DSU. At its meeting of 16 February 2001, the DSB referred the matter to the original panel. Australia, the EC and Korea reserved their third-party rights. The Panel circulated its report on 26 July 2001. The Panel concluded as follows:

- **It has not been established that PROEX III as such was inconsistent with Article 3.1(a) of the SCM Agreement;**
- **PROEX III as such is justified under the second paragraph of item (k) of the Illustrative List of Export Subsidies of Annex I of the SCM Agreement;**
- **PROEX III cannot be justified under paragraph 1 of the above-mentioned item.**

At its meeting on 23 August 2001, the DSB adopted the Panel Report on this second recourse to Article 21.5 of the DSU.

<u>WT/DS27 – European Communities – Regime for the Importation, Sale and Distribution of Bananas</u>

(See WT/DS27 for precedents) On 15 December 1998, the EC requested the establishment of a panel under Article 21.5 to determine that the implementing measures of the EC must be presumed to conform to WTO rules unless challenged in accordance with DSU procedures. On 18 December 1998, Ecuador requested the re-establishment of the original panel to examine whether the EC measures to implement the recommendations of the DSB are WTO-consistent. At its meeting on 12 January 1999, the DSB agreed to reconvene the original panel, pursuant to Article 21.5 of the DSU, to examine both Ecuador's and the EC's requests. Jamaica, Nicaragua, Colombia, Costa Rica, Côte d'Ivoire, Dominican Republic, Dominica, St. Lucia, Mauritius, St. Vincent, indicated their interest to join as third parties in both requests, while Ecuador and India indicated their third-party interest only in the EC request. On 18 January 1999, the Compliance Panels were composed. The two Compliance Panel Reports were circulated on 12 April 1999.

In the panel requested by the EC, pursuant to Article 21.5 of the DSU, the panel found that, because a challenge had actually been made by Ecuador regarding the WTO-consistency of the EC measures taken in implementation of the DSB recommendations, it was unable to agree with the EC that the EC must be presumed to be in compliance with the recommendations of the DSB. The report of the compliance panel requested by the EC, under Article 21.5 of the DSU, was never adopted by the DSB. In the panel requested by Ecuador, pursuant to Article 21.5 of the DSU, the panel found that the implementation measures taken by the EC in compliance with the recommendations of the DSB were not fully compatible with the EC's WTO obligations. The report of the compliance panel requested by Ecuador, under Article 21.5 of the DSU, was adopted by the DSB on 6 May 1999.

DS18 – Australia – Measures Affecting the Importation of Salmon

(See WT/DS18 for precedents) Canada made a request, pursuant to DSU Article 21.5, for determination by the original panel of whether the measures taken by Australia in implementing the recommendations of the DSB were WTO-consistent.. At its meeting of 28 July 1999, the DSB agreed to Canada's request and referred the matter for determination of the WTO-consistency of the implementing measures to the original panel. The EC, Norway and the US reserved their third-party rights. The DSB also referred the Canadian request for suspension of concessions to arbitration in view of Australia's challenge of the level of nullification suffered by Canada. On 7 September 1999, the Compliance Panel and Arbitrator were composed.

On 18 February 2000, the report of the DSU Article 21.5 panel was circulated to Members. The panel found that:

- **due to delays in the entry into force of several implementing measures which extended beyond the reasonable period of time within which Australia had to implement the DSB recommendations, no measures to comply existed in the sense of Article 21.5 of the DSU in respect of a number of covered products and during specific periods of time. As a result, during those periods, Australia failed to bring its measure into conformity with the SPS Agreement in the sense referred to in Article 22.6 of the DSU.**
- **Australia, by requiring that only salmon product that is "consumer-ready" as specifically defined can be imported into Australia and released from quarantine, was maintaining sanitary measures that were not "based on" a risk assessment, which was contrary to Articles 5.1 and 2.2 of the SPS Agreement. The panel also considered the same requirement to be in violation of Article 5.6 of the SPS Agreement.**
- **Finally, the panel found that Australia violated Articles 5.1 and 2.2 of the SPS Agreement as a result of a measure enacted by the Government of Tasmania that effectively prohibits the importation of certain Canadian salmon product into most parts of Tasmania without being based on a risk assessment and without sufficient scientific evidence.**

At its meeting on 20 March 2000, the DSB adopted the report of the compliance panel.

Settled or Inactive Cases.

Mutually Agreed Solutions Notified Under Article 3.6 of the DSU.

WT/DS329 – Panama – Tariff Classification of Certain Milk Products.

Complaint by Mexico. On 16 March 2005, Mexico has requested consultations with Panama regarding its Cabinet Decree N. 20 of 17 July 2002 which creates two new tariff subheadings in Panama's National Importation Nomenclature. According to Mexico, this Decree eliminates the existing tariff subheading No. 1901.10.10 for processed milk to which a 5% bound tariff applied pursuant to Panama's WTO Bindings. The Decree further created two new subheadings: No.1901.10.11 (baby formula) with a 0% tariff, and No. 1901.10.19 (all others) with a 65% tariff.

Mexico considers that Panama's new tariff classification for those milk products may violate Articles I, II and XXVIII of GATT 1994 and Article 4 of the Agreement on Agriculture.

In addition, Mexico raises a non-violation claim: Mexico claims that the application of the new tariff classification by Panama nullifies or impede, in the sense of Article XXIII.1(b) of the GATT 1994, the tariff concessions that Panama granted to Mexico for processed milk (5% consolidated tariff) as a result of its accession to the WTO.

On 20 September 2005, the parties to the dispute jointly informed the DSB that they had reached a mutually agreed solution regarding the matters raised by Mexico in its request for consultations.

WT/DS313 – European Communities – Anti-Dumping Duties on Certain Flat Rolled Iron or Non-Alloy Steel Products from India.

Complaint by India. On 5 July 2004, India requested consultations with the European Communities concerning the imposition of definitive anti-dumping measures on imports of certain flat rolled products of iron or non-alloy steel, of a width of 600 mm or more, not clad, plated or coated, in coils, not further worked than hot-rolled ("HR Coils") from India.

According to the Indian request, the EC violates Article 9.2 of the Anti-Dumping Agreement, which requires that an anti-dumping duty shall be collected on a non-discriminatory basis on imports of the product from all sources found to be dumped and causing injury. India claims that, while anti-dumping measures are in force against imports into the Community of HR Coils from India, no measures are in force against imports of the same product concerned from Egypt, Slovakia and Turkey, notwithstanding that the products imported from the latter three countries were also found by the Commission to be dumped and causing injury to the Community industry.

India also considers that the anti-dumping measures concerned violate certain other provision of the Anti-Dumping Agreement, including, but not limited to the following: Article 3, especially Articles 3.4 and 3.5; and Article 4.1.

On 22 October 2004, India and the European Communities notified the DSB that they had reached an agreement with respect to the matter raised by India in its request for consultations. According to the notification, the European Communities agreed to terminate the measure at issue.

WT/DS309 – China – Value-Added Tax on Integrated Circuits

Complaint by the United States. On 18 March 2004, the United States requested consultations with China concerning China's preferential value-added tax ("VAT") for domestically-produced or designed integrated circuits ("IC").

The United States claims that, although China provides for a 17 percent VAT on ICs, enterprises in China are entitled to a partial refund of the VAT on ICs that they have produced, resulting in a lower VAT rate on their products. In the US view, China thus appears to be subjecting imported ICs to higher taxes than applied to domestically produced ICs and to be according less favourable treatment to imported ICs.

In addition, the United States claims that China allows for a partial refund of VAT for domestically designed ICs that, because of technological limitations, are manufactured outside of China. In the US view, China thus appears to be providing for more favourable treatment of imports from one Member than from others, and also is discriminating against services and service suppliers of other Members.

The United States considers that these measures are inconsistent with the obligations of China under Articles I and III of the GATT 1994, the Protocol on the Accession of the People's Republic of China (WT/L/432), and Article XVII of the GATS.

On 26 March 2004, the European Communities requested to join the consultations. On 31 March 2004, Japan requested to join the consultations. On 1 April 2004, Mexico and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu requested to join the consultations. On 28 April 2004, China informed the DSB that it had accepted the requests of the European Communities, Japan and Mexico to join the consultations.

On 14 July 2004, China and the United States notified the DSB that they had reached an agreement with respect to the matter raised by the United States in its request for consultations. According to the notification, China agreed to amend or revoke the measures at issue to eliminate the availability of VAT refunds on ICs produced and sold in China and on on ICs designed in China but manufactured abroad by 1 November 2004 and 1 September 2004 respectively. The effective dates are 1 April 2005 and 1 October 2004 respectively.

On 5 October 2005, China and the United States informed the DSB that they were in agreement that the terms of the agreement had been successfully implemented, and thus they had agreed that a mutually satisfactory solution had been reached to the matter raised by the United States.

WT/DS305 – Egypt – Measures Affecting Imports of Textile and Apparel Products.

Complaint by the United States. On 23 December 2003, the United States requested consultations with Egypt concerning the tariffs applied by Egypt to certain textile and apparel products and the Decree of the President of the Arab Republic of Egypt No. 469 of the year 2001 ("Decree No. 469") and any amendments, related regulations or other implementing measures.

The United States alleges that, in the Uruguay Round, Egypt agreed that: (a) it would remove a general prohibition on the importation of apparel and made up textile products by January 1, 2002; (b) it would bind its duties under HS Chapters 61 (articles of apparel and clothing, knitted and crocheted) and 62 (articles of apparel and clothing, not knitted or crocheted) at an ad valorem rate of 46 percent in 2003, 43 percent in 2004 and 40 percent thereafter, and (c) it would bind its duties under HS Chapter 63 (other made up textile articles; sets; worn clothing) at an ad valorem rate of 41 percent in 2003, 38 percent in 2004, and 35 percent thereafter.

The United States alleges that, on December 31, 2001 Egypt issued Decree No. 469 which amended the customs duties applicable to a number of imported articles, including articles that enter under HS Chapters 61, 62 and 63, and imposed specific duties (i.e., in Egyptian pounds per piece of clothing), rather than ad valorem duties. The United States alleges that these specific duties greatly exceed Egypt's bound rates of duty. According to the United States, the ad valorem equivalent of these duties ranges from 141 percent to 51,296 percent. The United States considers that these tariffs, Decree No. 469 and any related measures are inconsistent with the obligations of Egypt under Article II of the GATT 1994 and Article 7 of the Agreement on Textiles and Clothing.

On 15 January 2004, the European Communities requested to join the consultations. On 22 January 2004, Egypt accepted the request.

On 20 May 2005, Egypt and the United States informed the DSB that they had reached a mutually agreed solution under Article 3.6 of the DSU.

WT/DS261 – Uruguay – Tax Treatment on Certain Products.

Complaint by Chile. On 18 June 2002, Chile requested consultations with Uruguay with regard to the tax treatment applied by the latter to certain products.

In particular, Chile referred to Uruguay's Internal Specific Tax ("IMESI") which taxes the first alienation and the importation by non-taxpayers of certain goods which include, inter alia, beverages (alcoholic beverages, juices, mineral water), tobacco and cigarettes, automobiles, lubricants and fuel. The fiscal framework for the IMESI is contained in various legal instruments, including Chapter 11 of the 1996 "Texto Ordenado", Decree 96/990 of 21 February 1990 from the Ministry of Economy and Finance, and the bi-monthly Resolutions of the Direction General for Taxation. This framework was recently amended as regards cigarettes by Decree 200/2002 of 3 June 2002.

Chile contended that, in most cases, taxable income for this tax is determined by using a fictitious price. According to Chile, this system would increase the taxable income if compared to the real sales price, especially in the case of foreign goods. Chile submits that the IMESI violates Articles I and III of GATT 1994 because it establishes a tax system based on the use of fictitious prices in order to determine the taxable income. Chile considered that this system discriminates between national and imported products and, in some cases, between imported products depending on their origin. Chile further claimed that this alleged discrimination constitutes a de facto import prohibition as regards certain products.

Chile recalled that in the trade policy review for Uruguay in 1998, this system was subject to some discussion and Uruguay indicated, at the time, that they were in the process of elaborating norms that ensured an equal treatment to all products regardless of their origin.

On 4 July 2002, the European Communities requested to join the consultations. On 5 July 2002, Mexico requested to join the consultations. On 3 April 2003, Chile requested the DSB to establish a panel. At its meeting on 15 April 2003, the DSB deferred the establishment of the panel. Further to a second request by Chile, the DSB established a panel at its meeting on 19 May 2003. The EC, Mexico and the US reserved their third-party rights. On 4 July 2003, the Panel was composed. On 15 August 2003, the Chair of the Panel informed the DSB that both parties had jointly requested the Panel to suspend its work for a period of 60 days, until 12 October 2003. The Panel has agreed to this request and is suspending its work from 14 August to 12 October 2003. On 12 October 2003, both parties jointly requested the Panel to extend the suspension of its work for another 60 days, until 11 December 2003. The Panel agreed to this request and was continuing to suspend its work until 11 December 2003. On 11 December 2003, both parties jointly requested the Panel to suspend its work for a final additional period of 30 days, until 10 January 2004, in order to formalize a mutually agreed solution over the coming days and notify it to the Dispute Settlement Body, in accordance with Article 3.6 of the DSU. The Panel agreed to this request and is suspending its work from 12 December 2003 to 10 January 2004.

On 8 January 2004, Chile and Uruguay informed the DSB that they had reached a mutually agreed solution under Article 3, paragraphs 5 and 6 of the DSU.

WT/DS250 – United States – Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products.

Complaint by Brazil. On 20 March 2002, Brazil requested consultations with the US concerning the so-called "Equalizing Excise Tax" imposed by the State of Florida on processed orange and grapefruit products produced from citrus fruit grown outside the United States (Section 601.155 Florida Statutes). Brazil indicated that since 1970, the state of Florida had imposed, pursuant to section 601.155 of the Florida Statutes, an "equalizing excise tax" on processed orange and processed grapefruit products, in amounts determined by the Florida Department of Citrus. However, the statute by its terms – Section 601.155(5), Florida Statutes – exempted from the tax products "produced in whole or in part from citrus fruit grown within the United States." In the view of Brazil the incidence of this tax on imported processed citrus products and not on domestic products on its face constituted a violation of Articles II:1(a), III.1 and III:2 of GATT 1994.

Brazil contended that the impact of the Florida equalizing excise tax had been to provide protection and support to domestic processed citrus products and to restrain the importation of processed citrus products into Florida. Since processed citrus products, principally in the form of frozen concentrated orange juice were among Brazil's most significant exports to the United States, Brazil was of the view that the restraint on their importation by the State of Florida constituted a nullification and impairment of benefits accruing to Brazil under GATT 1994. Brazil reserved the right to raise additional factual or legal points related to the aforementioned measure during the course of consultations.

On 16 August 2002, Brazil requested the establishment of the panel. At its meeting on 30 August 2002, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Brazil, the DSB established a panel at its meeting on 1 October 2002. The EC, Mexico and Paraguay reserved their third party rights to participate in the panel proceedings. On 11 October 2002, Chile reserved its third party rights to participate in the panel proceedings.

On 28 May 2004, the United States and Brazil informed the DSB that they had reached a mutually agreed solution under Article 3.6 of the DSU.

WT/DS245 – Japan – Measures Affecting the Importation of Apples.

Complaint by the United States. At the DSB meeting on 9 January 2004, Japan indicated that it intended to comply with the recommendations and rulings of the DSB in a manner that respected its WTO obligations under the SPS Agreement. In that connection, Japan also stated that it would need a reasonable period of time to implement the said recommendations and rulings and was willing to discuss this matter with the United States in accordance with Article 21.3(b) of the DSU. On 10 February 2004, Japan and the United States informed the DSB that they had agreed that the reasonable period of time shall be six months and 20 days, that is from 10 December 2003 to 30 June 2004.

On 30 June 2004, Japan and the United States sent to the DSB the confirmed procedures between the parties under Articles 21 and 22 of the DSU.

Considering that Japan had failed to implement the DSB's recommendations and rulings before the expiration of the reasonable period of time, on 19 July 2004 the United States requested the DSB to

establish a panel under Article 21.5 of the DSU and to authorize the suspension of concessions or other obligations with respect to Japan under Article 22.2 of the DSU. In respect of the latter, on 29 July 2004 Japan requested this matter to be referred to arbitration in accordance with Article 22.6 of the DSU and the foregoing confirmed procedures. After the matter was referred to arbitration (which would be carried out by the original panel) at the meeting of the DSB on 30 July 2004, both parties jointly requested the Arbitrator to suspend the arbitration proceeding on 4 August 2004 until adoption by the DSB of its recommendations and rulings of the former proceeding, i.e., the panel proceeding under Article 21.5 of the DSU.

In respect of the panel proceeding under Article 21.5 of the DSU, at its meeting on 30 July 2004 the DSB decided to refer the matter raised by the United States to the original panel. Australia, Brazil, China, the European Communities, New Zealand and Chinese Taipei reserved their third party rights.

On 23 June 2005, the Article 21.5 Panel circulated its Report to Members. The Panel report found that Japan's phytosanitary measure imposed on imports of apples from the United States is contrary to Articles 2.2 and 5.1 of the SPS Agreement and if the United States only exports mature, symptomless apples, the alternative measure proposed by the United States meets the requirement of Article 5.6 of the SPS Agreement. (See also V)B)) On 18 July 2005, the parties to the dispute jointly requested the Chairman of Arbitrator to suspend the 22.6 proceedings until 31 August 2005. At the DSB meeting on 30 July 2005, the Panel Report was adopted.

On 30 August 2005, the parties to the dispute jointly informed the DSB that they had reached a mutually agreed solution regarding the matters raised by the United States in this dispute.

WT/DS237 – Turkey – Certain Import Procedures for Fresh Fruit.

Complaint by Ecuador. On 31 August 2001, Ecuador requested consultations with Turkey concerning certain import procedures for fresh fruits and, in particular, bananas. The procedure requires, according to Ecuador, the issuance by the Turkish Ministry of Agriculture of a document, known as "Kontrol Belgesi". Ecuador explained that this procedure is established under the "Communiqué for Standardization in Foreign Trade" published by the Under-Secretariat of Foreign Trade in the Official Journal 24271 of 25 December 2000 (Annex 1 thereof). Ecuador alleged that this procedure, as applied by the Turkish authorities, is a barrier to trade which is inconsistent with the obligations of Turkey under GATT 1994, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Import Licensing Procedures, the Agreement on Agriculture and the GATS. In particular, Ecuador considered that the provisions of the WTO agreements with which Turkey's "Kontrol Belgesi" procedure appears to be inconsistent include the following:

- **Articles II, III, VIII, X and XI of the GATT 1994;**
- **Articles 2.3 and 8 and Annexes B and C of the Agreement on the Application of Sanitary and Phytosanitary Measures**
- **Paragraphs 2, 3, 5 and 6 of Article 1 of the Agreement on Import Licensing Procedures;**
- **Article 4 of the Agreement on Agriculture; and**
- **Articles VI and XVII of the General Agreement on Trade in Services (GATS).**

On 20 September 2001, the EC requested to be joined in the consultations.

On 14 June 2002, Ecuador requested the establishment of a panel. At its meeting on 24 June 2002, the DSB deferred the establishment of a panel. Further to a second request by Ecuador, the DSB established a panel at its meeting on 29 July 2002. During the meeting, Ecuador also requested the DSB to suspend the composition of the Panel as the parties were engaged in consultations to find a mutually satisfactory solution to the dispute between them. The EC and the US reserved their third-party rights. On 7 August 2002, Colombia requested third party rights.

On 22 November 2002, the parties to the dispute informed the DSB that they had found a mutually agreed solution to their dispute.

WT/DS235 – Slovakia – Safeguard Measure on Imports of Sugar.

Complaint by Poland. On 11 July 2001, Poland requested consultations with Slovakia concerning the quantitative restrictions imposed by Slovakia on imports of sugar (tariff heading 1701). The imposition of the measure in question was notified to the Committee on Safeguards and circulated in document G/SG/N/10/SVK/1. Poland considered that this safeguard measure has been imposed in a manner inconsistent with Slovakia's obligations under the Safeguards Agreement. According to Poland, it appeared that Slovak authorities acted inconsistently with various provisions of the Safeguards Agreement, namely, Article 3.1, Article 4.2(b), Article 5.2(a), Article 7.4, Article 12.1(b), Article 12.1(c) and Article 12.3

Poland considered that the investigation and the safeguard measure imposed have nullified or impaired the benefits accruing to Poland directly or indirectly under the Safeguards Agreement.

On 11 January 2002, the parties notified the DSB that they have reached a mutually agreed solution within the meaning of Article 3.6 of the DSU. Accordingly, Slovakia agreed to a progressive increase of the level of its quota for imports of sugar from Poland between 2002 and 2004, and Poland agreed to remove its quantitative restriction on imports of butter and margarine. Both parties agreed to implement the above by 1 January 2002.

WT/DS231 – European Communities – Trade Description of Sardines.

Complaint by Peru. On 25 July 2003, the European Communities and Peru informed the DSB that they had reached a mutually agreed solution pursuant to Article 3.6 of the DSU.

WT/DS210 – Belgium – Administration of Measures Establishing Customs Duties for Rice.

Request by the United States. On 12 October 2000, the US requested consultations with the EC concerning the administration by Belgium of laws and regulations establishing the customs duties applicable to rice imported from the United States. The United States considered that:

- **Belgium has failed to administer the pertinent laws and regulations in a manner that is consistent with its WTO obligations, leading to the assessment of duties on rice imported from the United States in excess of the bound rate of duty, in contravention of Article II of the GATT 1194;**
- **Belgium's use of reference prices in the calculation of the applicable import duties would appear to be inconsistent with Article VII of the GATT 1994 and the Customs Valuation Agreement;**

- **Belgium's refusal to recognize widely accepted industry standards associated with the grading of rice appears to be inconsistent with Articles 2, 3, 5, 6, 7, and 9 of the Agreement on Technical Barriers to Trade;**
- **Belgium has failed to administer its customs valuation determinations and its assessment of tariffs in a transparent manner, thereby impeding trade, and appears to have applied the measures in a manner that discriminates against rice imported from the United States.**
- **According to the United States, the measures have restricted imports of rice into Belgium. Thus, the Belgian measures also appear to be inconsistent with Articles I, X and XI of the GATT 1994 and Article 4 of the Agreement on Agriculture.**
- **According to the United States, Belgium's measures appear to be inconsistent with the following specific provisions of the identified agreements: Articles I, II, VII, VIII, X and XI of the GATT 1994; Articles 1-6, 7, 10, 14, 16 and Annex I of the Customs Valuation Agreement; Articles 2, 3, 5, 6, 7 and 9 of the Agreement on Technical Barriers to Trade; Article 4 of the Agreement on Agriculture. Belgium's measures also appear to nullify or impair the benefits accruing to the United States directly or indirectly under the cited agreements.**

On 19 January 2001, the US requested the establishment of a panel. At its meeting on 1 February 2001, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the US, the DSB established a panel at its meeting of 12 March 2001. India and Japan reserved their third-party rights. On 29 May 2001, the US requested the Director-General to determine the composition of the Panel. On 7 June 2001, the Panel was composed.

On 26 July 2001, the US requested the Panel, pursuant to Article 12.12 of the DSU, to suspend its work until 30 September 2001 in light of on-going consultations between the US and the EC. On 27 September, the US requested a further suspension of the Panel from 1 to 9 October 2001. On 9 October, the US requested to further suspend the work of the Panel until 1 November 2001. On 1 November, the US requested to further suspend the work of the Panel until 16 November 2001. On 19 November 2001, the US requested the Panel to suspend its work until 30 November 2001.

On 18 December 2001, the US and the EC informed the DSB that they had reached a mutually agreed solution pursuant to Article 3.6 of the DSU.

<u>WT/DS199 – Brazil – Measures Affecting Patent Protection.</u>

Complaint by the United States. On 30 May 2000, the US requested consultations with Brazil in respect of those provisions of Brazil's 1996 industrial property law (Law No. 9,279 of 14 May 1996; effective May 1997) and other related measures, which establish a "local working" requirement for the enjoyability of exclusive patent rights. The US asserts that the "local working" requirement can only be satisfied by the local production – and not the importation – of the patented subject-matter. More specifically, the US noted that Brazil's "local working" requirement stipulates that a patent shall be subject to compulsory licensing if the subject-matter of the patent is not "worked" in the territory of Brazil. The US further noted that Brazil explicitly defines "failure to be worked" as "failure to manufacture or incomplete manufacture of the product" or "failure to make full use of the patented process". The US considered that such a requirement is inconsistent with Brazil's obligations under Articles 27 and 28 of the TRIPS Agreement, and Article III of the GATT 1994.

At its meeting of 1 February 2001, the DSB established a panel. Cuba, the Dominican Republic, Honduras, India and Japan reserved their third party rights. On 5 July 2001, the parties to the dispute notified to the DSB a mutually satisfactory solution on the matter.

WT/DS198 – Romania – Measures on Minimum Import Prices.

Complaint by the United States. On 30 May 2000, the US requested consultations with Romania in respect of Romania's use of minimum import prices for customs valuation purposes. The measures at issue were the Customs Code of 1997 (L141/1997), the Ministry of Finance General Customs Directive (Ordinance No. 5, 4 August 1998), and other related statutes and regulations. The United States asserted that, pursuant to these measures, Romania has established arbitrary minimum and maximum import prices for such products as meat, eggs, fruits and vegetables, clothing, footwear, and certain distilled spirits. The United States further asserted that Romania has instituted burdensome procedures for investigating import prices when the c.i.f. value falls below the minimum import price. The United States considered that Romania's measures are inconsistent with its obligations under Articles 1 through 7, and 12 of the Customs Valuation Agreement; general notes 1, 2 and 4 of Annex 1 of the Customs Valuation Agreement; Articles II, X, and XI of the GATT 1994; Article 4.2 of the Agreement on Agriculture; and Articles 2 and 7 of the Agreement on Textiles and Clothing.

On 26 September 2001, the US and Romania informed the DSB that they had reached a mutually satisfactory solution pursuant to Article 3.6 of the DSU.

WT/DS196 – Argentina – Certain Measures on the Protection of Patents and Test Data.

Complaint by the United States. On 30 May 2000, the US requested consultations with Argentina concerning Argentina's legal regimes governing patents in Law 24,481 (as amended by Law 24,572), Law 24,603, and Decree 260/96; and data protection in Law 24,766 and Regulation 440/98, and in other related measures. The US considered that Argentina:

- **fails to protect against unfair commercial use of undisclosed test or other data, submitted as a requirement for market approval of pharmaceutical or agricultural chemical products;**
- **improperly excludes certain subject matter, including micro organisms, from patentability;**
- **fails to provide prompt and effective provisional measures, such as preliminary injunctions, for purposes of preventing infringements of patent rights from occurring;**
- **denies certain exclusive rights for patents, such as the protection of products produced by patented processes and the right of importation;**
- **fails to provide certain safeguards for the granting of compulsory licenses, including timing and justification safeguards for compulsory licenses granted on the basis of inadequate working;**
- **improperly limits the authority of its judiciary to shift the burden of proof in civil proceedings involving the infringements of process patent rights; and**
- **places impermissible limitations on certain transitional patents so as to limit the exclusive rights conferred by these patents, and to deny the opportunity for patentees to amend pending applications in order to claim certain enhanced protection provided by the TRIPS Agreement.**

According to the US, Argentina's legal regimes governing patents and data protection are therefore inconsistent with Argentina's obligations under the TRIPS Agreement, including Articles 27, 28, 31, 34, 39, 50, 62, 65 and 70 of the Agreement.

On 31 May 2002, the US and Argentina notified the DSB that they have reached an agreement on all of the matters raised by the US in its requests for consultations regarding this dispute and that concerning Argentina – Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals (WT/DS171).

WT/DS190 – Argentina – Transitional Safeguard Measures on Certain Imports of Woven Fabric Products of Cotton and Cotton Mixtures Originating in Brazil.

Complaint by Brazil. This request for a panel, dated 11 February 2000, concerns transitional safeguard measures applied by Argentina, as of 31 July 1999, against certain imports of woven fabrics of cotton and cotton mixtures originating in Brazil. The measures at issue were applied through Resolution MEyOSP 861/99 of the Ministry of the Economy and Public Works and Services of Argentina. In accordance with Article 6.11 of the Agreement on Textiles and Clothing, Brazil had referred the matter to the Textiles Monitoring Body (TMB) for review and recommendations, after consultations requested earlier by Argentina had failed to produce a mutually satisfactory solution. At its meeting of 18-22 October 1999, the TMB conducted a review of the measures implemented by Argentina, having recommended that Argentina rescind the safeguard measures applied against imports from Brazil. On 29 November 1999, in accordance with Article 8.10 of the Agreement on Textiles and Clothing, Argentina notified the TMB that it considered itself unable to conform with the recommendations issued by the TMB. At its meeting of 13-14 December 1999, the TMB conducted a review of the reasons given by Argentina and recommended that Argentina reconsider its position. The TMB's recommendations notwithstanding, the matter remained unresolved. Brazil is of the view that the transitional safeguards applied by Argentina are inconsistent with Argentina's obligations under Articles 2.4, 6.1, 6.2, 6.3, 6.4, 6.7, 6.8, 6.11, 8.9 and 8.10 of the Agreement on Textiles and Clothing and should, therefore, be rescinded forthwith.

At its meeting on 20 March 2000, the DSB established a panel. The EC, Pakistan, Paraguay and the US reserved their third-party rights. In a communication dated June 2000, the parties notified a mutually agreed solution to this dispute. Pursuant to the agreement reached, Brazil retains the right to resume the procedures for the composition of the panel from the point where they stood at the time the agreement was reached.

WT/DS171 – Argentina – Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals.

Complaint by the United States. On 6 May 1999, the US requested consultations with Argentina in respect of:

(i) the alleged absence in Argentina of either patent protection for pharmaceutical products or an effective system for providing exclusive marketing rights in such products, and

(ii) Argentina's alleged failure to ensure that changes in its laws, regulations and practice during the transition period provided under Article 65.2 of the TRIPS Agreement do not result in a lesser degree of consistency with the provisions of the TRIPS Agreement.

Under item (i), the US contended that the TRIPS Agreement does not permit WTO Members to allow third parties to market products subject to exclusive marketing rights without the consent of the right holder. According to the United States, Argentina's law does not provide product patent protection

for pharmaceutical inventions, or a system that conforms to Article 70.9 of the TRIPS Agreement with regard to the grant of exclusive marketing rights. The US therefore contended that Argentina's legal regime appears to be inconsistent with Articles 27, 65 and 70 of the TRIPS Agreement.
Under item (ii), the US contended that prior to August 1998, Argentina provided a ten year term of protection against unfair commercial use for undisclosed test data or other data submitted to Argentine regulatory authorities in support of applications for marketing approval for agricultural chemical products. The US further alleged that since the issuance in 1998 of Regulation 440/98, which inter alia revoked earlier regulations, Argentina has provided no effective protection for such data against unfair commercial use. The United States therefore alleges that Argentina's legal regime is inconsistent with Article 65.5 of the TRIPS Agreement.

On 31 May 2002, the US and Argentina notified the DSB that they have reached an agreement on all of the matters raised by the US in its requests for consultations regarding this dispute and that concerning Argentina – Certain Measures on the Protection of Patents and Test Data (WT/DS196).

WT/DS151 – United States – Measures Affecting Textiles and Apparel Products (ll).

Complaint by the European Communities. This dispute, dated 19 November 1998, is in respect of alleged changes to US rules of origin for textiles and apparel products. The EC discloses that this issue was the subject of an earlier request for consultations (WT/DS85), in respect of which a mutually agreed solution was notified to the DSB, pursuant to Article 3.1 of the DSU. However, the EC contends that the US has not implemented its commitments as contained in that agreement with the result that, in the EC view, the US is still acting in a manner inconsistent with its obligations under the WTO. The dispute concerns changes allegedly introduced by the US to its rules of origin for textiles and apparel products, which entered into force on 1 July 1996, which changes adversely affect exports of EC textile products to the US, in that as a result of these changes EC products are allegedly no longer recognised in the US as being of EC origin. The EC alleges violations of Articles 2.4, 4.2 and 4.4 of the ATC, Article 2 of the Agreement on Rules of Origin, Article III of GATT 1994, and Article 2 of the TBT Agreement. In a communication dated 21 July 2000, the parties notified a mutually agreed solution to this dispute.

WT/DS125 – Greece – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs.

Complaint by the United States. This request, dated 30 April 1998, is in respect of the same measures raised against the EC above (DS124). On 20 March 2001, the parties to the dispute notified a mutually satisfactory solution on the matter to the DSB.

WT/DS124 – European Communities – Enforcement of Intellectual Property Rights for motion pictures and television programs.

Complaint by the United States. This request, dated 30 April 1998, is in respect of the lack of enforcement of intellectual property rights in Greece. The US claims that a significant number of TV stations in Greece regularly broadcast copyrighted motion pictures and television programs without the authorization of copyright owners. The US contends that effective remedies against copyright infringement do not appear to be provided or enforced in Greece in respect of these broadcasts. The US alleges a violation of Articles 41 and 61 of the TRIPS Agreement. On 20 March 2001, the parties to the dispute notified a mutually satisfactory solution on the matter to the DSB.

WT/DS119 – Australia – Anti-Dumping Measures on Imports of Coated Woodfree Paper Sheets.

Complaint by Switzerland. This request, dated 20 February 1998, is in respect of the provisional anti-dumping measures applied on the imports of coated woodfree paper sheets from Switzerland.

Switzerland contends that the investigation is not in conformity with Australia's commitments under Articles 3 and 5 of the Anti-Dumping Agreement. On 13 May 1998, the two parties notified a mutually agreed solution.

WT/DS115 – European Communities – Measures Affecting the Grant of Copyright and Neighbouring Rights.

Complaint by the United States. On 6 January 1998, the US requested consultations with the EC regarding similar measures as in WT/DS82 in respect of Ireland. On 9 January 1998, the US requested the establishment of a panel. On 6 November 2000, the parties notified the DSB that they had reached a mutually satisfactory solution.

WT/DS103, WT/DS113 – Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products.

Complaints by the United States and New Zealand. On 9 May 2003, Canada and the United States, and Canada and New Zealand informed the DSB that they had reached mutually agreed solutions under Article 3.6 of the DSU in both disputes.

WT/DS102 – Philippines – Measures Affecting Pork and Poultry.

Complaint by the United States. This request, dated 7 October 1997, is in respect of the same measures complained of by the US in DS74, but also includes Administrative Order No. 8, Series of 1997, which purports to amend the original measure complained of in DS74. On 12 March 1998, the parties communicated a mutually agreed solution to their dispute.

WT/DS99 – United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea.

Complaint by Korea. This request, dated 14 August 1997, is in respect of a decision of the US Department of Commerce (DoC) not to revoke the anti-dumping duty on dynamic random access memory semi-conductors (DRAMS) of one megabyte or above originating from Korea. Korea contends that the DoC's decision was made despite the finding that the Korean DRAM producers have not dumped their products for a period of more than three and a half consecutive years, and despite the existence of evidence demonstrating conclusively that Korean DRAM producers will not engage in dumping DRAMS in the future. Korea considered that these measures are in violation of Articles 6 and 11 of the Anti-Dumping Agreement.

At its meeting on 16 January 1998, the DSB established a panel. The Panel found the measures complained of to be in violation of Article 11.2 of the Anti-Dumping Agreement. The report of the Panel was circulated on 29 January 1999. At its meeting on 19 March 1999, the DSB adopted the Panel Report. Korea requested that this matter be referred to the original panel pursuant to Article

21.5 of the DSU. Following adoption of the panel report by the DSB, Korea submitted a request to the effect that the matter be referred to the original panel pursuant to Article 21.5 of the DSU. At its meeting on 25 April 2000, the DSB agreed to reconvene the original panel pursuant to Article 21.5 of the DSU. The EC reserved its reserved its third-party rights. 19 September 2000, Korea has requested the Panel to suspend its work, including the issuance of the interim report, "until further notification" pursuant to Article 12.12 of the DSU. The Panel, in a letter sent to the parties on 21 September 2000, has agreed to this request. On 20 October 2000, the parties notified the DSB of a mutually satisfactory solution to the matter, involving the revocation of the antidumping order at issue as the result of a five-year "sunset" review by the US Department of Commerce.

WT/DS96 – India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Goods.

Complaint by the European Communities. This request, dated 18 July 1997, raises the same issues in respect of India's quantitative restrictions on imports of agricultural, textile and industrial products as in the requests by the US (DS90), Australia (DS91), Canada (DS92), New Zealand (DS93), and Switzerland (DS94). In addition, the EC is also alleging violations of Articles 2, 3 and 5 of the SPS Agreement. On 7 April 1998, the two parties notified a mutually agreed solution.

WT/DS94 – India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products.

Complaint by Switzerland. This request, dated 18 July 1997, raises the same issues in respect of India's quantitative restrictions on imports of agricultural, textile and industrial products as in the requests by the US (DS90), Australia (DS91), Canada (DS92), and New Zealand (DS93). However, Switzerland does not invoke the Agreement on Agriculture. On 23 February 1998, the two parties notified a mutually agreed solution.

WT/DS93 – India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products.

Complaint by New Zealand. This request, dated 16 July 1997, raises the same issues in respect of India's quantitative restrictions on imports of agricultural, textile and industrial products as in the requests by the US (DS90), Australia (DS91) and Canada (DS92). However, New Zealand makes an additional claim for nullification and impairment of benefits accruing to it under GATT 1994. In a letter dated 14 September 1998, but communicated to the Secretariat on 1 December 1998, the two parties notified a mutually agreed solution to this dispute.

WT/DS92 – India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products.

Complaint by Canada. This request, dated 16 July 1997, raises the same issues in respect of India's quantitative restrictions on imports of agricultural, textile and industrial products as in the requests by the US (DS90) and Australia (DS91). On 25 March 1998, the two parties notified a mutually agreed solution.

WT/DS91 – India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products.

Complaint by Australia. This request, dated 16 July 1997, raises the same issues in respect of India's quantitative restrictions on imports of agricultural, textile and industrial products as in the request by the US in DS90. On 23 March 1998, the two parties notified a mutually agreed solution.

WT/DS86 – Sweden – Measures Affecting the Enforcement of Intellectual Property Rights.

Complaint by the United States. This request, dated 28 May 1997, is in respect of Sweden's alleged failure to make provisional measures available in the context of civil proceedings involving intellectual property rights. The US contends that this failure violates Sweden's obligations under Articles 50, 63 and 65 of the TRIPS Agreement. In a communication dated 2 December 1998, the two parties notified a mutually agreed solution to this dispute.

WT/DS85 – United States – Measures Affecting Textiles and Apparel Products.

Complaint by the European Communities. This request, dated 23 May 1997, is in respect of changes to US rules of origin for textiles and apparel products. The EC alleges that the US has introduced changes to its rules of origin for textile and apparel products, which affect exports of EC fabrics, scarves and other flat textile products to the US. As a result, the EC alleges that EC products are no longer recognised in the US as being of EC origin and lose the free access to the US market that they had hitherto enjoyed. The EC contends that these changes in US rules of origin are in violation of the obligations of the US under Articles 2.4, 4.2 and 4.4 of the ATC, Article 4.2 of the Agreement on Rules of Origin, Article III of GATT 1994, and Article 2 of the TBT Agreement. On 11 February 1998, the two parties notified their mutually agreed solution.

WT/DS83 – Denmark – Measures Affecting the Enforcement of Intellectual Property Rights.

Complaint by the United States. This request, dated 14 May 1997, is in respect of Denmark's alleged failure to make provisional measures available in the context of civil proceedings involving intellectual property rights. The US contends that this failure violates Denmark's obligations under Articles 50, 63 and 65 of the TRIPS Agreement. On 7 June 2001, the parties to the dispute notified to the DSB a mutually satisfactory solution on the matter.

WT/DS82 – Ireland – Measures Affecting the Grant of Copyright and Neighbouring Rights.

Complaint by the United States. On 14 May 1997, the US requested consultations with Ireland in respect Ireland's alleged failure to grant copyright and neighbouring rights under its law. The US contended that this failure violates Ireland's obligations under Articles 9-14, 63, 65 and 70 of the TRIPS Agreement. On 9 January 1998, the United States requested the establishment of a panel. On 6 November 2000, the parties informed the DSB that they had reached a mutually satisfactory solution.

WT/DS74 – Philippines – Measures Affecting Pork and Poultry.

Complaint by the United States. This request, dated 1 April 1997, is in respect of the implementation by the Philippines of its tariff-rate quotas for pork and poultry. The US contends that the Philippines'

implementation of these tariff-rate quotas, in particular the delays in permitting access to the in-quota quantities and the licensing system used to administer access to the in-quota quantities, appears to be inconsistent with the obligations of the Philippines under Articles III, X, and XI of GATT 1994, Article 4 of the Agreement on Agriculture, Articles 1 and 3 of the Agreement on Import Licensing Procedures, and Articles 2 and 5 of TRIMs. The US further contends that theses measures appear to nullify or impair benefits accruing to it directly or indirectly under cited agreements. On 12 March 1998, the parties communicated a mutually agreed solution to their dispute.

WT/DS73 – Japan – Procurement of a Navigation Satellite.

Complaint by the European Communities. This request, dated 26 March 1997, is in respect of a procurement tender published by the Ministry of Transport (MoT) of Japan to purchase a multi-functional satellite for Air Traffic Management. The EC contends that the specifications in the tender were not neutral but referred explicitly to US specifications. This meant, the EC contends, that European bidders could effectively not participate in the tender. The EC alleges inconsistency of this tender with Annex I of Appendix I of Japan's commitments under the Government Procurement Agreement (GPA). The EC also alleges violations of Articles VI(3) and XII(2) of the GPA. On 31 July 1997, the EC notified the Secretariat that a mutually agreed solution had been reached with Japan in this dispute. On 19 February 1998, the two parties communicated the text of their agreement to the DSB.

WT/DS72 – European Communities – Measures Affecting Butter Products.

Complaint by New Zealand. This request, dated 24 March 1997, is in respect of decisions by the EC and the United Kingdom's Customs and Excise Department, to the effect that New Zealand butter manufactured by the ANMIX butter-making process and the spreadable butter-making process be classified so as to be excluded from eligibility for New Zealand's country-specific tariff quota established by the European Communities' WTO Schedule. New Zealand alleges violations of Articles II, X and XI of GATT, Article 2 of the TBT Agreement, and Article 3 of the Agreement on Import Licensing Procedures. On 6 November 1997, New Zealand requested the establishment of a panel. The DSB established a panel on 18 November 1997. The US reserved its third-party rights. At the request of the complainants, dated 24 February 1999, the Panel agreed, pursuant to Article 12.12 of the DSU, to suspend the panel proceedings. In a communication dated 11 November 1999, the parties notified a mutually agreed solution to this dispute.

WT/DS43 – Turkey – Taxation of Foreign Film Revenues.

Complaint by the United States. This request for consultations, dated 12 June 1996, concerns Turkey's taxation of revenues generated from the showing of foreign films. Violation of GATT Article III is alleged. On 9 January 1997, the United States requested the establishment of a panel. At its meeting on 25 February 1997, the DSB established a panel. Canada reserved its third-party rights to the dispute. On 14 July 1997, both parties notified the DSB of a mutually agreed solution.

WT/DS42 – Japan – Measures Concerning Sound Recordings.

Complaint by the European Communities. This request for consultations, dated 24 May 1996, concerns the intellectual property protection of sound recordings under GATT Article XXII:1. Violations of Articles 14.6 and 70.2 of the TRIPS Agreement are alleged. Earlier, the United States

requested consultations with Japan on the same issue (WT/DS28), in which the EC joined. On 7 November 1997, both parties notified a mutually agreed solution.

WT/DS40 – Korea – Laws, Regulations and Practices in the Telecommunications Procurement Sector.

Complaint by the European Communities. This request for consultations, dated 9 May 1996, concerns the laws, regulations and practices in the telecommunications sector. The EC claims that the procurement practices of the Korean telecommunications sector (Korea Telecom and Dacom) discriminate against foreign suppliers. The EC also claims that the Korean government has favoured US suppliers under two bilateral telecommunications agreements between Korea and the US. Violations of GATT Articles I, III and XVII are alleged. On 22 October 1997, the parties notified the Secretariat of a mutually agreed solution.

WT/DS37 – Portugal – Patent Protection under the Industrial Property Act.

Complaint by the United States. This request for consultations dated 30 April 1996, concerned Portugal's term of patent protection under its Industrial Property Act. The US claimed that the provisions in that Act with respect to existing patents were inconsistent with Portugal's obligations under the TRIPS Agreement. Violations under Articles 33, 65 and 70 were alleged. On 3 October 1996, both parties notified a mutually agreed solution to the DSB.

WT/DS36 – Pakistan – Patent Protection for Pharmaceutical and Agricultural Chemical Products.

Complaint by the United States. In its request for consultations dated 30 April 1996, the United States claimed that the absence in Pakistan of (i) either patent protection for pharmaceutical and agricultural chemical products or a system to permit the filing of applications for patents on these products and (ii) a system to grant exclusive marketing rights in such products, violates TRIPS Agreement Articles 27, 65 and 70. On 4 July 1996, the United States requested the establishment of a panel. The DSB considered the request at its meeting on 16 July 1996, but did not establish a panel due to Pakistan's objection. At the DSB meeting on 25 February 1997, both parties informed the DSB that they had reached a mutually agreed solution to the dispute and that the terms of the agreement were being drawn up, and would be communicated to the DSB once finalized. On 28 February 1997, the terms of the agreement were communicated to the Secretariat.

WT/DS35 – Hungary – Export Subsidies in Respect of Agricultural Products.

Complaint by Argentina, Australia, Canada, New Zealand, Thailand and the United States. This request, dated 27 March 1996, claims that Hungary violated the Agreement on Agriculture (Article 3.3 and Part V) by providing export subsidies in respect of agricultural products not specified in its Schedule, as well as by providing agricultural export subsidies in excess of its commitment levels. On 9 January 1997, Argentina, Australia, New Zealand and the United States requested the establishment of a panel. At its meeting on 25 February 1997 the DSB established a panel. Canada, Japan, Thailand and Uruguay reserved their third-party rights to the dispute. At the DSB meeting on 30 July 1997, Australia, on behalf of all the complainants, notified the DSB that the parties to the dispute had reached a mutually agreed solution, which required Hungary to seek a waiver of certain of its WTO obligations. Pending adoption of the waiver, the complaint was not formally withdrawn.

WT/DS28 – Japan – Measures Concerning Sound Recordings.

Complaint by the United States. This request, dated 9 February 1996, is the first WTO dispute settlement case involving the TRIPS Agreement. The United States claims that Japan's copyright regime for the protection of intellectual property in sound recordings is inconsistent with, inter alia, the TRIPS Agreement Article 14 (protection of performers, producers of phonograms and broadcasting organizations). On January 24 1997, both parties informed the DSB that they had reached a mutually satisfactory solution to the dispute.

WT/DS21 – Australia – Measures Affecting the Importation of Salmonids.

Complaint by the United States. This request for consultations, dated 17 November 1995, concerns the same regulation alleged to be in violation of the WTO Agreements in WT/DS18, in respect of which the reports of the panel and Appellate Body have already been adopted and are awaiting implementation. On 11 May 1999, the United States requested the establishment of a panel. At its meeting on 16 June 1999, the DSB established a panel. Canada, the EC, Hong Kong/China, India and Norway reserved their third party rights. At the request of the complainants, the Panel agreed on 8 November 1999 to suspend its work, pursuant to Article 12.12 of the DSU, until such time as the panelists have completed their work in the ongoing proceeding requested by Canada pursuant to Article 21.5 of the DSU (WT/DS18) or for eleven months, whichever is the earlier. On 29 March 2000, the panel agreed to a request by the US, pursuant to Article 12.12 of the DSU, to suspend its work for a period of one month, i.e. until 29 April 2000. On 12 May 2000, the panel agreed to a request by the US to suspend its work for an additional period of time, which will expire on 17 July 2000. On 27 October 2000, the parties to the dispute notified a mutually satisfactory solution on the matter to the DSB.

WT/DS20 – Korea – Measures Concerning Bottled Water.

Complaint by Canada. In this request for consultations dated 8 November 1995, Canada claimed that Korean regulations on the shelf-life and physical treatment (disinfection) of bottled water were inconsistent with GATT Articles III and XI, SPS Articles 2 and 5 and TBT Article 2. At the DSB meeting on 24 April 1996, the parties to the dispute announced that they reached a settlement.

WT/DS19 – Poland – Import Regime for Automobiles.

Complaint by India. This request for consultations, dated 28 September 1995, concerns Poland's preferential treatment of the EC in its tariff scheme on automobiles. On 16 July 1996, both parties notified a mutually agreed solution to the DSB.

WT/DS7, WT/DS12, WT/DS14 – European Communities – Trade Description of Scallops.

Complaints by Canada, Peru and Chile. The complaint concerned a French Government Order laying down the official name and trade description of scallops. Complainants claimed that this Order will reduce competitiveness on the French market as their product will no longer be able to be sold as "Coquille Saint-Jacques" although there is no difference between their scallops and French scallops in terms of colour, size, texture, appearance and use, i.e. it is claimed they are "like products". Violations of GATT Articles I and III and TBT Article 2 were alleged.

A panel was established at the request of Canada on 19 July 1995. A joint panel was established on 11 October 1995 at the request of Peru and Chile on the same subject. The two panels concluded their substantive work, but suspended the proceedings pursuant to Article 12.12 of the DSU in May 1996 in view of the consultations held among the parties concerned towards a mutually agreed solution. The parties notified a mutually agreed solution to the DSB on 5 July 1996. Brief panel reports noting the settlement were circulated to Members on 5 August 1996 in accordance with the provisions of Article 12.7 of the DSU.

WT/DS6 – United States – Imposition of Import Duties on Automobiles from Japan under Sections 301 and 304 of the Trade Act of 1974.

Complaint by Japan. On 19 July 1995, the parties notified settlement of this dispute. Japan had alleged that the import surcharges violated GATT Articles I and II.

WT/DS5 – Korea – Measures Concerning the Shelf-Life of Products.

Complaint by the United States. On 3 May 1995, the US requested consultations with Korea in respect of requirements imposed by Korea on imports from the US which had the effect of restricting imports. The US alleged violations of Articles III and XI of GATT, Articles 2 and 5 of the SPS Agreement, Article 2 of the TBT Agreement, and Article 4 of the Agreement on Agriculture. The parties notified a mutually acceptable solution to this dispute on 31 July 1995.

APPELLATE BODY STATISTICS.

http://www.wto.org/english/tratop_e/dispu_e/stats_e.htm#fntext2
The following tables provide statistical information on appeals in the WTO.

Table 1. Number of Appellate Body Reports adopted.

Year of adoption	All Appellate Body Reports	Appellate Body Reports other than those arising from Reports of Panels established pursuant to DSU Article 21.5 (1)	Appellate Body Reports arising from Reports of Panels established pursuant to DSU Article 21.5
1996	2	2	0
1997	5	5	0
1998	8	8	0
1999	7	7	0
2000	10	8	2
2001	12	9	3
2002	7	6	1
2003	7	5	2
2004	6	6	0
2005	9	8	1
2006(2)	5	2	3
Total	**78**	**66**	**12**

1. Panels established pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") relate to "disagreement[s] as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the Dispute Settlement Body (the "DSB").

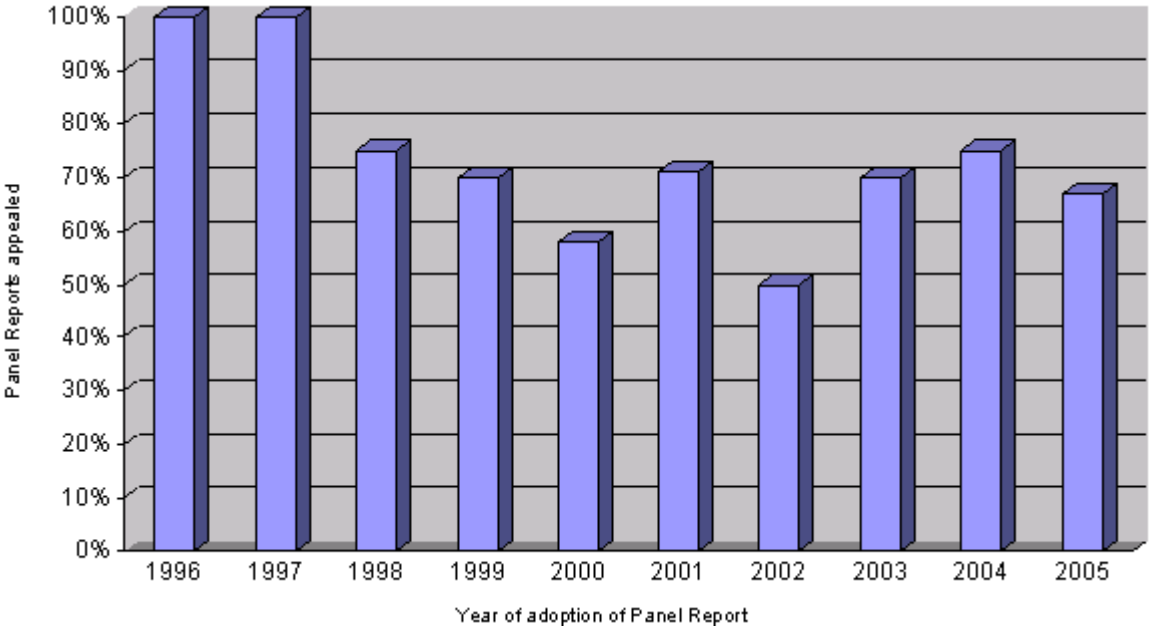
2. Appellate Body Reports adopted as at 1 September 2006.

Table 2. Percentage of Panel Reports appealed.

	All Panel Reports			Reports of Panels other than those established pursuant to DSU Article 21.5 (3)			Reports of Panels established pursuant to DSU Article 21.5		
Year of adoption	**Panel Reports adopted**	**Panel Reports appealed (4)**	**Percentage of Panel Reports appealed (5)**	**Panel Reports adopted (6)**	**Panel Reports appealed**	**Percentage of Panel Reports appealed**	**Panel Reports adopted**	**Panel Reports appealed**	**Percentage of Panel Reports appealed**
1996	2	2	100%	2	2	100%	0	0	-
1997	5	5	100%	5	5	100%	0	0	-
1998	12	9	75%	12	9	75%	0	0	-
1999	10	7	70%	9	7	78%	1	0	0%
2000	19	11	58%	15	9	60%	4	2	50%
2001	17	12	71%	13	9	69%	4	3	75%
2002	12	6	50%	11	5	45%	1	1	100%
2003	10	7	70%	8	5	63%	2	2	100%
2004	8	6	75%	8	6	75%	0	0	0%
2005	20	12	60%	17	11	65%	3	1	33%
Total	**115**	**77**	**67%**	**100**	**68**	**68%**	**15**	**9**	**60%**

3. Supra, footnote 1.
4. Panel Reports are counted as having been appealed where they are adopted as upheld, modified, or reversed by an Appellate Body Report. The number of Panel Reports appealed may differ from the number of Appellate Body Reports because, for example, some Appellate Body Reports address more than one Panel Report.
5. Percentages are rounded to the nearest whole number.
6. The Panel Reports in EC — Bananas III (Ecuador), EC — Bananas III (Guatemala and Honduras), EC — Bananas III (Mexico), and EC — Bananas III (US) are counted as a single Panel Report. The Panel Reports in US — Steel Safeguards are also counted as a single Panel Report.

Chart 1. Percentage of Panel Reports appealed.



APPELLATE BODY -- ANNUAL REPORT FOR 2005 (Statistics).

WT/AB/5 (JANUARY 2006)

ANNEX 2

APPEALS FILED: 1995–2005

Year	Number of Notices of Appeal filed
1995	0
1996	4
1997	6[a]
1998	8
1999	9[b]
2000	13[c]
2001	9[d]
2002	7[e]
2003	6[f]
2004	5
2005	10
Total	**77**

ANNEX 3
PERCENTAGE OF PANEL REPORTS APPEALED: 1996–2005

	All Panel Reports			Panel Reports other than Article 21.5 Reports[b]			Article 21.5 Panel Reports		
Year of adoption	*Panel Reports adopted* [c]	*Panel Reports appealed* [d]	*Percentage appealed* [e]	*Panel Reports adopted*	*Panel Reports appealed*	*Percentage appealed*	*Panel Reports adopted*	*Panel Reports appealed*	*Percentage appealed*
1996	2	2	100%	2	2	100%	0	0	–
1997	5	5	100%	5	5	100%	0	0	–
1998	12	9	75%	12	9	75%	0	0	–
1999	10	7	70%	9	7	78%	1	0	0%
2000	19	11	58%	15	9	60%	4	2	50%
2001	17	12	71%	13	9	69%	4	3	75%
2002	12	6	50%	11	5	45%	1	1	100%
2003	10	7	70%	8	5	63%	2	2	100%
2004	8	6	75%	8	6	75%	0	0	–
2005	20	12	60%	17	11	65%	3	1	33%
Total	**115**	**77**	**67%**	**100**	**68**	**68%**	**15**	**9**	**60%**

ANNEX 4
PARTICIPANTS AND THIRD PARTICIPANTS IN APPEALS CIRCULATED THROUGH 2005

As of the end of 2005, there were 149 WTO Members, of which 66 (44 per cent) have participated in appeals in which Appellate Body Reports ere circulated between 1996 and 2005.

STATISTICAL SUMMARY.

WTO Member	Appellant	Other Appellant	Appellee	Third Participant	Total
Antigua & Barbuda	1	–	1	–	1
Argentina	2	1	3	4	10
Australia	2	1	5	11	19
Barbados	–	–	–	1	1
Belize	–	–	–	2	2
Benin	–	–	–	1	1
Bolivia	–	–	–	1	1
Brazil	8	3	10	9	30
Cameroon	–	–	–	1	1
Canada	8	6	14	12	40
Chad	–	–	–	1	1
Chile	2	–	1	4	7
China	–	1	1	8	10
Colombia	–	–	–	4	4

WTO Member	Appellant	Other Appellant	Appellee	Third Participant	Total
Costa Rica	1	–	–	3	4
Côte d'Ivoire	–	–	–	2	2
Cuba	–	–	–	3	3
Dominica	–	–	–	2	2
Dominican Republic	1	–	1	1	3
Ecuador	–	1	1	5	7
Egypt	–	–	–	1	1
El Salvador	–	–	–	2	2
European Communities	10	11	26	33	80
Fiji	–	–	–	1	1
Ghana	–	–	–	1	1
Grenada	–	–	–	1	1
Guatemala	1	1	1	2	5
Guyana	–	–	–	1	1
Honduras	1	1	2	1	5
Hong Kong, China	–	–	–	4	4
India	5	1	5	13	24
Indonesia	–	–	1	1	2
Israel	–	–	–	1	1
Jamaica	–	–	–	3	3
Japan	4	4	8	19	35
Kenya	–	–	–	1	1
Korea	4	2	5	6	17
Madagascar	–	–	–	1	1
Malaysia	1	–	1	–	2
Mauritius	–	–	–	2	2
Malawi	–	–	–	1	1
Mexico	3	1	4	13	21
New Zealand	–	2	5	6	13
Nicaragua	–	–	–	2	2
Nigeria	–	–	–	1	1
Norway	–	1	1	6	8
Pakistan	–	–	2	2	4
Panama	–	–	–	1	1
Paraguay	–	–	–	4	4
Peru	–	–	1	1	2
Philippines	1	–	1	1	3
Poland	–	–	1	–	1
Senegal	–	–	–	1	1
St Lucia	–	–	–	2	2
St Kitts & Nevis	–	–	–	1	1
St Vincent & the Grenadines	–	–	–	1	1
Suriname	–	–	–	1	1
Swaziland	–	–	–	1	1
Switzerland	–	1	1	–	2
Chinese Taipei	–	–	–	7	7
Tanzania	–	–	–	1	1
Thailand	3	–	4	3	10

WTO Member	Appellant	Other Appellant	Appellee	Third Participant	Total
Trinidad &Tobago	–	–	–	1	1
Turkey	1	–	–	1	2
United States	23	8	41	23	95
Venezuela	–	–	1	6	7
Total	**82**	**46**	**148**	**255**	**531**

ANNEX 6
WTO AGREEMENTS COVERED IN APPELLATE BODY REPORTS CIRCULATED THROUGH 2005

Year of Circulation	DSU	WTO Agmt	GATT 1994	Agriculture	SPS	ATC	TBT	TRIMs	Anti-Dumping	Import Licensing	SCM	TRIPS	GATS	Safe-guards
1996	0	0	2	0	0	0	0	0	0	0	0	0	0	0
1997	4	1	5	1	0	2	0	0	0	1	1	1	1	0
1998	7	1	4	1	2	0	0	0	1	1	0	0	0	0
1999	7	1	6	1	1	0	0	0	0	0	2	0	0	1
2000	8	1	7	2	0	0	0	0	2	0	5	1	1	2
2001	7	1	3	1	0	1	1	0	4	0	1	0	0	2
2002	8	2	4	3	0	0	1	0	1	0	3	1	1	1
2003	4	2	3	0	1	0	0	0	4	0	1	0	0	1
2004	2	0	5	0	0	0	0	0	2	0	1	0	0	0
2005	9	0	5	2	0	0	0	0	2	0	4	0	1	0
Total	**56**	**9**	**44**	**11**	**4**	**3**	**2**	**0**	**16**	**2**	**18**	**3**	**4**	**7**

Chronological list of WTO disputes cases.

http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm

2006: cases 336-349

DS349	European Communities — Measures Affecting the Tariff Quota for Fresh or Chilled Garlic (Complainant: Argentina)	6 September 2006
DS348	Colombia — Customs Measures on Importation of Certain Goods from Panama (Complainant: Panama)	20 July 2006
DS347	European Communities — Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (Complainant: United States)	31 January 2006
DS346	United States — Anti-Dumping Administrative Review on Oil Country Tubular Goods from Argentina (Complainant: Argentina)	20 June 2006
DS345	United States — Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties (Complainant: India)	6 June 2006
DS344	United States — Final Anti-dumping Measures on Stainless Steel from Mexico (Complainant: Mexico)	26 May 2006
DS343	United States — Measures Relating to Shrimp from Thailand (Complainant: Thailand)	24 April 2006
DS342	China — Measures Affecting Imports of Automobile Parts (Complainant: Canada)	13 April 2006
DS341	Mexico — Definitive Countervailing Measures on Olive Oil from the European Communities (Complainant: European Communities)	31 March 2006
DS340	China — Measures Affecting Imports of Automobile Parts (Complainant: United States)	30 March 2006
DS339	China — Measures Affecting Imports of Automobile Parts (Complainant: European Communities)	30 March 2006
DS338	Canada — Provisional Anti-Dumping and Countervailing Duties on Grain Corn from the United States (Complainant: United States)	17 March 2006
DS337	European Communities — Anti-Dumping Measure on Farmed Salmon from Norway (Complainant: Norway)	17 March 2006
DS336	Japan — Countervailing Duties on Dynamic Random Access Memories from Korea (Complainant: Korea)	14 March 2006

2005: cases 325-335

DS335	United States — Anti-Dumping Measure on Shrimp from Ecuador (Complainant: Ecuador)	17 November 2005
DS334	Turkey — Measures Affecting the Importation of Rice (Complainant: United States)	2 November 2005
DS333	Dominican Republic — Foreign Exchange Fee Affecting Imports from Costa Rica (Complainant: Costa Rica)	12 September 2005

DS332	Brazil — Measures Affecting Imports of Retreaded Tyres (Complainant: European Communities)	20 June 2005
DS331	Mexico — Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala (Complainant: Guatemala)	17 June 2005
DS330	Argentina — Countervailing Duties on Olive Oil, Wheat Gluten and Peaches (Complainant: European Communities)	29 April 2005
DS329	Panama — Tariff Classification of Certain Milk Products (Complainant: Mexico)	16 March 2005
DS328	European Communities — Definitive Safeguard Measure on Salmon (Complainant: Norway)	1 March 2005
DS327	Egypt — Anti-Dumping Duties on Matches from Pakistan (Complainant: Pakistan)	21 February 2005
DS326	European Communities — Definitive Safeguard Measure on Salmon (Complainant: Chile)	8 February 2005
DS325	United States — Anti-Dumping Determinations regarding Stainless Steel from Mexico (Complainant: Mexico)	5 January 2005

2004: cases 306-324

DS324	United States — Provisional Anti-Dumping Measures on Shrimp from Thailand (Complainant: Thailand)	9 December 2004
DS323	Japan — Import Quotas on Dried Laver and Seasoned Laver (Complainant: Korea)	1 December 2004
DS322	United States — Measures Relating to Zeroing and Sunset Reviews (Complainant: Japan)	24 November 2004
DS321	Canada — Continued Suspension of Obligations in the EC — Hormones Dispute (Complainant: European Communities)	8 November 2004
DS320	United States — Continued Suspension of Obligations in the EC — Hormones Dispute (Complainant: European Communities)	8 November 2004
DS319	United States — Section 776 of the Tariff Act of 1930 (Complainant: European Communities)	5 November 2004
DS318	India — Anti-Dumping Measures on Certain Products from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Complainant: Chinese Taipei)	28 October 2004
DS317	United States — Measures Affecting Trade in Large Civil Aircraft (Complainant: European Communities)	6 October 2004
DS316	European Communities — Measures Affecting Trade in Large Civil Aircraft (Complainant: United States)	6 October 2004
DS315	European Communities — Selected Customs Matters (Complainant: United States)	21 September 2004
DS314	Mexico — Provisional Countervailing Measures on Olive Oil from the European Communities (Complainant: European Communities)	18 August 2004
DS313	European Communities — Anti-Dumping Duties on Certain Flat Rolled Iron or Non-Alloy Steel Products from India (Complainant: India)	5 July 2004
DS312	Korea — Anti-Dumping Duties on Imports of Certain Paper from Indonesia (Complainant: Indonesia)	4 June 2004
DS311	United States — Reviews of Countervailing Duty on Softwood Lumber from Canada (Complainant: Canada)	14 April 2004
DS310	United States — Determination of the International Trade Commission in Hard Red Spring Wheat from Canada (Complainant: Canada)	8 April 2004
DS309	China — Value-Added Tax on Integrated Circuits (Complainant: United States)	18 March 2004
DS308	Mexico — Tax Measures on Soft Drinks and Other Beverages (Complainant: United States)	16 March 2004
DS307	European Communities — Aid for Commercial Vessels (Complainant: Korea)	13 February 2004
DS306	India — Anti-Dumping Measure on Batteries from Bangladesh (Complainant: Bangladesh)	28 January 2004

2003: cases 280-305

DS305	Egypt — Measures Affecting Imports of Textile and Apparel Products (Complainant: United States)	23 December 2003
DS304	India — Anti-Dumping Measures on Imports of Certain Products from the European Communities (Complainant: European Communities)	8 December 2003
DS303	Ecuador — Definitive Safeguard Measure on Imports of Medium Density Fibreboard (Complainant: Chile)	24 November 2003
DS302	Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes (Complainant: Honduras)	8 October 2003
DS301	European Communities — Measures Affecting Trade in Commercial Vessels (Complainant: Korea)	3 September 2003
DS300	Dominican Republic — Measures Affecting the Importation of Cigarettes (Complainant: Honduras)	28 August 2003
DS299	European Communities — Countervailing Measures on Dynamic Random Access Memory Chips from Korea (Complainant: Korea)	25 July 2003
DS298	Mexico — Certain Pricing Measures for Customs Valuation and Other Purposes (Complainant: Guatemala)	22 July 2003
DS297	Croatia — Measures Affecting Imports of Live Animals and Meat Products (Complainant: Hungary)	9 July 2003
DS296	United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea (Complainant: Korea)	30 June 2003
DS295	Mexico — Definitive Anti-Dumping Measures on Beef and Rice (Complainant: United States)	16 June 2003
DS294	United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) (Complainant: European Communities)	12 June 2003
DS293	European Communities — Measures Affecting the Approval and Marketing of Biotech Products (Complainant: Argentina)	14 May 2003
DS292	European Communities — Measures Affecting the Approval and Marketing of Biotech Products (Complainant: Canada)	13 May 2003
DS291	European Communities — Measures Affecting the Approval and Marketing of Biotech Products (Complainant: United States)	13 May 2003
DS290	European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complainant: Australia)	17 April 2003
DS289	Czech Republic — Additional Duty on Imports of Pig-Meat from Poland (Complainant: Poland)	16 April 2003
DS288	South Africa — Definitive Anti-Dumping Measures on Blanketing from Turkey (Complainant: Turkey)	9 April 2003
DS287	Australia — Quarantine Regime for Imports (Complainant: European Communities)	3 April 2003
DS286	European Communities — Customs Classification of Frozen Boneless Chicken Cuts (Complainant: Thailand)	25 March 2003
DS285	United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Complainant: Antigua and Barbuda)	13 March 2003
DS284	Mexico — Certain Measures Preventing the Importation of Black Beans from Nicaragua (Complainant: Nicaragua)	17 March 2003
DS283	European Communities — Export Subsidies on Sugar (Complainant: Thailand)	14 March 2003
DS282	United States — Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico (Complainant: Mexico)	18 February 2003
DS281	United States — Anti-Dumping Measures on Cement from Mexico (Complainant: Mexico)	31 January 2003
DS280	United States — Countervailing Duties on Steel Plate from Mexico (Complainant: Mexico)	21 January 2003

2002: cases 243-279

DS279	India — Import Restrictions Maintained Under the Export and Import Policy 2002-2007 (Complainant: European Communities)	23 December 2002
DS278	Chile — Definitive Safeguard Measure on Imports of Fructose (Complainant: Argentina)	20 December 2002
DS277	United States — Investigation of the International Trade Commission in Softwood Lumber from Canada (Complainant: Canada)	20 December 2002
DS276	Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain (Complainant: United States)	17 December 2002
DS275	Venezuela — Import Licensing Measures on Certain Agricultural Products (Complainant: United States)	7 November 2002
DS274	United States — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: Chinese Taipei)	1 November 2002
DS273	Korea — Measures Affecting Trade in Commercial Vessels (Complainant: European Communities)	21 October 2002
DS272	Peru — Provisional Anti-Dumping Duties on Vegetable Oils from Argentina (Complainant: Argentina)	21 October 2002
DS271	Australia — Certain Measures Affecting the Importation of Fresh Pineapple (Complainant: Philippines)	18 October 2002
DS270	Australia — Certain Measures Affecting the Importation of Fresh Fruit and Vegetables (Complainant: Philippines)	18 October 2002
DS269	European Communities — Customs Classification of Frozen Boneless Chicken Cuts (Complainant: Brazil)	11 October 2002
DS268	United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (Complainant: Argentina)	7 October 2002
DS267	United States — Subsidies on Upland Cotton (Complainant: Brazil)	27 September 2002
DS266	European Communities — Export Subsidies on Sugar (Complainant: Brazil)	27 September 2002
DS265	European Communities — Export Subsidies on Sugar (Complainant: Australia)	27 September 2002
DS264	United States — Final Dumping Determination on Softwood Lumber from Canada (Complainant: Canada)	13 September 2002
DS263	European Communities — Measures Affecting Imports of Wine (Complainant: Argentina)	4 September 2002
DS262	United States — Sunset Reviews of Anti-Dumping and Countervailing Duties on Certain Steel Products from France and Germany (Complainant: European Communities)	25 July 2002
DS261	Uruguay — Tax Treatment on Certain Products (Complainant: Chile)	18 June 2002
DS260	European Communities — Provisional Safeguard Measures on Imports of Certain Steel Products (Complainant: United States)	30 May 2002
DS259	United States — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: Brazil)	21 May 2002
DS258	United States — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: New Zealand)	14 May 2002
DS257	United States — Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada (Complainant: Canada)	3 May 2002
DS256	Turkey — Import Ban on Pet Food from Hungary (Complainant: Hungary)	3 May 2002
DS255	Peru — Tax Treatment on Certain Imported Products (Complainant: Chile)	22 April 2002
DS254	United States — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: Norway)	4 April 2002

DS253	United States — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: Switzerland)	3 April 2002
DS252	United States — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: China)	26 March 2002
DS251	United States — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: Korea)	20 March 2002
DS250	United States — Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products (Complainant: Brazil)	20 March 2002
DS249	United States — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: Japan)	20 March 2002
DS248	United States — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: European Communities)	7 March 2002
DS247	United States — Provisional Anti-Dumping Measure on Imports of Certain Softwood Lumber from Canada (Complainant: Canada)	6 March 2002
DS246	European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries (Complainant: India)	5 March 2002
DS245	Japan — Measures Affecting the Importation of Apples (Complainant: United States)	1 March 2002
DS244	United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan (Complainant: Japan)	30 January 2002
DS243	United States — Rules of Origin for Textiles and Apparel Products (Complainant: India)	11 January 2002

2001: cases 220-242

DS242	European Communities — Generalized System of Preferences (Complainant: Thailand)	7 December 2001
DS241	Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil (Complainant: Brazil)	7 November 2001
DS240	Romania — Import Prohibition on Wheat and Wheat Flour (Complainant: Hungary)	18 October 2001
DS239	United States — Anti-Dumping Duties on Silicon Metal from Brazil (Complainant: Brazil)	18 September 2001
DS238	Argentina — Definitive Safeguard Measure on Imports of Preserved Peaches (Complainant: Chile)	14 September 2001
DS237	Turkey — Certain Import Procedures for Fresh Fruit (Complainant: Ecuador)	31 August 2001
DS236	United States — Preliminary Determinations with Respect to Certain Softwood Lumber from Canada (Complainant: Canada)	21 August 2001
DS235	Slovakia — Safeguard Measure on Imports of Sugar (Complainant: Poland)	11 July 2001
DS234	United States — Continued Dumping and Subsidy Offset Act of 2000 (Complainants: Canada, Mexico)	21 May 2001
DS233	Argentina — Measures Affecting the Import of Pharmaceutical Products (Complainant: India)	25 May 2001
DS232	Mexico — Measures Affecting the Import of Matches (Complainant: Chile)	17 May 2001
DS231	European Communities — Trade Description of Sardines (Complainant: Peru)	20 March 2001
DS230	Chile — Safeguard Measures and Modification of Schedules Regarding Sugar (Complainant: Colombia)	17 April 2001
DS229	Brazil — Anti-Dumping Duties on Jute Bags from India (Complainant: India)	9 April 2001
DS228	Chile — Safeguard Measures on Sugar (Complainant: Colombia)	15 March 2001
DS227	Peru — Taxes on Cigarettes (Complainant: Chile)	1 March 2001
DS226	Chile — Provisional Safeguard Measure on Mixtures of Edible Oils (Complainant: Argentina)	19 February 2001
DS225	United States — Anti-Dumping Duties on Seamless Pipe from Italy (Complainant: European	5 February 2001

	Communities)	
DS224	United States — US Patents Code (Complainant: Brazil)	31 January 2001
DS223	European Communities — Tariff-Rate Quota on Corn Gluten Feed from the United States (Complainant: United States)	25 January 2001
DS222	Canada — Export Credits and Loan Guarantees for Regional Aircraft (Complainant: Brazil)	22 January 2001
DS221	United States — Section 129(c)(1) of the Uruguay Round Agreements Act (Complainant: Canada)	17 January 2001
DS220	Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Complainant: Guatemala)	5 January 2001
		2000: cases 186-219
DS219	European Communities — Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil (Complainant: Brazil)	21 December 2000
DS218	United States — Countervailing Duties on Certain Carbon Steel Products from Brazil (Complainant: Brazil)	21 December 2000
DS217	United States — Continued Dumping and Subsidy Offset Act of 2000 (Complainants: Australia, Brazil, Chile, European Communities, India, Indonesia, Japan, Korea, Thailand)	21 December 2000
DS216	Mexico — Provisional Anti-Dumping Measure on Electric Transformers (Complainant: Brazil)	20 December 2000
DS215	Philippines — Anti-Dumping Measures Regarding Polypropylene Resins from Korea (Complainant: Korea)	15 December 2000
DS214	United States — Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Quality Line Pipe (Complainant: European Communities)	1 December 2000
DS213	United States — Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (Complainant: European Communities)	10 November 2000
DS212	United States — Countervailing Measures Concerning Certain Products from the European Communities (Complainant: European Communities)	10 November 2000
DS211	Egypt — Definitive Anti-Dumping Measures on Steel Rebar from Turkey (Complainant: Turkey)	6 November 2000
DS210	Belgium — Administration of Measures Establishing Customs Duties for Rice (Complainant: United States)	12 October 2000
DS209	European Communities — Measures Affecting Soluble Coffee (Complainant: Brazil)	12 October 2000
DS208	Turkey — Anti-Dumping Duty on Steel and Iron Pipe Fittings (Complainant: Brazil)	9 October 2000
DS207	Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Complainant: Argentina)	5 October 2000
DS206	United States — Anti-Dumping and Countervailing Measures on Steel Plate from India (Complainant: India)	4 October 2000
DS205	Egypt — Import Prohibition on Canned Tuna with SoyBean Oil (Complainant: Thailand)	22 September 2000
DS204	Mexico — Measures Affecting Telecommunications Services (Complainant: United States)	17 August 2000
DS203	Mexico — Measures Affecting Trade in Live Swine (Complainant: United States)	10 July 2000
DS202	United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (Complainant: Korea)	13 June 2000
DS201	Nicaragua — Measures Affecting Imports from Honduras and Colombia (Complainant: Honduras)	6 June 2000
DS200	United States — Section 306 of the Trade Act 1974 and Amendments thereto (Complainant: European Communities)	5 June 2000
DS199	Brazil — Measures Affecting Patent Protection (Complainant: United States)	30 May 2000
DS198	Romania — Measures on Minimum Import Prices (Complainant: United States)	30 May 2000

DS197	Brazil — Measures on Minimum Import Prices (Complainant: United States)	30 May 2000
DS196	Argentina — Certain Measures on the Protection of Patents and Test Data (Complainant: United States)	30 May 2000
DS195	Philippines — Measures Affecting Trade and Investment in the Motor Vehicle Sector (Complainant: United States)	23 May 2000
DS194	United States — Measures Treating Export Restraints as Subsidies (Complainant: Canada)	19 May 2000
DS193	Chile — Measures affecting the Transit and Importing of Swordfish (Complainant: European Communities)	19 April 2000
DS192	United States — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (Complainant: Pakistan)	3 April 2000
DS191	Ecuador — Definitive Anti-Dumping Measure on Cement from Mexico (Complainant: Mexico)	15 March 2000
DS190	Argentina — Transitional Safeguard Measures on Certain Imports of Woven Fabric Products of Cotton and Cotton Mixtures Originating in Brazil (Complainant: Brazil)	11 February 2000
DS189	Argentina — Definitive Anti-Dumping Measures on Carton-Board Imports from Germany and Definitive Anti-Dumping Measures on Imports of Ceramic Tiles from Italy (Complainant: European Communities)	26 January 2000
DS188	Nicaragua — Measures Affecting Imports from Honduras and Colombia (Complainant: Colombia)	17 January 2000
DS187	Trinidad and Tobago — Provisional Anti-Dumping Measure on Macaroni and Spaghetti from Costa Rica (Complainant: Costa Rica)	17 January 2000
DS186	United States — Section 337 of the Tariff Act of 1930 and Amendments thereto (Complainant: European Communities)	12 January 2000

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DS185	Trinidad and Tobago — Anti-Dumping Measures on Pasta from Costa Rica (Complainant: Costa Rica)	18 November 1999
DS184	United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (Complainant: Japan)	18 November 1999
DS183	Brazil — Measures on Import Licensing and Minimum Import Prices (Complainant: European Communities)	14 October 1999
DS182	Ecuador — Provisional Anti-Dumping Measure on Cement from Mexico (Complainant: Mexico)	5 October 1999
DS181	Colombia — Safeguard Measure of Imports of Plain Polyester Filaments from Thailand (Complainant: Thailand)	7 September 1999
DS180	United States — Reclassification of Certain Sugar Syrups (Complainant: Canada)	6 September 1999
DS179	United States — Anti-Dumping measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea (Complainant: Korea)	30 July 1999
DS178	United States — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from Australia (Complainant: Australia)	23 July 1999
DS177	United States — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand (Complainant: New Zealand)	16 July 1999
DS176	United States — Section 211 Omnibus Appropriations Act of 1998 (Complainant: European Communities)	8 July 1999
DS175	India — Measures Affecting Trade and Investment in the Motor Vehicle Sector (Complainant: United States)	2 June 1999
DS174	European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complainant: United States)	1 June 1999
DS173	France — Measures Relating to the Development of a Flight Management System (Complainant: United States)	21 May 1999

DS172	European Communities — Measures Relating to the Development of a Flight Management System (Complainant: United States)	21 May 1999
DS171	Argentina — Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals (Complainant: United States)	6 May 1999
DS170	Canada — Term of Patent Protection (Complainant: United States)	6 May 1999
DS169	Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Complainant: Australia)	13 April 1999
DS168	South Africa — Anti-Dumping Duties on Certain Pharmaceutical Products from India (Complainant: India)	1 April 1999
DS167	United States — Countervailing Duty Investigation with respect to Live Cattle from Canada (Complainant: Canada)	19 March 1999
DS166	United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (Complainant: European Communities)	17 March 1999
DS165	United States — Import Measures on Certain Products from the European Communities (Complainant: European Communities)	4 March 1999
DS164	Argentina — Measures Affecting Imports of Footwear (Complainant: United States)	1 March 1999
DS163	Korea — Measures Affecting Government Procurement (Complainant: United States)	16 February 1999
DS162	United States — Anti-Dumping Act of 1916 (Complainant: Japan)	10 February 1999
DS161	Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Complainant: United States)	1 February 1999
DS160	United States — Section 110(5) of US Copyright Act (Complainant: European Communities)	26 January 1999
DS159	Hungary — Safeguard Measure on Imports of Steel Products from the Czech Republic (Complainant: Czech Republic)	21 January 1999
DS158	European Communities — Regime for the Importation, Sale and Distribution of Bananas (Complainants: Guatemala, Honduras, Mexico, Panama, United States)	20 January 1999
DS157	Argentina — Definitive Anti-Dumping Measures on Imports of Drill Bits from Italy (Complainant: European Communities)	14 January 1999
DS156	Guatemala — Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico (Complainant: Mexico)	5 January 1999

1998: cases 115-155

DS155	Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather (Complainant: European Communities)	23 December 1998
DS154	European Communities — Measures Affecting Differential and Favourable Treatment of Coffee (Complainant: Brazil)	7 December 1998
DS153	European Communities — Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complainant: Canada)	2 December 1998
DS152	United States — Sections 301–310 of the Trade Act 1974 (Complainant: European Communities)	25 November 1998
DS151	United States — Measures Affecting Textiles and Apparel Products (II) (Complainant: European Communities)	19 November 1998
DS150	India — Measures Affecting Customs Duties (Complainant: European Communities)	31 October 1998
DS149	India — Import Restrictions (Complainant: European Communities)	28 October 1998
DS148	Czech Republic — Measure Affecting Import Duty on Wheat from Hungary (Complainant: Hungary)	12 October 1998
DS147	Japan — Tariff Quotas and Subsidies Affecting Leather (Complainant: European Communities)	8 October 1998
DS146	India — Measures Affecting the Automotive Sector (Complainant: European Communities)	6 October 1998

DS145	Argentina — Countervailing Duties on Imports of Wheat Gluten from the European Communities (Complainant: European Communities)	23 September 1998
DS144	United States — Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada (Complainant: Canada)	25 September 1998
DS143	Slovak Republic — Measure Affecting Import Duty on Wheat from Hungary (Complainant: Hungary)	19 September 1998
DS142	Canada — Certain Measures Affecting the Automotive Industry (Complainant: European Communities)	17 August 1998
DS141	European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India (Complainant: India)	3 August 1998
DS140	European Communities — Anti-Dumping Investigations Regarding Unbleached Cotton Fabrics from India (Complainant: India)	3 August 1998
DS139	Canada — Certain Measures Affecting the Automotive Industry (Complainant: Japan)	3 July 1998
DS138	United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (Complainant: European Communities)	12 June 1998
DS137	European Communities — Measures Affecting Imports of Wood of Conifers from Canada (Complainant: Canada)	17 June 1998
DS136	United States — Anti-Dumping Act of 1916 (Complainant: European Communities)	4 June 1998
DS135	European Communities — Measures Affecting Asbestos and Products Containing Asbestos (Complainant: Canada)	28 May 1998
DS134	European Communities — Restrictions on Certain Import Duties on Rice (Complainant: India)	27 May 1998
DS133	Slovak Republic — Measures Concerning the Importation of Dairy Products and the Transit of Cattle (Complainant: Switzerland)	7 May 1998
DS132	Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States (Complainant: United States)	8 May 1998
DS131	France — Certain Income Tax Measures Constituting Subsidies (Complainant: United States)	5 May 1998
DS130	Ireland — Certain Income Tax Measures Constituting Subsidies (Complainant: United States)	5 May 1998
DS129	Greece — Certain Income Tax Measures Constituting Subsidies (Complainant: United States)	5 May 1998
DS128	Netherlands — Certain Income Tax Measures Constituting Subsidies (Complainant: United States)	5 May 1998
DS127	Belgium — Certain Income Tax Measures Constituting Subsidies (Complainant: United States)	5 May 1998
DS126	Australia — Subsidies Provided to Producers and Exporters of Automotive Leather (Complainant: United States)	4 May 1998
DS125	Greece — Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs (Complainant: United States)	4 May 1998
DS124	European Communities — Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs (Complainant: United States)	30 April 1998
DS123	Argentina — Safeguard Measures on Imports of Footwear (Complainant: Indonesia)	22 April 1998
DS122	Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland (Complainant: Poland)	6 April 1998
DS121	Argentina — Safeguard Measures on Imports of Footwear (Complainant: European Communities)	6 April 1998
DS120	India — Measures Affecting Export of Certain Commodities (Complainant: European Communities)	11 March 1998
DS119	Australia — Anti-Dumping Measures on Imports of Coated Woodfree Paper Sheets (Complainant: Switzerland)	20 February 1998

DS118	United States — Harbour Maintenance Tax (Complainant: European Communities)	6 February 1998
DS117	Canada — Measures Affecting Film Distribution Services (Complainant: European Communities)	20 January 1998
DS116	Brazil — Measures Affecting Payment Terms for Imports (Complainant: European Communities)	8 January 1998
DS115	European Communities — Measures Affecting the Grant of Copyright and Neighbouring Rights (Complainant: United States)	6 January 1998
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DS114	Canada — Patent Protection of Pharmaceutical Products (Complainant: European Communities)	19 December 1997
DS113	Canada — Measures Affecting Dairy Exports (Complainant: New Zealand)	29 December 1997
DS112	Peru — Countervailing Duty Investigation against Imports of Buses from Brazil (Complainant: Brazil)	23 December 1997
DS111	United States — Tariff Rate Quota for Imports of Groundnuts (Complainant: Argentina)	19 December 1997
DS110	Chile — Taxes on Alcoholic Beverages (Complainant: European Communities)	15 December 1997
DS109	Chile — Taxes on Alcoholic Beverages (Complainant: United States)	11 December 1997
DS108	United States — Tax Treatment for "Foreign Sales Corporations" (Complainant: European Communities)	18 November 1997
DS107	Pakistan — Export Measures Affecting Hides and Skins (Complainant: European Communities)	7 November 1997
DS106	Australia — Subsidies Provided to Producers and Exporters of Automotive Leather (Complainant: United States)	10 November 1997
DS105	European Communities — Regime for the Importation, Sale and Distribution of Bananas (Complainant: Panama)	24 October 1997
DS104	European Communities — Measures Affecting the Exportation of Processed Cheese (Complainant: United States)	8 October 1997
DS103	Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Complainant: United States)	8 October 1997
DS102	Philippines — Measures Affecting Pork and Poultry (Complainant: United States)	7 October 1997
DS101	Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States (Complainant: United States)	4 September 1997
DS100	United States — Measures Affecting Imports of Poultry Products (Complainant: European Communities)	18 August 1997
DS99	United States — Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea (Complainant: Korea)	14 August 1997
DS98	Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products (Complainant: European Communities)	12 August 1997
DS97	United States — Countervailing Duty Investigation of Imports of Salmon from Chile (Complainant: Chile)	5 August 1997
DS96	India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (Complainant: European Communities)	18 July 1997
DS95	United States — Measure Affecting Government Procurement (Complainant: Japan)	18 July 1997
DS94	India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (Complainant: Switzerland)	17 July 1997
DS93	India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (Complainant: New Zealand)	16 July 1997
DS92	India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (Complainant: Canada)	16 July 1997

DS91	India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (Complainant: Australia)	16 July 1997
DS90	India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (Complainant: United States)	15 July 1997
DS89	United States — Anti-Dumping Duties on Imports of Colour Television Receivers from Korea (Complainant: Korea)	10 July 1997
DS88	United States — Measure Affecting Government Procurement (Complainant: European Communities)	20 June 1997
DS87	Chile — Taxes on Alcoholic Beverages (Complainant: European Communities)	4 June 1997
DS86	Sweden — Measures Affecting the Enforcement of Intellectual Property Rights (Complainant: United States)	28 May 1997
DS85	United States — Measures Affecting Textiles and Apparel Products (Complainant: European Communities)	22 May 1997
DS84	Korea — Taxes on Alcoholic Beverages (Complainant: United States)	23 May 1997
DS83	Denmark — Measures Affecting the Enforcement of Intellectual Property Rights (Complainant: United States)	14 May 1997
DS82	Ireland — Measures Affecting the Grant of Copyright and Neighbouring Rights (Complainant: United States)	14 May 1997
DS81	Brazil — Measures Affecting Trade and Investment in the Automotive Sector (Complainant: European Communities)	7 May 1997
DS80	Belgium — Measures Affecting Commercial Telephone Directory Services (Complainant: United States)	2 May 1997
DS79	India — Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complainant: European Communities)	28 April 1997
DS78	United States — Safeguard Measure Against Imports of Broom Corn Brooms (Complainant: Colombia)	28 April 1997
DS77	Argentina — Measures Affecting Textiles, Clothing and Footwear (Complainant: European Communities)	21 April 1997
DS76	Japan — Measures Affecting Agricultural Products (Complainant: United States)	7 April 1997
DS75	Korea — Taxes on Alcoholic Beverages (Complainant: European Communities)	2 April 1997
DS74	Philippines — Measures Affecting Pork and Poultry (Complainant: United States)	1 April 1997
DS73	Japan — Procurement of a Navigation Satellite (Complainant: European Communities)	26 March 1997
DS72	European Communities — Measures Affecting Butter Products (Complainant: New Zealand)	24 March 1997
DS71	Canada — Measures Affecting the Export of Civilian Aircraft (Complainant: Brazil)	10 March 1997
DS70	Canada — Measures Affecting the Export of Civilian Aircraft (Complainant: Brazil)	10 March 1997
DS69	European Communities — Measures Affecting Importation of Certain Poultry Products (Complainant: Brazil)	24 February 1997
DS68	Ireland — Customs Classification of Certain Computer Equipment (Complainant: United States)	14 February 1997
DS67	United Kingdom — Customs Classification of Certain Computer Equipment (Complainant: United States)	14 February 1997
DS66	Japan — Measures Affecting Imports of Pork (Complainant: European Communities)	25 January 1997
DS65	Brazil — Certain Measures Affecting Trade and Investment in the Automotive Sector (Complainant: United States)	10 January 1997

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DS64	Indonesia — Certain Measures Affecting the Automobile Industry (Complainant: Japan)	29 November 1996
DS63	United States — Anti-Dumping Measures on Imports of Solid Urea from the Former German Democratic Republic (Complainant: European Communities)	28 November 1996
DS62	European Communities — Customs Classification of Certain Computer Equipment (Complainant: United States)	8 November 1996
DS61	United States — Import Prohibition of Certain Shrimp and Shrimp Products (Complainant: Philippines)	25 October 1996
DS60	Guatemala — Anti-Dumping Investigation Regarding Portland Cement from Mexico (Complainant: Mexico)	17 October 1996
DS59	Indonesia — Certain Measures Affecting the Automobile Industry (Complainant: United States)	8 October 1996
DS58	United States — Import Prohibition of Certain Shrimp and Shrimp Products (Complainants: India, Malaysia, Pakistan, Thailand)	8 October 1996
DS57	Australia — Textile, Clothing and Footwear Import Credit Scheme (Complainant: United States)	7 October 1996
DS56	Argentina — Measures Affecting Imports of Footwear, Textiles, Apparel and other Items (Complainant: United States)	4 October 1996
DS55	Indonesia — Certain Measures Affecting the Automobile Industry (Complainant: Japan)	4 October 1996
DS54	Indonesia — Certain Measures Affecting the Automobile Industry (Complainant: European Communities)	3 October 1996
DS53	Mexico — Customs Valuation of Imports (Complainant: European Communities)	27 August 1996
DS52	Brazil — Certain Measures Affecting Trade and Investment in the Automotive Sector (Complainant: United States)	9 August 1996
DS51	Brazil — Certain Automotive Investment Measures (Complainant: Japan)	30 July 1996
DS50	India — Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complainant: United States)	2 July 1996
DS49	United States — Anti-Dumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico (Complainant: Mexico)	1 July 1996
DS48	European Communities — Measures Concerning Meat and Meat Products (Hormones) (Complainant: Canada)	28 July 1996
DS47	Turkey — Restrictions on Imports of Textile and Clothing Products (Complainant: Thailand)	20 June 1996
DS46	Brazil — Export Financing Programme for Aircraft (Complainant: Canada)	19 June 1996
DS45	Japan — Measures Affecting Distribution Services (Complainant: United States)	13 June 1996
DS44	Japan — Measures Affecting Consumer Photographic Film and Paper (Complainant: United States)	13 June 1996
DS43	Turkey — Taxation of Foreign Film Revenues (Complainant: United States)	12 June 1996
DS42	Japan — Measures concerning Sound Recordings (Complainant: European Communities)	28 May 1996
DS41	Korea — Measures concerning Inspection of Agricultural Products (Complainant: United States)	24 May 1996
DS40	Korea — Laws, Regulations and Practices in the Telecommunications Procurement Sector (Complainant: European Communities)	5 May 1996
DS39	United States — Tariff Increases on Products from the European Communities (Complainant: European Communities)	18 April 1996
DS38	United States — The Cuban Liberty and Democratic Solidarity Act (Complainant: European Communities)	3 May 1996
DS37	Portugal — Patent Protection under the Industrial Property Act (Complainant: United States)	30 April 1996

DS36	Pakistan — Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complainant: United States)	30 April 1996
DS35	Hungary — Export Subsidies in respect of Agricultural Products (Complainants: Argentina, Australia, Canada, New Zealand, Thailand, United States)	27 March 1996
DS34	Turkey — Restrictions on Imports of Textile and Clothing Products (Complainant: India)	21 March 1996
DS33	United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India (Complainant: India)	14 March 1996
DS32	United States — Measures Affecting Imports of Women's and Girls' Wool Coats (Complainant: India)	14 March 1996
DS31	Canada — Certain Measures Concerning Periodicals (Complainant: United States)	11 March 1996
DS30	Brazil — Countervailing Duties on Imports of Desiccated Coconut and Coconut Milk Powder from Sri Lanka (Complainant: Sri Lanka)	23 February 1996
DS29	Turkey — Restrictions on Imports of Textile and Clothing Products (Complainant: Hong Kong, China)	12 February 1996
DS28	Japan — Measures Concerning Sound Recordings (Complainant: United States)	9 February 1996
DS27	European Communities — Regime for the Importation, Sale and Distribution of Bananas (Complainants: Ecuador, Guatemala, Honduras, Mexico, United States)	5 February 1996
DS26	European Communities — Measures Concerning Meat and Meat Products (Hormones) (Complainant: United States)	26 January 1996
		1995: cases 1-25
DS25	European Communities — Implementation of the Uruguay Round Commitments Concerning Rice (Complainant: Uruguay)	14 December 1995
DS24	United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear (Complainant: Costa Rica)	22 December 1995
DS23	Venezuela — Anti-Dumping Investigation in Respect of Imports of Certain Oil Country Tubular Goods (OCTG) (Complainant: Mexico)	5 December 1995
DS22	Brazil — Measures Affecting Desiccated Coconut (Complainant: Philippines)	30 November 1995
DS21	Australia — Measures Affecting the Importation of Salmonids (Complainant: United States)	20 November 1995
DS20	Korea — Measures concerning Bottled Water (Complainant: Canada)	8 November 1995
DS19	Poland — Import Regime for Automobiles (Complainant: India)	28 September 1995
DS18	Australia — Measures Affecting Importation of Salmon (Complainant: Canada)	5 October 1995
DS17	European Communities — Duties on Imports of Rice (Complainant: Thailand)	5 October 1995
DS16	European Communities — Regime for the Importation, Sale and Distribution of Bananas (Complainants: Guatemala, Honduras, Mexico, United States)	28 September 1995
DS15	Japan — Measures Affecting the Purchase of Telecommunications Equipment (Complainant: European Communities)	18 August 1995
DS14	European Communities — Trade Description of Scallops (Complainant: Chile)	24 July 1995
DS13	European Communities — Duties on Imports of Grains (Complainant: United States)	19 July 1995
DS12	European Communities — Trade Description of Scallops (Complainant: Peru)	18 July 1995
DS11	Japan — Taxes on Alcoholic Beverages (Complainant: United States)	7 July 1995
DS10	Japan — Taxes on Alcoholic Beverages (Complainant: Canada)	7 July 1995
DS9	European Communities — Duties on Imports of Cereals (Complainant: Canada)	30 June 1995

DS8	Japan — Taxes on Alcoholic Beverages (Complainant: European Communities)	21 June 1995
DS7	European Communities — Trade Description of Scallops (Complainant: Canada)	19 May 1995
DS6	United States — Imposition of Import Duties on Automobiles from Japan under Sections 301 and 304 of the Trade act of 1974 (Complainant: Japan)	17 May 1995
DS5	Korea — Measures Concerning the Shelf-Life of Products (Complainant: United States)	3 May 1995
DS4	United States — Standards for Reformulated and Conventional Gasoline (Complainant: Brazil)	10 April 1995
DS3	Korea — Measures Concerning the Testing and Inspection of Agricultural Products (Complainant: United States)	4 April 1995
DS2	United States — Standards for Reformulated and Conventional Gasoline (Complainant: Venezuela)	24 January 1995
DS1	Malaysia — Prohibition of Imports of Polyethylene and Polypropylene (Complainant: Singapore)	10 January 1995

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http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm
[October 1, 2006]

SUMMARY OF SELECTED WTO / DSU CASES.

(October 1, 2006)
http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm

DISPUTE SETTLEMENT: DISPUTE DS2
United States — Standards for Reformulated and Conventional Gasoline
Appellate Body and Panel Reports Adopted
Complaints by Venezuela and Brazil.

Venezuela requested consultations on 24 January 1995 and Brazil on 10 April 1995. Complainants alleged that a US gasoline regulation discriminated against complainants' gasoline in violation of GATT Articles I and III and Article 2 of the Agreement on Technical Barriers to Trade (TBT).

Further to Venezuela's request, the DSB established a Panel at its meeting on 10 April 1995. On 26 April 1995 the Panel was composed. Further to Brazil's request, the DSB established a Panel at its meeting on 19 June 1995. On 31 May 1995, in accordance with Article 9 of the DSU, it was agreed that a single panel would consider the complaints of Venezuela and Brazil. The report of the panel was circulated to Members on 29 January 1996. The report of the panel found the regulation to be inconsistent with GATT Article III:4 and not to benefit from an Article XX exception.

The US appealed on 21 February 1996. On 22 April, the Appellate Body issued its report, modifying the panel report on the interpretation of GATT Article XX(g), but concluding that Article XX(g) was not applicable in this case. The Appellate Report, together with the panel report as modified by the Appellate Report, was adopted by the DSB on 20 May 1996.

Implementation Status of Adopted Reports

The US announced implementation of the recommendations of the DSB as of 19 August 1997, at the end of the 15 month reasonable period of time.

DISPUTE SETTLEMENT: DISPUTE DS11
Japan — Taxes on Alcoholic Beverages
Appellate Body and Panel Reports Adopted
Complaints by the European Communities, Canada and the United States.

The EC requested consultations on 21 June 1995, and Canada and the US on 7 July 1995. The complainants claimed that spirits exported to Japan were discriminated against under the Japanese liquor tax system which, in their view, levies a substantially lower tax on "slouch" than on whisky, cognac and white spirits.

A joint panel was established at the DSB meeting on 27 September 1995. On 30 October 1995, the Panel was composed. The report of the panel, which found the Japanese tax system to be inconsistent with GATT Article III:2, was circulated to Members on 11 July 1996.

On 8 August 1996 Japan filed an appeal. The report of the Appellate Body was circulated to Members on 4 October 1996. The Appellate Body's Report affirmed the Panel's conclusion that the Japanese Liquor Tax Law is inconsistent with GATT Article III:2, but pointed out several areas where the Panel had erred in its legal reasoning. The Appellate Report, together with the panel report as modified by the Appellate Report, was adopted on 1 November 1996.

Implementation Status of Adopted Reports

On 24 December 1996, the US, pursuant to Article 21(3)(C) of the DSU applied for binding arbitration to determine the reasonable period of time for implementation by Japan of the recommendations of the Appellate Body.

The Arbitrator's report was circulated to members on 14 February 1997. The Arbitrator found the reasonable period for implementation of the recommendations to be 15 months from the date of adoption of the reports i.e. it expired on 1 February 1998. Japan presented modalities for implementation which were accepted by the complainants.

DISPUTE SETTLEMENT: DISPUTE DS31
Canada — Certain Measures Concerning Periodicals
Appellate Body and Panel Reports Adopted
Complaint by the United States.

On 11 March 1996, the United States requested consultations with Canada concerning certain measures prohibiting or restricting the importation into Canada of certain periodicals. The US claimed that the measures are in contravention of GATT Article XI. The US further alleged that the tax treatment of so-called "split-run" periodicals and the application of favourable postage rates to certain Canadian periodicals are inconsistent with GATT Article III.

On 24 May 1996, the US requested the establishment of a panel. At its meeting on 6 June 1996, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the US, the DSB established a panel on 19 June 1996. On 25 July 1996, the Panel was composed. The report of the Panel was circulated to Members on 14 March 1997. The Panel found the measures applied by Canada to be in violation of GATT rules.

On 29 April 1997, Canada notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 30 June 1997. The Appellate Body upheld the Panel's findings and conclusions on the applicability of GATT 1994 to Part V.1 of Canada's Excise Tax Act, but reversed the Panel's finding that Part V.1 of the Excise Act is inconsistent with the first sentence of Article III:2 of GATT 1994. The Appellate Body further concluded that Part V.1 of the Excise Act is inconsistent with the second sentence of Article III:2 of GATT 1994. The Appellate Body also reversed the Panel's conclusion that Canada's "funded" postal rate scheme is justified by Article III:8(be) of GATT 1994.

At its meeting on 30 July 1997, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body.

Implementation Status of Adopted Reports

The implementation period was agreed by the parties to be 15 months from the date of adoption of the reports i.e. it expired on 30 October 1998. Canada has withdrawn the contested measure.

DISPUTE SETTLEMENT: DISPUTE DS44
Japan — Measures Affecting Consumer Photographic Film and Paper
Appellate Body and Panel Reports Adopted
Complaint by the United States.

On 13 June 1996, the United States requested consultations with Japan concerning Japan's laws, regulations and requirements affecting the distribution, offering for sale and internal sale of imported consumer photographic film and paper. The US alleged that:

- **the Japanese Government treated imported film and paper less favourably through these measures, in violation of GATT Articles III and X.**
- **these measures nullify or impair benefits accruing to the US (a non-violation claim).**

On 20 September 1996, the US requested the establishment of a panel. At its meeting on 3 October 1996, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the US, the DSB established a panel at its meeting on 16 October 1996. The EC and Mexico reserved their third party rights. On 12 December 1996, the US requested the Director-General to determine the composition of the Panel. On 17 December 1996, the Panel was composed. The report of the Panel was circulated to Members on 31 March 1998. The Panel found:

- **that the US had not demonstrated that the Japanese 'measures' cited by the US nullified or impaired, either individually or collectively, benefits accruing to the US within the meaning of GATT Article XXIII:1(b);**
- **that the US had not demonstrated that the Japanese distribution 'measures' cited by the US accord less favourable treatment to imported photographic film and paper within the meaning of GATT Article III:4; and**
- **that the US did not demonstrate that Japan failed to publish administrative rulings of general application in violation of GATT Article X:1.**

The Panel report was adopted by the DSB on 22 April 1998.

DISPUTE SETTLEMENT: DISPUTE DS62
European Communities — Customs Classification of Certain Computer Equipment
Appellate Body and Panel Reports Adopted
Complaints by the United States.

These are in respect of the alleged reclassification by the European Communities, for tariff purposes, of certain Local Area Network (LAN) adapter equipment and personal computers with multimedia capability. The US alleged that these measures violate Article II of GATT 1994.

At its meeting on 25 February 1997, the DSB established a panel in respect of the complaint WT/DS62. Japan, Korea, India and Singapore reserved their third-party rights. At its meeting on 20 March 1997, the DSB established a panel in respect of the complaints WT/DS67 and WT/DS68. In accordance with Article 9.1 of the DSU, the DSB agreed to establish a single panel to examine the complaints WT/DS62, WT/DS67 and WT/DS68.

The report of the Panel was circulated to Members on 5 February 1998. The Panel found that the EC failed to accord imports of LAN equipment from the US treatment no less favourable than that provided for in the EC Schedule of commitments, thereby acting inconsistently with Article II:1 of GATT 1994.

On 24 March 1998, the EC notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 5 June 1998. The Appellate Body reversed the Panel's conclusion that the EC tariff treatment of LAN equipment is inconsistent with Article II:1 of GATT 1994.

At its meeting on 22 June 1998, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

DISPUTE SETTLEMENT: DISPUTE DS70
Canada — Measures Affecting the Export of Civilian Aircraft
Appellate Body and Panel Reports Adopted
Complaint by Brazil.

On 10 March 1997, Brazil requested consultations with Canada in respect of certain subsidies granted by the Government of Canada or its provinces intended to support the export of civilian aircraft. The request was made pursuant to Article 4 of the Subsidies Agreement. Brazil contended that these measures are inconsistent with Article 3 of the Subsidies Agreement.

At its meeting on 23 July 1998, the DSB established a panel. The US reserved its third party rights. On 16 October 1998, Brazil requested the Director-General to determine the composition of the Panel. On 22 October 1998, the Panel was composed. The report of the panel was circulated to Members on 14 April 1999. The Panel found that certain of Canada's measures were inconsistent with Articles 3.1(a) and 3.2 of the Subsidies Agreement, but rejected Brazil's claim that EDC assistance to the Canadian regional aircraft industry constitutes export subsidies.

On 3 May 1999, Canada notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 2 August 1999. The Appellate Body upheld the findings of the panel.

The DSB adopted the Appellate Body and Panel Reports on 20 August 1999.

Appellate Body and Panel Compliance Reports (Article 21.5) Adopted

On 23 November 1999, Brazil requested the establishment of a panel under Article 21.5 because it believed that Canada had not taken measures to comply fully with the rulings and recommendations of the DSB. Brazil and Canada reached an agreement concerning the procedures to be applicable pursuant to Articles 21 and 22 of the DSU and Article 4 of the Subsidies Agreement. At its meeting on 9 December 1999, the DSB agreed to reconvene the original panel pursuant to Article 21.5 of the DSU. Australia, the EC and the US reserved their third-party rights. On 17 December 1999, the Compliance Panel was composed.

The report of the compliance panel was circulated to Members on 9 May 2000. The panel found:

- **that Canada had implemented the recommendation of the DSB that Canada withdraw Technology Partnership Canada (TPC) assistance to the Canadian regional aircraft industry within 90 days,**
- **but that Canada had failed to implement the recommendation that it withdraw the Canada Account assistance to the Canadian regional aircraft industry within 90 days.**

With regard to the latter finding, the panel considered that the measures taken by Canada were not sufficient to ensure that future Canada Account transactions in the Canadian regional aircraft sector would be in conformity with the interest rate provisions of the OECD Arrangement and would thereby qualify for the safe haven in item (k) of Annex I of the Subsidies Agreement. The panel therefore concluded that Canada's measures did not ensure that such Canada Account transactions would not be prohibited export subsidies.

On 22 May 2000, Brazil notified its intention to appeal certain issues of law and legal interpretations developed by the compliance panel. The report of the Appellate Body was circulated to Members on 21 July 2000. The Appellate Body found that the review panel erred in declining to examine one of Brazil's arguments to the effect that the revised TPC programme is inconsistent with Article 3.1(a) of the Subsidies Agreement. The Appellate Body also found, however, that Brazil had failed to establish that the revised TPC programme is inconsistent with Article 3.1(a) of the Subsidies Agreement and, accordingly, that Brazil had failed to establish that Canada has not implemented the recommendations of the DSB. The DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report, at its meeting on 4 August 2000. Canada stated its intention to implement the recommendations of the DSB in respect of the Canada Account Programme.

Implementation Status of Adopted Reports

At the DSB meeting of 19 November 1999, Canada announced that it had withdrawn the measures at issue within 90 days and thus had implemented the recommendations and rulings of the DSB. On 23 November 1999, Brazil requested the establishment of a panel under Article 21.5 because it believed that Canada had not taken measures to comply fully with the rulings and recommendations of the DSB. Brazil and Canada reached an agreement concerning the procedures to be applicable pursuant to Articles 21 and 22 of the DSU and Article 4 of the Subsidies Agreement. At its meeting on 9 December 1999, the DSB agreed to reconvene the original panel pursuant to Article 21.5 of the DSU. Australia, the EC and the US reserved their third-party rights.

The compliance panel report was circulated to Members on 9 May 2000. The panel concluded that Canada's measures did not ensure that such Canada Account transactions would not be prohibited export subsidies.

On 22 May 2000, Brazil notified its intention to appeal certain issues of law and legal interpretations developed by the review panel. The report of the Appellate Body was circulated to Members on 9 May 2000. The Appellate Body found that Brazil had failed to establish that Canada has not implemented the recommendations of the DSB. The DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report, at its meeting on 4 August 2000. Canada stated its intention to implement the recommendations of the DSB in respect of the Canada Account Programme.

DISPUTE SETTLEMENT: DISPUTE DS84
Korea — Taxes on Alcoholic Beverages
Appellate Body and Panel Reports Adopted
Complaints by the European Communities and the United States.

On 4 April 1997, the EC requested consultations with Korea in respect of internal taxes imposed by Korea on certain alcoholic beverages pursuant to its Liquor Tax Law and Education Tax Law. The EC contended that the Korean Liquor Tax Law and Education Tax Law appear to be inconsistent with Korea's obligations under Article III:2 of GATT 1994. On 23 May 1997, the US requested consultations with Korea in respect of the same measures complained of by the EC. The US also alleged violations of Article III:2.

On 10 September 1997, the EC and the US requested the establishment of a panel. At its meeting on 25 September 1997, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the EC and the US, the DSB established a panel at its meeting on 16 October 1997. Canada and Mexico reserved their third-party rights. On 26 November 1997, the EC and the US requested the Director-General to determine the composition of the Panel. On 5 December 1997, the Panel was composed. The report of the Panel was circulated to Members on 17 September 1998. The Panel found that:

- **soju (both diluted and distilled), is directly competitive and substitutable with the imported distilled alcoholic beverages that were in issue, namely, whisky, brandy, rum, gin, vodka, tequila, liqueurs and ad-mixtures.**
- **Korea has taxed the imported products in a dissimilar manner and that the tax differential was more than *de minimis*, and is applied so as to afford protection to domestic production.**
- **The Panel therefore concluded that Korea had violated Article III:2 of GATT 1994.**

On 20 October 1998, Korea notified its intention to appeal certain issues of law and legal interpretations developed by the Panel. The report of the Appellate Body was circulated to Members on 18 January 1999. The Appellate Body upheld the panel's findings on all points.
The DSB adopted the Panel and Appellate Body Reports on 17 February 1999.

Implementation Status of Adopted Reports

At the DSB meeting on 19 March 1999, Korea informed the DSB that it was considering options for implementation of the DSB's recommendations. On 9 April 1999, the two complainants separately

requested, pursuant to Article 21.3(c) of the DSU, that the reasonable period of time for Korea to implement the recommendations of the DSB be determined by arbitration. On 23 April 1999, the three parties to the dispute jointly informed the DSB that they had agreed on the appointment of an arbitrator for the determination of the reasonable period of time for implementation, and also that they had agreed that the arbitrator issue his arbitration award no later than 7 June 1999. On 4 June 1999, the arbitrator determined the reasonable period of time to be 11 months and two weeks. i.e. until 31 January 2000. At the DSB meeting on 27 January 2000, Korea stated that it considered to have fully implemented the DSB's rulings and recommendations by amending its Liquor Tax Law and the Education Tax Law to impose flat rates of 72% liquor tax and 30% education tax on all distilled alcoholic beverages on a non-discriminatory basis.

DISPUTE SETTLEMENT: DISPUTE DS99
United States — Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea
Appellate Body and Panel Reports Adopted
Complaint by Korea.

On 14 August 1997, Korea requested consultations with the US in respect of a decision of the US Department of Commerce (DoC) not to revoke the anti-dumping duty on dynamic random access memory semi-conductors (DRAMS) of one megabyte or above originating from Korea. Korea contended that the DoC's decision was made despite the finding that the Korean DRAM producers have not dumped their products for a period of more than three and a half consecutive years, and despite the existence of evidence demonstrating conclusively that Korean DRAM producers will not engage in dumping DRAMS in the future. Korea considered that these measures are in violation of Articles 6 and 11 of the Anti-Dumping Agreement.

On 6 November 1997, Korea requested the establishment of a panel. At its meeting on 18 November 1997, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Korea, the DSB established a panel at its meeting on 16 January 1998. On 10 March 1998, Korea requested the Director-General to determine the composition of the Panel. On 19 March 1998, the Panel was composed. The report of the Panel was circulated on 29 January 1999. The Panel found the measures complained of to be in violation of Article 11.2 of the Anti-Dumping Agreement. At its meeting on 19 March 1999, the DSB adopted the Panel Report.

Appellate Body and Panel Compliance Reports (Article 21.5) Adopted

On 9 March 2000, Korea informed the DSB that it believed that the measures taken by the United States to comply with the rulings and recommendations of the DSB were not consistent with the Anti-Dumping Agreement and Article X:1 of GATT 1994. Korea therefore requested that this matter be referred to the original panel pursuant to Article 21.5 of the DSU. On 6 April 2000, Korea submitted a new request to the effect that the matter be referred to the original panel pursuant to Article 21.5 of the DSU. At its meeting on 25 April 2000, the DSB agreed to reconvene the original panel pursuant to Article 21.5 of the DSU. The EC reserved its reserved its third-party rights. On 11 May 2000, the Compliance Panel was composed.

On 19 September 2000, Korea requested the Panel to suspend its work, including the issuance of the interim report, "until further notification" pursuant to Article 12.12 of the DSU. The Panel, in a letter

sent to the parties on 21 September 2000, agreed to this request. On 20 October 2000, the parties notified the DSB of a mutually satisfactory solution to the matter, involving the revocation of the antidumping order at issue as the result of a five-year "sunset" review by the US Department of Commerce.

Implementation Status of Adopted Reports

On 13 April 1999, the United States informed the DSB it was studying ways in which to implement the recommendations of the DSB. At the DSB meeting on 26 July 1999, the two parties notified the DSB that they had agreed on an implementation period of 8 months effective from the date of adoption of the report, i.e. from 19 March 1999. The reasonable period of time expired on 19 November 1999.

At the DSB meeting on 27 January 2000, the US stated that it considered to have implemented the recommendations and rulings by the DSB. The US recalled that the Commerce Department had amended section 351.222(b) by deleting the "not likely" standard and incorporating the "necessary" standard of the Anti-Dumping Agreement. The Commerce Department then issued a revised Final Results of Redetermination in the Third Administrative Review on 4 November 1999, concluding that, because a resumption of dumping was likely, it was necessary to leave the anti-dumping order in place.

On 9 March 2000, Korea informed the DSB that it believed that the measures taken by the United States to comply with the rulings and recommendations of the DSB were not consistent with the Anti-Dumping Agreement and Article X:1 of GATT 1994. Korea therefore requested that this matter be referred to the original panel pursuant to Article 21.5 of the DSU. On 6 April 2000, Korea submitted a new request to the effect that the matter be referred to the original panel pursuant to Article 21.5 of the DSU. At its meeting on 25 April 2000, the DSB agreed to reconvene the original panel pursuant to Article 21.5 of the DSU. The EC reserved its reserved its third-party rights.

On 19 September 2000, Korea requested the Panel to suspend its work, including the issuance of the interim report, "until further notification" pursuant to Article 12.12 of the DSU. The Panel, in a letter sent to the parties on 21 September 2000, agreed to this request. On 20 October 2000, the parties notified the DSB of a mutually satisfactory solution to the matter, involving the revocation of the antidumping order at issue as the result of a five-year "sunset" review by the US Department of Commerce.

Mutually Agreed Solutions notified under Article 3.6 of the DSU

This request, dated 14 August 1997, is in respect of a decision of the US Department of Commerce (DoC) not to revoke the anti-dumping duty on dynamic random access memory semi-conductors (DRAMS) of one megabyte or above originating from Korea. Korea contends that the DoC's decision was made despite the finding that the Korean DRAM producers have not dumped their products for a period of more than three and a half consecutive years, and despite the existence of evidence demonstrating conclusively that Korean DRAM producers will not engage in dumping DRAMS in the future. Korea considered that these measures are in violation of Articles 6 and 11 of the Anti-Dumping Agreement.

At its meeting on 16 January 1998, the DSB established a panel. The Panel found the measures complained of to be in violation of Article 11.2 of the Anti-Dumping Agreement. The report of the

Panel was circulated on 29 January 1999. At its meeting on 19 March 1999, the DSB adopted the Panel Report. Korea requested that this matter be referred to the original panel pursuant to Article 21.5 of the DSU. Following adoption of the panel report by the DSB, Korea submitted a request to the effect that the matter be referred to the original panel pursuant to Article 21.5 of the DSU. At its meeting on 25 April 2000, the DSB agreed to reconvene the original panel pursuant to Article 21.5 of the DSU. The EC reserved its reserved its third-party rights. 19 September 2000, Korea has requested the Panel to suspend its work, including the issuance of the interim report, "until further notification" pursuant to Article 12.12 of the DSU. The Panel, in a letter sent to the parties on 21 September 2000, has agreed to this request. On 20 October 2000, the parties notified the DSB of a mutually satisfactory solution to the matter, involving the revocation of the antidumping order at issue as the result of a five-year "sunset" review by the US Department of Commerce.

DISPUTE SETTLEMENT: DISPUTE DS108
United States — Tax Treatment for "Foreign Sales Corporations"
Appellate Body and Panel Reports Adopted
Complaint by the European Communities.

On 18 November 1997, the EC requested consultations with the US in respect of Sections 921-927 of the US Internal Revenue Code and related measures, establishing special tax treatment for "Foreign Sales Corporations" (FSC). The EC contended that these provisions were inconsistent with US obligations under Articles III:4 and XVI of the GATT 1994, Articles 3.1(a) and (b) of the Subsidies Agreement, and Articles 3 and 8 of the Agreement on Agriculture.

On 1 July 1998, the EC requested the establishment of a Panel. In the request for a panel, the EC invoked Article 3.1(a) and (b) of the Subsidies Agreement, and Articles 3 and 8, 9 and 10 of the Agreement on Agriculture, and did not pursue the claims under the GATT 1994. At its meeting on 23 July 1998, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the EC, the DSB established a panel at its meeting on 22 September 1998. Barbados, Canada and Japan reserved their third-parties rights. On 9 November 1998, the Panel was composed. The report of the panel was circulated to Members on 8 October 1999. The panel found that, through the FSC scheme, the United States had acted inconsistently with its obligations under Article 3.1(a) of the Subsidies Agreement as well as with its obligations under Article 3.3 of the Agreement on Agriculture (and consequently with its obligations under Article 8 of that Agreement).

On 28 October 1999, the US notified its intention to appeal certain issues of law and legal interpretations developed by the panel. On 2 November 1999, the US withdrew its notice of appeal pursuant to Rule 30 of the Working Procedures for Appellate Review, stating that the withdrawal was conditional on its right to file a new notice of appeal pursuant to Rule 20 of the Working Procedures. On 26 November 1999, the US notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The report of the Appellate Body was circulated to Members on 24 February 2000. The Appellate Body ruled as follows:

- **it upheld the panel's finding that the FSC measure constituted a prohibited subsidy under Article 3.1(a) of the SCM Agreement.**
- **it reversed the panel's finding that the FSC measure involved "the provision of subsidies to reduce the costs of marketing exports" of agricultural products under Article 9.1(d) of the**

Agriculture Agreement and, in consequence, reversed the panel's findings that the US had acted inconsistently with its obligations under Article 3.3 of the Agriculture Agreement.

- **it found that the US acted inconsistently with its obligations under Articles 10.1 and 8 of the Agriculture Agreement by applying export subsidies, through the FSC measure, in a manner which results in, or threatens to lead to, circumvention of its export subsidy commitments with respect to agricultural products.**
- **it also emphasized that it was not ruling that a Member must choose one kind of tax system over another so as to be consistent with that Member's WTO obligations.**

The DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report, at its meeting on 20 March 2000.

Appellate Body and Panel Compliance Reports (Article 21.5) Adopted

On 7 December 2000, the EC notified the DSB that consultations had failed to settle the dispute and that it was requesting the establishment of a panel pursuant to Article 21.5 of the DSU. At its meeting of 20 December 2000, the DSB agreed to refer the matter to the original panel. Australia, Canada, India, Jamaica and Japan reserved their third party rights. On 5 January 2001, the Panel was composed. On 21 December 2000, pursuant to an agreement between the parties, the US and the EC jointly requested the Article 22.6 DSU arbitrator to suspend the arbitration proceeding until adoption of the panel report or, if there is an appeal, adoption of the Appellate Body report. The arbitration was accordingly suspended.

On 20 August 2001, the compliance panel report was circulated to the Members. The Panel concluded that the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (the amended FSC legislation) was still inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement, with 10.1 and 8 of the Agreement on Agriculture and with Article III:4 of the GATT 1994.

On 15 October 2001, the US notified its decision to appeal certain issues of law and legal interpretations developed by the panel report. On 14 January 2002, the Appellate Body circulated its Report to the Members. The Appellate Body:

- **upheld the Panel's findings that the US acted inconsistently with its obligations under the SCM Agreement, the Agreement on Agriculture, and the GATT 1994 through the FSC amended legislation, a measure taken by the United States to implement the recommendations and rulings made by the DSB in the original proceedings in the *United States — FSC* dispute;**
- **with respect to third party rights, found that the Panel erred in its interpretation of Article 10.3 of the DSU in declining to rule that *all* written submissions of the parties filed prior to the first meeting of the Panel must be provided to the third parties.**

At its meeting on 29 January 2002, the DSB adopted the Appellate Body Report and the Panel Report, as upheld by the Appellate Body Report.

On 13 January 2005, the EC notified the DSB that consultations had failed to settle the dispute and that it was requesting the establishment of a panel pursuant to Article 21.5 of the DSU. At its meeting of 25 January 2005, the DSB deferred the establishment of a panel. At its meeting of 17 February 2005, the DSB agreed to refer the matter to the original panel.

On 22 April 2005, the European Communities requested the Director-General to compose the panel. On 2 May 2005, the Director-General composed the panel. On 2 August 2005, the Panel informed the DSB that given the particular circumstances of this case and the schedule agreed after consultations with parties to this dispute, it was not possible for the Panel to complete its work within the 90-day period as foreseen in Article 21.5, and that the Panel expected to complete its work by the second week of August.

On 30 September 2005, the Panel Report was circulated to Members. The Panel found that the United States has failed to implement fully the DSB recommendations and rulings arising from the original dispute and first compliance proceedings. On 24 November 2005, the United States notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel.

On 10 January 2006, the Appellate Body informed the DSB that due to the time required for completion and translation of the report, the Appellate Body would not be able to circulate its report within the 60-day period, and that it estimated that the report would be circulated no later than 13 February 2006. The report of the Appellate Body was circulated to Members on 13 February 2006. In its report, the Appellate Body upheld the Panel's findings. At its meeting on 14 March 2006, the DSB adopted the Appellate Body report and the Panel report, as upheld by the Appellate Body report.

Implementation Status of Adopted Reports

Pursuant to Article 21.3 of the DSU, the US informed the DSB on 7 April 2000 of its intention to implement the recommendations of the DSB in a manner consistent with its WTO obligations. At the request of the United States, at its meeting of 12 October 2000, the DSB modified the time-period for implementation so as to expire on 1 November 2000. On 17 November 2000, the US stated that, with the adoption on 15 November 2000 of the FSC Repeal and Extraterritorial Income Exclusion Act, it had implemented the recommendations and rulings of the DSB. On the same date, the EC stated that, in its view, the US had failed to comply with the DSB recommendations and rulings, and requested the US to enter into consultations with the EC pursuant to Articles 4 and 21.5 of the DSU, Article 4 of the SCM Agreement, Article 19 of the Agreement on Agriculture and Article XXIII:1 of GATT 1994. Also on 17 November 2000, the EC requested authorisation from the DSB to take appropriate countermeasures and suspend concessions pursuant to Article 4.10 of the SCM Agreement and Article 22.2 of the DSU.

Pursuant to an agreement between the parties to the dispute, the US would request arbitration with respect to the EC's request and the arbitration would be suspended until the reconstituted panel has decided the conformity of the new US legislation with the panel and Appellate Body reports. On 27 November 2000, the US requested that the matter be referred to arbitration pursuant to Article 22.6 of the DSU. On 7 December 2000, the EC notified the DSB that consultations had failed to settle the dispute and that it was requesting the establishment of a panel pursuant to Article 21.5 of the DSU. At its meeting of 20 December, the DSB agreed to refer the matter to the original panel. On 21 December 2000, pursuant to an agreement between the parties, the US and the EC jointly requested the Article 22.6 DSU arbitrator to suspend the arbitration proceeding until adoption of the panel report or, if there is an appeal, adoption of the Appellate Body report. The arbitration was accordingly suspended.

On 20 August 2001, the compliance panel report was circulated to the Members. The Panel concluded that the amended FSC legislation was still inconsistent with Articles 3.1(a) and 3.2 of the SCM

Agreement, with 10.1 and 8 of the Agreement on Agriculture and with Article III:4 of the GATT 1994.

On 15 October 2001, the US notified its decision to appeal certain issues of law and legal interpretations developed by the panel report. On 14 January 2002, the Appellate Body circulated its Report to the Members. The Appellate Body upheld the Panel's findings that the US acted inconsistently with its obligations under the SCM Agreement, the Agreement on Agriculture, and the GATT 1994 through the FSC amended legislation, a measure taken by the United States to implement the recommendations and rulings made by the DSB in the original proceedings in the *United States — FSC* dispute. With respect to third party rights, the Appellate Body found that the Panel erred in its interpretation of Article 10.3 of the DSU in declining to rule that *all* written submissions of the parties filed prior to the first meeting of the Panel must be provided to the third parties.

At its meeting on 29 January 2002, the DSB adopted the Appellate Body Report and the Panel Report, as upheld by the Appellate Body Report. In accordance with the procedural agreement concluded by the parties to the dispute in September 2000 (WT/DS108/12), Article 22.6 arbitration on the amount of countermeasures and suspension of concessions would be automatically reactivated.

On 30 August 2002, the Arbitrator's award was circulated. The Arbitrator determined that the suspension by the EC of concessions under the GATT 1994 in the form of the imposition of a 100 per cent *ad valorem* charge on imports of certain goods from the United States in a maximum amount of $4,043 million per year, as described in the EC's request for authorization to take countermeasures and suspend concessions, would constitute appropriate countermeasures within the meaning of Article 4.10 of the SCM Agreement.

On 24 April 2003, the EC requested authorization to suspend concessions or other obligations under Article 22.7 of the DSU and Article 4.10 of the SCM Agreement. At its meeting on 7 May 2003, the DSB granted the EC authorization to take appropriate countermeasures and to suspend concessions.
On 5 November 2004, the EC requested the US to enter into consultations under Articles 4 and 21.5 of the DSU, Article 4 of the *SCM Agreement*, Article 19 of the Agreement on Agriculture and Article XXII:1 of GATT 1994 with respect to *the American JOBS Creation Act of 2004* (the "JOBS Act") enacted by the US on 22 October 2004. According to the EC, the JOBS Act was intended to implement the DSB recommendations and rulings in this case (compliance phase) but failed to do so properly and was inconsistent with the same provisions of the *WTO Agreement* as did the predecessor legislation. In particular, the European Communities considers that Section 101 of the JOBS Act contains transitional provisions which will allow US exporters to continue to benefit from the WTO incompatible FSC Replacement and Extraterritorial Income Exclusion Act (a) in the years 2005 and 2006 with respect to all export transactions and (b) for an indefinite period with respect to certain binding contracts, thus failing to withdraw the subsidy and implement the DSB's recommendations and rulings.
On 17 November 2004, Australia requested to join the consultations.

On 13 January 2005, the EC notified the DSB that consultations had failed to settle the dispute and that it was requesting the establishment of a panel pursuant to Article 21.5 of the DSU. At its meeting of 25 January 2005, the DSB deferred the establishment of a panel. At its meeting of 17 February 2005, the DSB agreed to refer the matter to the original panel.

On 22 April 2005, the European Communities requested the Director General to compose the panel. On 2 May 2005, the Director-General composed the panel. On 2 August 2005, the Panel informed the DSB that given the particular circumstances of this case and the schedule agreed after consultations

with parties to this dispute, it was not possible for the Panel to complete its work within the 90-day period as foreseen in Article 21.5, and that the Panel expected to complete its work by the second week of August.

On 30 September 2005, the Panel Report was circulated to Members. The Panel found that the United States has failed to implement fully the DSB recommendations and rulings arising from the original dispute and first compliance proceedings. On 24 November 2005, the United States notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel. On 28 November 2005, the European Communities notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel. On 13 February 2006, the Appellate Body circulated its report.

DISPUTE SETTLEMENT: DISPUTE DS136
United States — Anti-Dumping Act of 1916
Appellate Body and Panel Reports Adopted
Complaint by the European Communities.

On 9 June 1988, the EC requested consultations with the US in respect of the alleged failure of the US to repeal its Anti-Dumping Act of 1916. The EC contended that the US Anti-Dumping Act of 1916 is still in force and is applicable to the import and internal sale of any foreign product irrespective of its origin, including products originating in countries which are WTO Members. The EC also alleged that the 1916 Act exists in the US statute books in parallel with the Tariff Act of 1930, as amended, which includes the US implementing legislation of multilateral Anti-Dumping provisions. The EC alleged violations of Articles III:4, VI:1, and VI:2 of GATT 1994, Article XVI:4 of the WTO Agreement, and Articles 1, 2, 3, 4 and 5 of the Anti-Dumping Agreement.

On 1 November 1998, the EC requested the establishment of a panel. At its meeting on 25 November 1998, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the EC, the DSB established a panel at its meeting on 1 February 1999. India, Japan and Mexico reserved their third-party rights. On 1 April 1999, the Panel was composed. The report of the panel was circulated to Members on 31 March 2000. The panel considered that:

- **Article VI:1 of GATT 1994 applies to any situation where a Member addresses the type of transnational price discrimination defined in that Article.**
- **on the basis of the terms of the 1916 Act, its legislative history and its interpretation by US courts, the transnational price discrimination test found in the 1916 Act met the definition of Article VI:1 of GATT 1994.**
- **by not providing exclusively for the injury test set out in Article VI, the 1916 Act violated Article VI:1 of the GATT 1994;**
- **by providing for the imposition of treble damages, fines or imprisonment, instead of anti-dumping duties, the 1916 Act violated Article VI:2 of the GATT 1994;**
- **by not providing for a number of procedural requirements found in the Anti-Dumping Agreement, the 1916 Act violated Articles 1, 4 and 5.5 of the Anti-Dumping Agreement; and**
- **by violating Articles VI:1 and VI:2 of the GATT 1994, the 1916 Act violated Article XVI:4 of the WTO Agreement.**

On 29 May 2000, the US notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The Appellate Body examined this appeal with that of WT/DS162. The

Appellate Body report was circulated to Members on 28 May 2000. The Appellate Body upheld all of the findings and conclusions of the panel that were appealed.

The DSB adopted the Appellate Body report and the Panel report, as upheld by the Appellate Body report, on 26 September 2000.

Implementation Status of Adopted Reports

Complaints by the European Communities (WT/DS136) and Japan (WT/DS162).

At the DSB meeting of 23 October 2000, the US stated that it was its intention to implement the DSB's recommendations and rulings. The US also stated that it would require a reasonable period of time for implementation and that it would consult with the EC and Japan on this matter. On 17 November 2000, the EC and Japan requested that the reasonable period of time be determined by arbitration pursuant to Article 21.3(c) of the DSU. The arbitrator circulated his report on 28 February 2001. He decided that the reasonable period of time in this case was 10 months and would thus expire on 26 July 2001. At its meeting on 24 July 2001, the DSB agreed to the US proposal to extend the reasonable period of time until 31 December 2001 or the end of the current session of the US Congress, whichever earlier. This extension had been agreed with the parties.

At the DSB meeting on 18 December 2001, the US informed that on 23 July 2001 it submitted proposed legislation to the US Congress repealing the 1916 Act and terminating all pending actions under the Act.. It added that, since the US Congress has not yet been adjourned, the US Administration continued to seek passage of the proposed legislation. Japan urged the US to complete the implementation within the reasonable period of time. However, in the event of non-compliance by the US, Japan will use its rights under Article 22 of the DSU. The EC also indicated that if the US would fail to comply with the DSB's recommendations, it would have no choice, but to request the authorization to suspend concessions or other obligations under Article 22.2 of the DSU. On 7 January 2002, on the grounds that that the US had failed to bring its measures into conformity within the reasonable period of time, the EC and Japan requested authorisation to suspend concessions pursuant to Article 22.2 of the DSU. Both Members propose that the suspension of concessions takes the form of an equivalent legislation to the Anti-Dumping Act of 1916 against imports from the US. On 17 January 2002, the US objected to the levels of suspension of obligations proposed by the EC and Japan and requested the DSB to refer the matter to arbitration, in accordance with Article 22.6 of the DSU. The US claimed that the principles and procedures of Article 22.3 had not been followed by the EC and Japan. At the DSB meeting on 18 January 2002, the matter was referred to arbitration. During the meeting, the parties indicated that they were still engaged in consultations and would be requesting the arbitrators, once appointed, to suspend their work with a view to exploring the possibility of finding a mutually satisfactory solution. On 25 February 2002, the US submitted to the DSB a status report regarding implementation of the DSB recommendations and rulings. On 27 February 2002, the parties requested the arbitrator to suspend the arbitration proceeding noting that a proposal to repeal the 1916 Act and to terminate cases pending under the Act was being examined by the US Congress. The parties noted, however, that the arbitration proceeding could be reactivated at the request of either party after 30 June 2002 if no substantial progress would have been made in resolving the dispute by then.

At the DSB meeting on 17 April 2002, the US submitted its Status Report regarding implementation of the DSB recommendations and rulings. The US stated that a bill had already been introduced to repeal the 1916 Antidumping Act and terminate some pending cases. While acknowledging the

progress made, the EC and Japan stressed the necessity for prompt compliance. Japan noted that under its bilateral agreement with the US, either party could re-activate the arbitration proceedings after 30 June 2002.

At the DSB meeting on 22 May 2002, the US submitted its status report regarding the implementation of the DSB recommendations and rulings. The US stated that on 23 April 2002 a bill had been introduced in the US Senate which would repeal the 1916 Act and apply to all pending court cases.

At the DSB meeting on 24 June 2002, the US submitted a status report where it stated that a bill had already been introduced in the US Congress to repeal the 1916 Anti-Dumping Act and to terminate some pending cases, and that it was continuing its efforts to find a mutually satisfactory solution to this dispute with the EC and Japan. The EC and Japan expressed concern about the lack of progress in this matter and urged the US to repeal the 1916 Act as soon as possible. Japan cautioned the US that it might reactivate arbitration proceedings if the 1916 Act was not repealed by 30 June. At the DSB meeting on 29 July 2002, the US reiterated the above statement. The EC and Japan expressed concern about the lack of progress in this matter and urged the United States to repeal the 1916 Act as soon as possible. They noted that proceedings against some of their companies might resume very soon and that it was imperative for swift action to be taken by the United States to prevent their companies from incurring huge expenses to defend themselves under legislation which had been found to be inconsistent with WTO rules

At the DSB meeting on 1 October 2002, the US submitted its status report and, in reference to the concerns expressed by the EC and Japan at the previous meetings of the DSB, stated that the bills currently before the Congress would repeal the 1916 Act and apply to all pending cases. The EC and Japan expressed concern about the lack of progress and indicated that swift action was imperative to prevent their companies from incurring huge expenses under WTO-inconsistent legislation.

At the DSB meeting on 11 November 2002, the US indicated that that the US Administration would continue to work with the US Congress following the Congressional recess to achieve further progress in resolving this dispute. The EC and Japan expressed concern about the lack of progress in this matter and urged the United States to repeal the 1916 Act without further delay. They noted that proceedings against some of their companies had resumed and that it was imperative for swift action to be taken by the US to prevent their companies from incurring huge expenses to defend themselves under legislation which had been found to be inconsistent with WTO rules. The EC said that the US status report was incomplete, as it did not mention the bill introduced by Representative Henry Hyde last June, which if adopted, would repeal the 1916 Act, but would not affect pending cases. For the EC, this would be unacceptable, as it would not fully comply with the recommendations and rulings of the DSB.

At the DSB meeting on 28 November 2002, the US reiterated that the bills repealing the 1916 Act which had been introduced in the US Congress, would apply to all pending court cases. It further stated that the US Administration would continue to work with the US Congress after the Congressional recess to achieve further progress in resolving this dispute. The EC and Japan expressed concern about the lack of progress in this matter and urged the US to repeal the 1916 Act without further delay. They also reiterated their concern about the bill introduced by Representative Henry Hyde on June 2002, which if adopted, would repeal the 1916 Act, but would not affect pending cases. They noted that such a result would be unacceptable, as it would not fully comply with the recommendations and rulings of the DSB. At the DSB meeting on 27 January 2003, the US repeated its previous status reports and the EC and Japan reiterated their concerns.

Given that no legislation had been adopted to repeal the 1916 Act and to terminate the cases pending before the US courts, on 19 September 2003 the EC requested the Arbitrators to reactivate the arbitration proceeding in dispute WT/DS136. In accordance with the request from the EC, the Arbitrators resumed the arbitration proceeding on the same day.

In respect of the arbitration proceeding in dispute WT/DS136, on 24 February 2004 the decision by the Arbitrators was circulated to Members. In light of the fact that the nullification or impairment results from the 1916 Act "as such", and not from particular instances of application of that law, the Arbitrators decided to set a number of parameters ((i) damages paid by EC companies as a result of judgements under the 1916 Act and (ii) amount of any settlement reached between an EC company and a US complainant pursuant to a 1916 Act complaint) with which the EC will have to comply when calculating by itself the amount of countermeasures it plans to impose, rather than setting a fixed value of trade which the EC should not exceed when suspending its WTO obligations against the US.

DISPUTE SETTLEMENT: DISPUTE DS160
United States — Section 110(5) of US Copyright Act
Appellate Body and Panel Reports Adopted
Complaint by the European Communities and their member States.

On 26 January 1999, the EC requested consultations with the US in respect of Section 110(5) of the US Copyright Act, as amended by the Fairness in Music Licensing Act, which was enacted on 27 October 1998. The EC contended that Section 110(5) of the US Copyright Act permits, under certain conditions, the playing of radio and television music in public places (bars, shops, restaurants, etc.) without the payment of a royalty fee. The EC considered that this statute is inconsistent with US obligations under Article 9(1) of the TRIPS Agreement, which requires Members to comply with Articles 1-21 of the Berne Convention.

The dispute centered on the compatibility of two exemptions provided for in Section 110(5) of the US Copyright Act with Article 13 of the TRIPS Agreement, which allows certain limitations or exceptions to exclusive rights of copyright holders, subject to the condition that such limitations are confined to certain special cases, do not conflict with a normal exploitation of the work in question and do not unreasonably prejudice the legitimate interests of the right holder:

- **The so-called "business" exemption, provided for in sub-paragraph (B) of Section 110(5), essentially allows the amplification of music broadcasts, without an authorization and a payment of a fee, by food service and drinking establishments and by retail establishments, provided that their size does not exceed a certain square footage limit. It also allows such amplification of music broadcasts by establishments above this square footage limit, provided that certain equipment limitations are met.**
- **The so-called "homestyle" exemption, provided for in sub-paragraph (A) of Section 110(5), allows small restaurants and retail outlets to amplify music broadcasts without an authorization of the right holders and without the payment of a fee, provided that they use only homestyle equipment (i.e. equipment of a kind commonly used in private homes).**

On 15 April 1999, the EC requested the establishment of a panel. At its meeting on 28 April 1999, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by the EC, the DSB established a panel at its meeting on 26 May 1999. Brazil, Australia, Canada, Japan and Switzerland reserved their third-party rights. On 27 July 1999, the EC made a request to the

Director-in-Charge to determine the composition of the Panel. On 6 August 1999, the Panel was composed. The report of the panel was circulated to Members on 15 June 2000. The panel found that:

- **the "business" exemption provided for in sub-paragraph (B) of Section 110(5) of the US Copyright Act did not meet the requirements of Article 13 of the TRIPS Agreement and was thus inconsistent with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement. The panel noted, *inter alia*, that a substantial majority of eating and drinking establishments and close to half of retail establishments were covered by the business exemption.**
- **the "homestyle" exemption provided for in sub-paragraph (A) of Section 110(5) of the US Copyright Act met the requirements of Article 13 of the TRIPS Agreement and was thus consistent with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement. Here, the panel noted certain limits imposed on the beneficiaries of the exemption, permissible equipment and categories of works as well as the practice by US courts.**

The DSB adopted the Panel Report at its meeting on 27 July 2000.

Implementation Status of Adopted Reports

Pursuant to Article 21.3 of the DSU, the US informed the DSB on 24 August 2000 that it would implement the recommendations of the DSB. The US proposed 15 months as a reasonable period of time within which to implement those recommendations. On 23 October 2000, the EC requested that the reasonable period of time for implementation be determined by means of binding arbitration as provided for in Article 21.3 (c) DSU. The Arbitrator circulated his Award on 15 January 2001. The Arbitrator determined that the reasonable period of time for the US to implement the recommendations and rulings of the DSB in this case is 12 months from the date of the adoption of the panel report. At its meeting of 24 July 2001, the DSB agreed to the US proposal to extend the reasonable period of time until 31 December 2001 or the end of the current session of the US Congress, whichever earlier. This extension had been agreed with the EC.

On 23 July 2001, the US and the EC notified the DSB of their agreement to pursue arbitration pursuant to Article 25.2 of the DSU in order to determine the level of nullification or impairment of benefits to the EC as result of Section 110(5)(B) of the US Copyright Act. On 9 November 2001, the arbitrator determined that the level of EC benefits which were being nullified or impaired as a result of the operation of Section 110(5)(B) amounted to Euro 1,219,900 per year.

At the DSB meeting on 18 December 2001, the US indicated that it was engaged in productive discussions with the EC with a view to resolving the dispute before the end of the expiry of the reasonable period of time. The EC underlined that the resolution of the dispute required an amendment of the WTO-inconsistent legislation. The EC stated that if it was not possible to conclude any arrangements before the end of the reasonable period of time, it would have to seek the DSB's authorization to suspend concessions or other obligations under Article 22.2 of the DSU. On 7 January 2002, on the grounds that that the US had failed to bring its measures into conformity within the reasonable period of time, the EC requested authorisation to suspend concessions pursuant to Article 22.2 of the DSU. The EC proposed to suspend concessions under the TRIPs Agreement in order to permit the levying of a special fee from US nationals in connection with border measures concerning copyright goods. On 17 January 2002, the US objected to the level of suspension of obligations proposed by the EC and requested the DSB to refer the matter to arbitration, in accordance with Article 22.6 of the DSU. The US claimed that the principles and procedures of

Article 22.3 had not been followed. During the DSB meeting on 18 January 2002, the parties indicated, however, that they were engaged in constructive negotiations and were hopeful of finding a mutually satisfactory solution. On 25 February 2002, the US submitted a status report regarding implementation of the DSB recommendations and rulings. On 26 February 2002, the parties requested the arbitrator to suspend the arbitration proceeding, while noting that the proceeding may be reactivated at the request of either party after 1 March 2002.

At the DSB meeting on 17 April 2002, the US presented a status report on its progress in implementing the DSB's recommendations and rulings. The US indicated that it was engaged in discussions with the EC to find a positive and mutually acceptable solution to the dispute. The EC expressed its concern about the US' slow progress in implementation and requested the US to provide more information in its next status report. Australia also expressed its concern about the delay and requested that any compensatory arrangement between the parties must be applied on a non-discriminatory basis.

At the DSB meeting on 24 June 2002, the US presented a status report on its progress in implementing the DSB's recommendations. The US stated that the US Administration was engaged in discussions with Congress and the EC in order to reach a mutually acceptable resolution to the dispute. The EC acknowledged the efforts being undertaken by the US Administration, but underlined the importance of the US to bring its measures into conformity with its obligations under the TRIPS Agreement. Australia reiterated its concern about the delay by the US in implementing the recommendations and rulings of the DSB and requested again that any compensatory arrangement reached between the parties must be applied on a non-discriminatory basis. At the DSB meeting on 29 July 2002, the US reiterated its previous statement. The EC acknowledged the efforts being made by the US Administration, but expressed concern about the significant delay in the implementation of the recommendations and rulings of the DSB. He inquired whether it would be possible for Congress to take action very soon considering the summer recess and legislative elections scheduled to take place in the fall.

At the DSB meeting on 1 October 2002, the US presented its status report regarding the implementation of the DSB's recommendations and rulings. At that meeting, the US stated that its administration was engaged in discussion with Congress and the EC to find a mutually acceptable solution. The EC inquired about the prospects of a solution in the short run. Australia stated that since its views were well-known it did not wish to repeat those. It also indicated that it had made a proposal in the context of the DSU negotiations to deal with its concerns.

At the DSB meetings on 11 November 2002, 28 November 2002 and 27 January 2003, the US presented status reports where it stated that the US and the EC were committed to finding a positive and mutually acceptable solution to the dispute and that the US Administration would continue to engage the US Congress following the Congressional recess with a view to settling this dispute as soon as practicable. The EC expressed disappointment with the lack of implementation by the US and urged the US to take rapid and concrete action to settle this dispute.

On 23 June 2003, the US and the EC informed the DSB of a mutually satisfactory temporary arrangement.

DISPUTE SETTLEMENT: DISPUTE DS162
United States — Anti-Dumping Act of 1916
Appellate Body and Panel Reports Adopted
Complaint by Japan.

On 10 February 1999, Japan requested consultations with the US in respect of the US Anti-Dumping Act of 1916, 15 USC. 72 (1994), ("US 1916 Act"). Japan alleged that the US 1916 Act stipulates that the importation or sale of imported goods within the US market in certain circumstances is unlawful, constituting a criminal offence and inviting civil liability. Japan further alleged that judicial decisions under the US 1916 Act are made without the procedural safeguards provided for in the Anti-Dumping Agreement. Japan stated that a court action had been brought under the US 1916 Act against affiliates of Japanese companies. Japan contended that the US 1916 Act is inconsistent with Articles III, VI and XI of GATT 1994, and the Anti-Dumping Agreement.

On 3 June 1999, Japan requested the establishment of a panel. At its meeting on 16 June 1999, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Japan, the DSB established a panel at its meeting on 26 July 1999. The EC and India reserved their third-party rights. On 11 August 1999, the Panel was composed. The report of the panel was circulated to Members on 29 May 2000. The panel considered that Article VI:1 of GATT 1994 applies to any situation where a Member addresses the type of transnational price discrimination defined in that Article. The panel then found that, on the basis of the terms of the 1916 Act, its legislative history and its interpretation by US courts, the transnational price discrimination test found in the 1916 Act met the definition of Article VI:1 of GATT 1994. The panel next went on to find that:

- **by providing for the imposition of treble damages, fines or imprisonment, instead of anti-dumping duties, the 1916 Act violated Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement;**
- **by not providing for a number of procedural requirements found in Article VI:1 of the GATT 1994 and the Anti-Dumping Agreement, the 1916 Act violated Articles VI:1 of the GATT 1994 and Articles 1, 4.1, 5.1, 5.2, 5.4 and 18.1 of the Anti-Dumping Agreement; and**
- **by violating Articles VI:1 and VI:2 of the GATT 1994, and Articles 1, 4.1, 5.1, 5.2, 5.4 and 18.1 of the Anti-Dumping Agreement, the 1916 Act violated Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.**

On 29 May 2000, the US notified its intention to appeal certain issues of law and legal interpretations developed by the panel. The Appellate Body examined this appeal with that of WT/DS136. The Appellate Body report was circulated to Members on 28 May 2000. The Appellate Body upheld all of the findings and conclusions of the panel that were appealed.

The DSB adopted the Appellate Body report and the Panel report, as upheld by the Appellate Body report, on 26 September 2000.

Implementation Status of Adopted Reports

Complaints by the European Communities (WT/DS136) and Japan (WT/DS162).

At the DSB meeting of 23 October 2000, the US stated that it was its intention to implement the DSB's recommendations and rulings. The US also stated that it would require a reasonable period of time for implementation and that it would consult with the EC and Japan on this matter. On 17 November

2000, the EC and Japan requested that the reasonable period of time be determined by arbitration pursuant to Article 21.3(c) of the DSU. The arbitrator circulated his report on 28 February 2001. He decided that the reasonable period of time in this case was 10 months and would thus expire on 26 July 2001. At its meeting on 24 July 2001, the DSB agreed to the US proposal to extend the reasonable period of time until 31 December 2001 or the end of the current session of the US Congress, whichever earlier. This extension had been agreed with the parties.

At the DSB meeting on 18 December 2001, the US informed that on 23 July 2001 it submitted proposed legislation to the US Congress repealing the 1916 Act and terminating all pending actions under the Act.. It added that, since the US Congress has not yet been adjourned, the US Administration continued to seek passage of the proposed legislation. Japan urged the US to complete the implementation within the reasonable period of time. However, in the event of non-compliance by the US, Japan will use its rights under Article 22 of the DSU. The EC also indicated that if the US would fail to comply with the DSB's recommendations, it would have no choice, but to request the authorization to suspend concessions or other obligations under Article 22.2 of the DSU. On 7 January 2002, on the grounds that that the US had failed to bring its measures into conformity within the reasonable period of time, the EC and Japan requested authorisation to suspend concessions pursuant to Article 22.2 of the DSU. Both Members propose that the suspension of concessions takes the form of an equivalent legislation to the Anti-Dumping Act of 1916 against imports from the US. On 17 January 2002, the US objected to the levels of suspension of obligations proposed by the EC and Japan and requested the DSB to refer the matter to arbitration, in accordance with Article 22.6 of the DSU. The US claimed that the principles and procedures of Article 22.3 had not been followed by the EC and Japan. At the DSB meeting on 18 January 2002, the matter was referred to arbitration. During the meeting, the parties indicated that they were still engaged in consultations and would be requesting the arbitrators, once appointed, to suspend their work with a view to exploring the possibility of finding a mutually satisfactory solution. On 25 February 2002, the US submitted to the DSB a status report regarding implementation of the DSB recommendations and rulings. On 27 February 2002, the parties requested the arbitrator to suspend the arbitration proceeding noting that a proposal to repeal the 1916 Act and to terminate cases pending under the Act was being examined by the US Congress. The parties noted, however, that the arbitration proceeding could be reactivated at the request of either party after 30 June 2002 if no substantial progress would have been made in resolving the dispute by then.

At the DSB meeting on 17 April 2002, the US submitted its Status Report regarding implementation of the DSB recommendations and rulings. The US stated that a bill had already been introduced to repeal the 1916 Antidumping Act and terminate some pending cases. While acknowledging the progress made, the EC and Japan stressed the necessity for prompt compliance. Japan noted that under its bilateral agreement with the US, either party could re-activate the arbitration proceedings after 30 June 2002.

At the DSB meeting on 22 May 2002, the US submitted its status report regarding the implementation of the DSB recommendations and rulings. The US stated that on 23 April 2002 a bill had been introduced in the US Senate which would repeal the 1916 Act and apply to all pending court cases.

At the DSB meeting on 24 June 2002, the US submitted a status report where it stated that a bill had already been introduced in the US Congress to repeal the 1916 Anti-Dumping Act and to terminate some pending cases, and that it was continuing its efforts to find a mutually satisfactory solution to this dispute with the EC and Japan. The EC and Japan expressed concern about the lack of progress in this matter and urged the US to repeal the 1916 Act as soon as possible. Japan cautioned the US

that it might reactivate arbitration proceedings if the 1916 Act was not repealed by 30 June. At the DSB meeting on 29 July 2002, the US reiterated the above statement. The EC and Japan expressed concern about the lack of progress in this matter and urged the United States to repeal the 1916 Act as soon as possible. They noted that proceedings against some of their companies might resume very soon and that it was imperative for swift action to be taken by the United States to prevent their companies from incurring huge expenses to defend themselves under legislation which had been found to be inconsistent with WTO rules

At the DSB meeting on 1 October 2002, the US submitted its status report and, in reference to the concerns expressed by the EC and Japan at the previous meetings of the DSB, stated that the bills currently before the Congress would repeal the 1916 Act and apply to all pending cases. The EC and Japan expressed concern about the lack of progress and indicated that swift action was imperative to prevent their companies from incurring huge expenses under WTO-inconsistent legislation.

At the DSB meeting on 11 November 2002, the US indicated that that the US Administration would continue to work with the US Congress following the Congressional recess to achieve further progress in resolving this dispute. The EC and Japan expressed concern about the lack of progress in this matter and urged the United States to repeal the 1916 Act without further delay. They noted that proceedings against some of their companies had resumed and that it was imperative for swift action to be taken by the US to prevent their companies from incurring huge expenses to defend themselves under legislation which had been found to be inconsistent with WTO rules. The EC said that the US status report was incomplete, as it did not mention the bill introduced by Representative Henry Hyde last June, which if adopted, would repeal the 1916 Act, but would not affect pending cases. For the EC, this would be unacceptable, as it would not fully comply with the recommendations and rulings of the DSB.

At the DSB meeting on 28 November 2002, the US reiterated that the bills repealing the 1916 Act which had been introduced in the US Congress, would apply to all pending court cases. It further stated that the US Administration would continue to work with the US Congress after the Congressional recess to achieve further progress in resolving this dispute. The EC and Japan expressed concern about the lack of progress in this matter and urged the US to repeal the 1916 Act without further delay. They also reiterated their concern about the bill introduced by Representative Henry Hyde on June 2002, which if adopted, would repeal the 1916 Act, but would not affect pending cases. They noted that such a result would be unacceptable, as it would not fully comply with the recommendations and rulings of the DSB. At the DSB meeting on 27 January 2003, the US repeated its previous status reports and the EC and Japan reiterated their concerns.

Given that no legislation had been adopted to repeal the 1916 Act and to terminate the cases pending before the US courts, on 19 September 2003 the EC requested the Arbitrators to reactivate the arbitration proceeding in dispute WT/DS136. In accordance with the request from the EC, the Arbitrators resumed the arbitration proceeding on the same day.

In respect of the arbitration proceeding in dispute WT/DS136, on 24 February 2004 the decision by the Arbitrators was circulated to Members. In light of the fact that the nullification or impairment results from the 1916 Act "as such", and not from particular instances of application of that law, the Arbitrators decided to set a number of parameters ((i) damages paid by EC companies as a result of judgements under the 1916 Act and (ii) amount of any settlement reached between an EC company and a US complainant pursuant to a 1916 Act complaint) with which the EC will have to comply when calculating by itself the amount of countermeasures it plans to impose, rather than setting a

fixed value of trade which the EC should not exceed when suspending its WTO obligations against the US.

DISPUTE SETTLEMENT: DISPUTE DS176
United States — Section 211 Omnibus Appropriations Act of 1998
Appellate Body and Panel Reports Adopted
Complaint by the European Communities and its Member States.

On 8 July 1999, the EC requested consultations with the US in respect of Section 211 of the US Omnibus Appropriations Act. The EC and its member States alleged as follows:

- **Section 211, which was signed into law on 21 October 1998, did not allow the registration or renewal in the United States of a trademark, if it was previously abandoned by a trademark owner whose business and assets have been confiscated under Cuban law.**
- **This law provided that no US court shall recognize or enforce any assertion of such rights.**
- **Section 211 US Omnibus Appropriations Act was not in conformity with the US' obligations under the TRIPS Agreement, notably its Article 2 in conjunction with the Paris Convention, Article 3, Article 4, Articles 15 to 21, Article 41, Article 42 and Article 62.**

Further to the request of the EC and its member States, the DSB established a panel at its meeting on 26 September 2000. Canada, Japan and Nicaragua reserved their third-party rights. On 17 October 2000, the EC and its member States requested the Director-General to determine the composition of the Panel. On 26 October 2000, the Panel was composed.

The Panel circulated its Report on 6 August 2001. The Panel rejected most of the claims by the EC and their Member States except that relating to the inconsistency of Section 211(a)(2) of the Omnibus Appropriations Act with Article 42 of the TRIPS Agreement. In this regard, the panel concluded that this Section is inconsistent with the relevant TRIPs Article on the grounds that it limits, under certain circumstances, right holders' effective access to and availability of civil judicial procedures.

On 4 October 2001, the EC and its Member States notified their decision to appeal certain issues of law and legal interpretations developed by the panel report. The Appellate Body report was circulated to Members on 12 January 2002. The Appellate Body:

- **found, in respect of the protection of trademarks, that Sections 211(a)(2) and (b) of the Omnibus Appropriations Act violated the national treatment and most-favoured nation obligations under the TRIPS Agreement and the Paris Convention for the Protection of Industrial Property, thereby reversing the Panel's findings to the contrary;**
- **reversed the Panel's finding that Section 211(a)(2) is inconsistent with Article 42 of the TRIPS Agreement and concluded that Article 42 contains procedural obligations, while Section 211 affects substantive trademark rights;**
- **upheld the Panel's findings that Section 211 does not violate the US' obligations under Article 2.1 of the TRIPS Agreement in conjunction with Article 6quinquies A(1) of the Paris Convention, and Articles 15 and 16 of the TRIPS Agreement. It also upheld the Panel's finding under Article 42 of the TRIPS Agreement in respect of Section 211(b); and**
- **reversed the Panel's conclusion that trade names are not a category of intellectual property protected under the TRIPS Agreement and then completed the analysis reaching the same conclusions for trade names as with respect to trademarks. It also found that Sections**

211(a)(2) and (b) are not inconsistent with Article 2.1 of the TRIPS Agreement in conjunction with Article 8 of the Paris Convention (1967).

At its meeting on 2 January 2002, the DSB adopted the Appellate Body report and the Panel report, as upheld by the Appellate Body report.

Implementation Status of Adopted Reports

At the DSB meeting on 19 February 2002, the US stated that it needed a reasonable period of time to comply with the rulings and recommendations of the DSB. On 28 March 2002, the US and the EC informed the DSB that they have reached a mutual agreement on the reasonable period of time for the US to implement the recommendations and rulings of the DSB. The reasonable period of time will expire on 31 December 2002, or on the date on which the current session of the US Congress adjourns, and in no event later than 3 January 2003.

At the DSB meeting on 1 October 2002, the US presented its status report regarding the implementation of the DSB's recommendations and rulings. The US referred to the mutually agreed reasonable period of time. It also stated that the US Administration was consulting with the Congress to determine the appropriate statutory measures needed to be taken to resolve the dispute. Both the EC and Cuba expressed their expectation that a solution would be found within the agreed reasonable period of time.

At the DSB meeting on 28 November 2002, the US presented a status report where it said that the reasonable period of time for the implementation of the recommendations and rulings of the DSB would expire on 31 December 2002, or on the date on which the current session of the US Congress adjourned, whichever was later, and in no event later than 3 January 2003. He further stated that the US Administration was working with the US Congress with a view to resolving this dispute. The EC said that the EC was open to all solutions that would favour compliance by the US with its obligations under the WTO Agreement. While the EC expected to find a mutually satisfactory solution to the dispute with the US, it was concerned about recent pronouncements by the US Administration that there was no need to clarify that Section 211 did not apply in cases where the trademark had been abandoned by the original owner. He recalled that during the Panel proceedings, the US representatives gave assurances, which were accepted by the Panel, that Section 211 would not apply to a new trademark after a former trademark, to which the Section might have applied, had been abandoned. He further noted that the US Federal Courts had taken a contrary view and had applied Section 211 to trademarks succeeding abandoned trademarks. Given the uncertainty, it was imperative for any solution to this dispute to specifically address the issue of the abandonment of trademarks. Cuba urged the United States to bring its measures into conformity with the recommendations and rulings of the DSB within the reasonable period of time that it had agreed with the EC.

At the DSB meeting on 28 November 2002, the US submitted a status report indicating that the US Congress would convene early 2003 and that the US Administration would continue to engage the US Congress with a view to finding a solution to this dispute. The EC noted that the US status report was too brief and did not shed light on the steps being taken by the US to bring its measures into conformity with the recommendations and rulings of the DSB. The EC urged the US to stand by the affirmations it expressly made during the Panel proceedings and which were relied upon by the Panel. It was necessary for it to be clarified that Section 211 did not apply to a new trademark after a former trademark, to which Section 211 might have applied, had been abandoned. Cuba urged the US to

bring its measures into conformity with the recommendations and rulings of the DSB within the reasonable period of time that it had agreed with the EC.

On 20 December 2002, the EC and the US informed the DSB that they had mutually agreed to modify the reasonable period of time for the US to implement the recommendations and rulings of the DSB, so as to expire on 30 June 2003. At the DSB meeting on 27 January 2003, the US submitted its status report and indicated that US Administration was intent on working with the new Congress in order to find a solution to this dispute. The EC indicated that, given the extension of the reasonable period, it expected that the US Administration would work diligently with the new Congress to bring its measures into conformity by the new deadline. Cuba strongly urged the US to implement the recommendations and rulings of the DSB within the reasonable period of time that it had agreed with the EC.

On 30 June 2003, the EC and the US informed the DSB that they had mutually agreed to modify the reasonable period of time for the US to implement the recommendations and rulings of the DSB, so as to expire on 31 December 2003.

At the DSB meeting on 2 October 2003, the US presented its status report noting that there is a bill pending in the US House of Representatives that would, among others, repeal Section 211. The US administration would continue to work with the US Congress with respect to appropriate statutory measures that would resolve this dispute. The EC welcomed the introduction of a bill in June 2003 in the US Congress that would, *inter alia*, repeal Section 211. The EC hoped that this repeal, which was part of a whole scheme of measures to ensure adequate protection of intellectual property rights, would offer a solution to this dispute to the benefit of all.

At the DSB meeting on 7 November 2003, the US said that the US administration would continue to work closely with the US Congress on appropriate statutory measures to resolve this dispute. The EC welcomed the introduction of the bill in the US Congress in June 2003. Cuba expressed concern about the lack of implementation by the US and urged it to promptly bring its measures into conformity with the recommendations and rulings of the DSB as soon as possible.
At the DSB meeting on 1 December 2003, the US repeated its previous status report. The EC noted that the deadline for implementation in this case would expire by the end of December 2003. Cuba reiterated it concern.

On 19 December 2003, the EC and the US informed the DSB that they had mutually agreed to modify the reasonable period of time for implementation of the DSB recommendations and rulings so as to expire on 31 December 2004. On 17 December 2004, the EC and the US informed the DSB that they had mutually agreed to modify the reasonable period of time for implementation of the DSB recommendations and rulings so as to expire on 30 June 2005.

DISPUTE SETTLEMENT: DISPUTE DS179
United States — Anti-Dumping measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea
Appellate Body and Panel Reports Adopted
Complaint by Korea.

On 30 July 1999, Korea requested consultations with the US in respect of Preliminary and Final Determinations of the US's Department of Commerce (DOC) on Stainless Steel Plate in Coils from Korea dated 4 November 1998 and 31 March 1999 respectively, and Stainless Steel Sheet and Strip

from Korea dated 20 January 1999 and 8 June 1999 respectively. Korea considered that several errors were made by the US in those determinations which resulted in erroneous findings and deficient conclusions as well as the imposition, calculation and collection of anti-dumping margins which are incompatible with the obligation of the US under the provisions of the Anti-Dumping Agreement and Article VI of GATT 1994 and in particular, but not necessarily exclusively, Article 2, Article 6 and Article 12 of the Anti-Dumping Agreement. Korea believed that the US did not act in conformity with the cited provisions, among others, in its treatment of the following: certain US sales made to a bankrupt company; the calculation of two distinct exchange rate periods for export sales; and currency conversion for certain normal value sales made in US dollars.

On 14 October 1999, Korea requested the establishment of a panel. At its meeting on 27 October 1999, the DSB deferred the establishment of a panel. Further to a second request to establish a panel by Korea, the DSB established a panel at its meeting on 19 November 1999. The EC and Japan reserved their third-party rights. On 24 March 2000, the Panel was composed. The panel circulated its report on 22 December 2000. The panel concluded that:

i. **with respect to "local sales":**

- **he US in the *Plate* investigation did not act inconsistently with its obligations under Article 2.4.1, Article 2.4 chapeau ("fair comparison"), and Article 12.2 of the AD Agreement nor with its obligations under Article X:3(a) of GATT 1994;**
- **the US in the *Sheet* investigation acted inconsistently with Article 2.4.1 of the AD Agreement by performing a currency conversion that was not required.**

ii. **with respect to the treatment of unpaid sales, the US:**

- **acted inconsistently with its obligations under Article 2.4 chapeau of the AD Agreement in both the *Plate* and *Sheet* investigations by making allowances in respect of sales through unaffiliated importers which were not permissible allowances for differences affecting price comparability;**
- **acted inconsistently with its obligations under Article 2.4 chapeau of the AD Agreement in both the *Plate and Sheet* investigations by making allowances in respect of sales through an affiliated importer which were not permissible allowances in the construction of the export price for costs incurred between importation and resale.**

iii. **with respet to multiple averageing, the panel concluded that:**

- **the US's use of multiple averaging periods in the *Plate* and *Sheet* investigations was inconsistent with the requirement of Article 2.4.2 to compare "a weighted average normal value with a weighted average of all comparable export transactions";**
- **the US's use of multiple averaging periods in the *Plate* and *Sheet* investigations was not inconsistent with Article 2.4.1 of the AD Agreement;**
- **the US's use of multiple averaging periods in the *Plate* and *Sheet* investigations was not inconsistent with the first sentence of the chapeau of Article 2.4 of the AD Agreement ("fair comparison").**

iv. **to the extent that the US has acted inconsistently with the provisions of the AD Agreement, it has nullified or impaired benefits accruing to Korea under that Agreement.**

At its meeting of 1 February 2001, the DSB adopted the panel report.

Implementation Status of Adopted Reports

At the DSB meeting of 1 March 2001, the US stated its intention to implement the DSB's recommendations and indicated that it would need a reasonable period of time to do so. on 26 April 2001, the parties to the dispute notified the DSB that they had mutually agreed that the reasonable period of time shall be 7 months and shall thus expire on 1 September 2001.

At the DSB's meeting of 10 September 2001, the US announced that it had implemented the DSB's recommendation on 1 September 2001. At that meeting, Korea acknowledged the implementation.

DISPUTE SETTLEMENT: DISPUTE DS212
United States — Countervailing Measures Concerning Certain Products from the European Communities
Appellate Body and Panel Reports Adopted
Complaint by the European Communities.

On 10 November 2000, the EC requested consultations with the US concerning the continued application by the United States of countervailing duties on a number of products. In particular, the EC claimed that the application of the "*same person*" methodology by the US, and the continued imposition of duties based on it, are in breach of Articles 10, 19 and 21 of the SCM Agreement, because there is no proper determination of a benefit to the producer of the goods under investigation, as required by Article 1.1(b) of the SCM Agreement. The EC included in this request for consultations 14 US countervailing duty orders[1] where this "*same person*" methodology was applied. All these cases involve alleged non-recurring subsidies granted to firms prior to a change of ownership;

On 1 February 2001, the EC requested further consultations with the US. Failing consultations and further to the request of the EC, the DSB established a panel at its meeting of 10 September 2001. Brazil, India and Mexico reserved their third-party rights. On 25 October 2001, the EC requested the Director-General to determine the composition of the Panel. On 5 November 2001, the Panel was composed. On 18 April 2002, the Chairman of the Panel informed the DSB that it would not be able to complete its work in six months due to the complexity of the matter. The Panel expected to complete its work by mid July 2002.

On 31 July 2002, the Panel Report was circulated to the Members. The Panel concluded that where a privatization is at arm's length and for fair market value, the benefit from a prior non-recurring financial contribution bestowed upon the state-owned producer no longer accrues to the privatized producer. Therefore, the Panel found that both the 12 countervailing duty determinations and Section 1677(5)(F) were inconsistent with WTO Law.

On 9 September 2002 the US notified its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel. The United States sought review by the Appellate Body of the conclusions of the Panel set forth in paragraphs 8.1(a) —(d) and 8.2 of the Panel Report.

On 9 December 2002, the Appellate Body Report was circulated to Members. The Appellate Body:

- **upheld the Panel's findings, in paragraphs 8.1 (a), (b) and (c) of the Panel Report, that the United States has acted inconsistently with Articles 10, 14, 19.1, 19.4, 21.1, 21.2 and 21.3 of the SCM Agreement, by imposing and maintaining countervailing duties without determining whether a "benefit" continues to exist in twelve countervailing duty determinations;**
- **reversed the Panel's finding, in paragraph 8.1(d), first sentence, of the Panel Report, that "[o]nce an importing Member has determined that a privatization has taken place at arm's-length and for fair market value, it must reach the conclusion that no "benefit" resulting from the prior financial contribution (or subsidization) continues to accrue to the privatized producer"; and**
- **reversed the Panel's conclusion, in paragraph 8.1(d), second sentence, of the Panel Report, that Section 771(5)(F) of the Tariff Act 1930, as amended, 19 U.S.C. § 1677(5)(F), is inconsistent with the SCM Agreement.**
- **upheld the Panel's conclusion, in paragraph 8.2 of the Panel Report, that, insofar as the United States has infringed its obligations under the SCM Agreement, as set out in paragraphs 8.1(a), (b), and (c) of the Panel Report, these actions of the United States constitute prima facie nullification or impairment of benefits accruing to the European Communities, pursuant to Article 3.8 of the DSU; and, because the United States has failed to rebut this presumption, the United States has in fact nullified or impaired benefits accruing to the European Communities under the SCM Agreement.**

The Appellate Body recommended that the DSB request the United States to bring its measures and administrative practice (the "same person" methodology) into conformity with its obligations under that Agreement. On 8 January 2003, the DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report.

Appellate Body and Panel Compliance Reports (Article 21.5) Adopted

On 17 March 2004, the EC, considering that the measures taken by the US to comply with its WTO obligations were unsatisfactory, requested the US to enter into consultations under Articles 4 and 21.5 of the DSU and Article 30 of the SCM Agreement. On 16 September 2004, pursuant to Articles 6 and 21.5 of the DSU, Article 30 of the SCM Agreement and Article XXIII of GATT 1994, the EC requested that the panel be established, as it disagrees with the US as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB.

In particular, the EC claims and requests the Panel to find the following:

1. **That in the sunset review *Certain Corrosion-Resistant Carbon Steel Flat Products from France* (C-427-810) (Case No. 9), the United States failed to properly examine the existence, continuation or likelihood of recurrence of subsidization. In particular, with regard to the privatization concerned, it improperly analysed whether the price for employees and retirees' shares constituted a subsidy or that it led to any continuation of a countervailable subsidy. This is inconsistent with Articles 10, 14, 19.4, 21.1and 21.3 of the SCM Agreement and Article VI: 3 of GATT 1994.**

2. That in the following sunset reviews:

- ***Cut-to-Length Carbon Steel Plate from United Kingdom* (C-412-815) (Case No. 8);**
- ***Cut-to-Length Carbon Steel Plate from Spain* (C-469-804) (Case No. 11),**

The EC considers that the United States failed to properly determine whether, in these cases, there was continuation or recurrence of subsidization and injury, because it did not examine the nature of the privatizations in question and their impact on the continuation of the alleged subsidization. This is inconsistent with Articles 10, 14, 19.4, 21.1, and 21.3 of the *SCM Agreement* and Article VI:3 of GATT 1994, according to the EC.

At its meeting of 27 September 2004, the DSB established the panel. Brazil, Korea and China reserved their rights as third parties. On 8 October 2004, the Panel was composed.
On 4 January 2005, the Chairman of the Panel informed the DSB that the Panel expected to complete its work in May 2005.

0n 17 August 2005, the Panel Report was circulated to Members. In the Panel Report, the European Communities prevailed only on its claims regarding (i) the US failure to examine the privatizations of BS plc (UK) and Aceralia (Spain); and (ii) the treatment of new evidence in the UK Section 129 proceedings. All other EC claims were either dismissed or rejected.

On 27 September 2005, the Panel Report was adopted by the DSB.

Implementation Status of Adopted Reports

At the DSB meeting on 27 January 2003, the US indicated that it intended to comply with the recommendations and rulings of the DSB in a manner that respected its WTO obligations and that, in that connection, it would need a reasonable period of time to implement them. The EC urged the US to promptly bring its measures into conformity with the recommendations and rulings of the DSB. The EC indicated that, since the principle underlying the findings in this case had been established by the Appellate Body in an earlier case (US — Imposition of countervailing duties on lead and bismuth carbon steel from the UK), and as such the US should by now know what it had to do to bring its measures into conformity with WTO disciplines, the reasonable period of time had to be short. On 10 April 2003, the parties notified the DSB that they had agreed on a reasonable period of time for implementation of 10 months (from 8 January 2003 to 8 November 2003)

At the DSB meeting on 7 November 2003, the US presented its first status report where it stated that on 23 June 2003, the US Department of Commerce (DOC) published a notice announcing a modification of the manner in which the Department would analyze the question of whether a subsidized, government-owned company remained subsidized after it was "privatized"; the DOC had also issued final revised determinations for each of the twelve countervailing determinations that were at issue on 24 October 2003; and as a result of these measures, the US considered that it had brought its measures into full conformity with the recommendations and rulings of the DSB. The EC said that while the amending legislation was to be welcomed, as it established a presumption that a company would not be deemed to have benefited from prior subsidies, if the company had been privatized in an arm's length, fair market value transaction, certain elements of the legislation gave rise to concern; it would appear that some of the factors which had to be taken into account by the DOC in its determination went beyond "governmental economic and other policies". The EC further stated that while the EC was satisfied with the results of the DOC's re-examination in eight out of the twelve

privatization cases, it regretted the decision that an analysis of privatization was not necessary to implement the DSB rulings in the other four cases, and that the EC was evaluating the reasons given for such an omission and its consequences on the implementation process. Mexico said that it, as a third-party, was in the process of analyzing whether the new US measure fully complied with the recommendations and rulings of the DSB.

At the DSB meeting on 1 December 2003, the EC reiterated its concerns regarding some aspects of the US implementation of the DSB's rulings. In particular, the EC was concerned with the treatment of the four cases where the DOC had refused to examine the nature of the privatizations. He said that discussions were ongoing on this matter to explore the possibility for a mutually acceptable solution. However, the EC reserved its right to initiate compliance proceedings. The US said that it had complied with the DSB's recommendations in this case. The US was disappointed to hear that the EC had some concerns regarding certain aspects of the revised determinations and was ready to discuss with the EC possible approaches to these concerns. Brazil said that its companies suffered commercial damages as a result of the US methodology, which was WTO-inconsistent.

On 17 March 2004, the EC, considering that the measures taken by the US to comply with its WTO obligations were unsatisfactory, requested the US to enter into consultations under Articles 4 and 21.5 of the DSU and Article 30 of the SCM Agreement. On 16 September 2004, pursuant to Articles 6 and 21.5 of the DSU, Article 30 of the SCM Agreement and Article XXIII of GATT 1994, the EC requested that the panel be established, as it disagrees with the US as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB. At its meeting of 27 September 2004, the DSB established the panel. Brazil, Korea and China reserved their rights as third parties. On 8 October 2004, the Panel was composed.

On 17 August 2005, the Panel Report was circulated to Members. In the Panel Report, the European Communities prevailed *only* on its claims regarding (i) the US failure to examine the privatizations of BS plc (UK) and Aceralia (Spain); and (ii) the treatment of *new* evidence in the UK Section 129 proceedings. All other EC claims were either dismissed or rejected.

On 27 September 2005, the Panel Report was adopted by the DSB. On 17 November 2005, the United States submitted its first status report.

Managing the Challenges of WTO Participation: 45 Case Studies. (2005).

http://www.wto.org/english/res_e/booksp_e/casestudies_e/casestudies_e.htm

Introduction.

The case studies make a mosaic image of what it takes, at the start of the twenty-first century, to manage the integration of an economy into the global trading system and what the rewards, or penalties, of integration can be for economies of all sizes, including many of the world's poorest and most resource-poor economies.

They show, through 'real world' examples, that joining the WTO and taking advantage of WTO membership is not something to be left to government alone. It calls for the participation of many different 'stakeholders' in an economy, including goods and services producers, industry associations, consumer associations, civil society groups and academic analysts.

They also show that people representing those different national interests and institutions take most of the significant decisions affecting an economy's participation in the global trading system. The WTO itself has only a secondary role; it helps to define the context of a trade policy decision but doesn't compel the choice of one policy over another.

The case studies include success stories, some stories of failure or frustration, one or two 'disasters' and some stories that are open-ended because the final outcome is not yet known.

Each of the case studies speaks for itself. The rest of this introduction provides some topical summaries of the case studies and identifies some of the ideas that emerge from them. But there are many more things in the cases themselves that we haven't covered here.

Playing the game.

Do you remember watching a sporting event for the first time? A game whose rules you didn't understand?

Confusing, wasn't it? You could probably guess the objective of the game by watching the scoreboard, but without knowing the rules it can be very difficult to understand why the players are doing what they do and who's getting ahead in the game and who's falling behind.

Now, imagine that you are watching a game that has about 150 players on the field and no scoreboard. Imagine, too, that the rulebook for this game has twenty-eight thick chapters and thousands of pages of footnotes and clarifications, so that there is some doubt about whether even the players know all the rules. Watching each player in this game is a stadium filled with millions of followers — a mixture of supporters and critics — who are continually shouting encouragement or instructions to the players while betting furiously on the outcome of every play.

To make things even harder to follow, this game doesn't have a referee: the players have to manage the game for themselves. And without a referee to blame whenever the play seems to go against their team, some spectators have taken to abusing the staff at the stadium.

The multilateral trading system is not a game, of course; being a member of WTO isn't much like play. But the trading system managed in the WTO is a huge and frequently confusing enterprise in which a large and complex set of rules governs the way that governments — the main 'players' — interact.

As in some sports, the 'spectators' sitting just outside the field of play — billions of ordinary business people and citizens — are an important part of the 'game'. All the gains and losses end up in their hands and, ultimately, for reasons that we shall see in this book, the future of the game is also in their hands. But most members of the public don't understand the game very well and some of them suspect that the rules, which have been agreed among the players beforehand, are stacked against them.

This book is a sort of guide to the game, from a spectator's viewpoint or, to be more precise, from the viewpoint of more than forty spectators.

There continues to be a considerable amount of misunderstanding about the role of the World Trade Organization as an institution. One still hears complaints about giving up sovereignty to faceless bureaucrats on the shores of Lake Geneva. Most of this book demonstrates just how much sovereign discretion economies participating in the system wield. It really is true that the WTO is a member-driven organization.

We hope that the cases in this book will help dispel the mystery and encourage more people to take a more active role in the 'game' in future. When you read the cases, you will probably recognize many of the issues that they raise and the challenges faced by the people at the centre of the story. Many of the stories told here for the first time are repeated every day in economies around the world: you can probably find very similar stories in the business press in your own city.

<u>The case studies</u>.

This book is the result of a project that has been jointly funded by the WTO and the Australian government's official aid agency, AusAID, to encourage better understanding of how the multilateral trading system works. Our sponsors agreed to allow us to seek case studies, predominantly written by observers and analysts in developing countries, that would detail some aspect of the way in which the stakeholders in a particular economy worked together to manage a problem or to make the most of an opportunity related to WTO membership.

We contacted authors in about fifty economies, many of them in academic institutions, and gave them a very short brief that left the choice of subject matter and approach entirely up to them. We did not

ask for 'success stories' and we made it clear that the analysis of the issues, including their assessment of the value or role of the WTO, was a matter for their own judgement.

We have accepted for publication virtually all the cases that reached a final draft within the time constraints we placed on the authors. So, as much as possible, this is an 'un-retouched' snapshot of participation in the WTO seen — mostly — from around the developing world about ten years after the organization was founded.

The big picture.

The cases in this book cover a wide range of commercial and government activities.

A Bangladeshi rock band finds that a 'Bollywood' movie producer has pirated one of its songs; band members use the provisions of the WTO to regain their rights.

The tiny Pacific island economy of Vanuatu decides to suspend its application for WTO membership when its inexperienced government administrators fail to find a sympathetic hearing from existing WTO members.

An 'inside' account of how India struggled to develop a national consensus on the liberalization of its protected agriculture sector.

The Kenyan government fights for the right, under the WTO Agreements, to import AIDS drugs manufactured elsewhere under 'compulsory licences' for use in Kenya. It finds that the issue of patent protection under its own legislation is not straightforward and that the patent law changes are not the biggest barrier to reducing the impact of the disease.

The tuna industry of Thailand fights to retain access to the European Union (EU) market on comparable terms to its competitors, but manages to avoid a costly formal dispute adjudication.
Chilean poultry exporters and government officials act urgently to handle an animal health emergency that could have killed exports to the vital European market, making effective use of international standards and notification procedures established by the WTO.

An exporter of traditional herbal medicines from Nepal runs into regulatory barriers he cannot understand or do much about until Nepal joins the WTO and the Nepalese government creates a regulatory framework that helps him to meet his customers' expectations of good manufacturing practice.

The Mexican government is backed into a corner, domestically, by the powerful Peasants' Union's revolt against imports from the United States under the North American Free Trade Agreement (NAFTA); the facts show, however, that the agreement has opened up new horizons for Mexican industry that could be extended by multilateral negotiation.

Nigerian industry is penalized by a system of import prohibitions that have strong political support but are economically costly — why Nigeria's WTO obligations don't offer a solution.

Some themes.

Accession

The accession of developing economies to the WTO has proved to be a major challenge to their government administration as well as to the content of their trade policies. It's a gruelling procedure requiring the preparation of detailed memoranda on foreign trade policies and practices and a convincing commitment to implement the WTO Agreements — without access, in most cases, to the lengthy implementation delays that were available to members of the WTO when the agreements were first negotiated. They must also negotiate bilateral trade deals with their most important trading partners, intended to ensure that they 'pay' for the rights that they will acquire as WTO members. The process often involves years of detailed examination by a working party and lengthy rounds of negotiation.

During this time it is not at all unusual for domestic pressures on the government to mount, as business and civil society — lacking experience with the WTO and fearful of the consequences of market liberalization — demand more details about the benefits of membership and often question the impact of the WTO rules on the economy's sovereignty.

Several cases in this collection provide new perspectives from the inside on this difficult process.

Damedin Tsogtbaatar reveals how the objectives of the business community and even of the government were shaped by Mongolia' s historical experience before its accession bid. He shows how these false expectations led to ill-prepared negotiations, less advantageous accession terms than might have been achieved and subsequent disenchantment with the WTO that had a lingering effect on Mongolian trade policy.

Vanuatu, an island economy in the Melanesian group, was also ill-prepared for its attempts to accede to the WTO. It had few government and private-sector resources to support its accession efforts and lacked the administrative resources to inform its domestic stakeholders or adequately to prepare for the bilateral negotiations. The government of Vanuatu (population 200, 000), like the government of China (population more than 1 billion), had chosen to make membership of the WTO an integral step in its objective of closer integration with the global economy. But economic reforms stalled along with the WTO bid, due in part to lack of adequate planning and national consensus on the objectives. The account by Daniel Gay reveals an unmistakeable bitterness in Vanuatu regarding the attitude of its major trading partners towards its WTO bid and even the role of the WTO secretariat.

In China the story of this historic change in economic direction is still unfolding, but the impression given by Gong Baihua of the Shanghai WTO Affairs Consultation Centre is that business and government are much more confident of their ability to control and to benefit from China's integration with the global economy.

Following the Vanuatu experience WTO members changed their approach to the accession of least-developed economies to reduce the administrative burdens on poor economies and to lower the bar to their entry. Nepal — whose accession had been slowed by political turmoil and security problems — was one of the first beneficiaries of this new approach, being invited to join WTO at the Cancún Ministerial meeting. P. R. Rajkarnikar tells the story of the leadership of a regional non-governmental organization (NGO), SAWTEE, in promoting consensus on membership during the

final stages of the process and of the influence that SAWTEE' s views had on specific issues relating to Nepal's accession such as plant breeders' rights.

Cambodia, too, was welcomed into the WTO at the Cancún meeting at a time when the constitutional machinery for ratifying the Agreement was not in place. Hach Sok and Samnang Chea examine the degree to which the accession was negotiated with the informed support of the business community and ask whether Cambodia, whose trade depends heavily on the export of garments, is well prepared for the future management of integration into global markets.

One of the most controversial aspects of recent accessions has been the demand by existing members that new members achieve still greater openness than is required by the current agreements. This was certainly one of the problems faced by Vanuatu.

The liberalization of markets that follows accession may also move the acceding economy to make consequential changes to its policies in order to take full advantage of accession. This is the case in Vietnam where, as Phan Van Sam and Vo Thanh Thu point out, liberalization of the banking sector — although not strictly required by the General Agreement on Trade in Services (GATS) — is essential to ensure that Vietnamese firms can make the best of their new opportunities for integration with global markets.

<u>Disputes</u>.

How do developing countries fare under the WTO dispute settlement system? Does it work for or against their interests? Are they able to afford the legal advice that they need in order to bring a case? Are they able to achieve satisfactory resolution of their problems when they do not have the economic power to 'retaliate' if so authorized by the Dispute Settlement Body? Can they afford to fight one case after another if necessary to protect their interests in a global market?

Several case studies help to throw some light on the answers to these questions. One of the first cases after the creation of WTO involved a dramatic contrast in the economic size and resources of the disputants. John Breckenridge tells the story of Costa Rica' s successful assertion of its rights under the Agreement on Textiles and Clothing against US safeguard actions. The victory for Costa Rica in this case — due, says the author, to better preparation as well as the merits of its case — was a signal to other developing countries that the system would work to protect the interests of all members.

Pakistan, too, was successful in challenging US textile safeguards in the late 1990s, as Turab Hussain recounts. This case details some of the practical aspects of preparing a case and the potentially ambiguous 'victories' that formal dispute adjudication can bring. The government of Pakistan was party to a WTO dispute for the first time. According to the author it was not well equipped for the case and relied heavily on the specialist knowledge and funding resources of the textile industry association and its members. After persisting with the case before the Textile Monitoring Body and eventually before a disputes panel and an appeal, Pakistan's objections to the three-year US safeguard quota were upheld. But it had taken almost all of those same three years — and a lot of money — to win the case. Pakistan's victory was, in the view of the industry, mostly one of principle.

Nilaratna Xuto contributes a case study from Thailand in which close collaboration between government officials and industry leaders challenged proposed changes in EU tariff preferences. The Thai tuna case illustrates the operation of the conciliation procedures in WTO disputes, using the good offices of the Director General of the WTO. These provisions of the disputes mechanism do not

capture headlines in the same way as a panel adjudication, but they offer many advantages as this case shows, including less contentious procedures, and significantly lower costs.

It is important to remember that no WTO dispute is supposed to be contentious$.$ Of course, there can be a lot of heat generated between the disputants at the time. But the resolution of disputes serves a positive purpose for all WTO members by helping to smooth world trade and by clarifying how national trade regulations should operate to give effect to the principles of the WTO Agreements.

The WTO disputes system helps to do this even with regard to regional agreements, where disputes among the parties can be even more bitter than those among WTO members at large. An interesting instance of this is the story that Diana Tussie and Valentina Delich tell about the challenge that Argentina raised to Chilean variable levies imposed on imports of vegetable oils, after it had tried unsuccessfully to resolve the matter in the context of the Mercosur regional agreement.

Another surprising aspect of dispute settlement is the confidence-building effect that a successful case can have, affecting the attitude of government and stakeholders towards global economic integration. Junsok Yang's account of the case brought by South Korea against US anti-dumping measures on colour televisions confirms that preparation for a dispute that demands close collaboration between officials and business people has a positive impact on domestic trade policy-making. For South Korea the result was a more confident participation in the WTO and a more positive view of the benefits of 'globalization' of the economy.

The South Korean colour television dispute had its origins in anti-dumping actions taken in the 1980s. Today, anti-dumping actions continue to give rise to serious disputes, as we can see from B. Battarcharyya's very recent case study on the work that the Indian shrimp exporting industry and the government of India have undertaken to fight a dumping charge in the United States. Whether this and related cases also targeting shrimp exports will be subject to WTO challenge may be known by the time this book is published. Bhattarcharyya's account suggests, however, that in addition to the financial considerations a decision to pursue a WTO dispute should include an evaluation of the strategic interests of the industry in a lengthy legal tussle.

There is a valuable lesson on this same point in Jacqueline Krikorian's story of Canada' s unsuccessful defence of its discriminatory implementation of tariff benefits associated with its side of the US-Canada Auto Pact. She concludes that it was a case fought for the wrong reasons in an attempt to defend a policy whose original objectives had already been bypassed in the marketplace. Friction with trading partners, uncertainty for the automobile industry and a lot of expense might have been spared, in her view, if the Canadian authorities had elected not to defend their policies.

<u>Standards and SPS</u>.

We asked all the case study authors to tell the story of a challenge or an opportunity faced by business in the world trading system. The stories that they tell range over many forms of trade barriers, but the most challenging seem to be those related to standards for health or safety, including food safety. Import regulations that fall under the provisions of the WTO' s Agreement on Technical Barriers to Trade (TBT) or the Agreement on Sanitary and Phyto-Sanitary Measures (SPS) are multiplying around the world. They are typically complex regulations, frequently implementing standards that create a high hurdle for imports. Developing country exporters whose own governments may not implement similar standards sometimes find it difficult to understand what steps are required for compliance with these standards, even when the standards themselves have international sanction.

Bijendra Shakya's story about the Gorkha Ayurved company of Nepal illustrates all of these factors. The principal of the company, which exports herbal medicines, had to find out for himself about the meaning of the compliance requirements of his customers and to find ways of certifying compliance ahead of government moves to implement an appropriate regulatory structure.

Even legitimate SPS barriers can result in total import prohibitions, so that the stakes can be very high for developing country exporters with limited resources to manage compliance with stringent food health requirements. Rina Oktaviani's study of the EU barriers faced by the Indonesian shrimp industry shows how little room there is for manoeuvre in such cases and the critical importance of good information flows between government and industry in finding means, within the resources of the export industry, to meet the market requirements.

Excellent information flow and a high priority on transparency with authorities in export markets were keys to the successful management of the health emergency in Chile' s poultry industry, as told by Claudia Orozco. The Chilean industry and government officials on-site, as well as the Chilean representatives in Brussels and in the OIE (International Office of Epizootics) were immediately alert to the importance of informing all concerned about the nature of the outbreak of avian flu. They handled the emergency successfully because their openness maintained the confidence of the European authorities, allowing them to win agreement to the regionalization of the problem, reducing its commercial impact and making a solution easier to implement.

The Colombian authorities were not so forthcoming about a standards barrier that they imposed on the Malaysian latex condom industry, according to Norma Mansor, Noor Hasniah Kasim and Yong Sook Lu. This case suggests that it may be necessary to 'read between the lines' to understand the commercial impact of an apparently innocuous labelling requirement. It would have been possible for government officials on either side to make a mistake had it not been for the WTO standards notification system that alerted the Malaysian firm to the potential problem with the Colombian labelling requirement and provided a mechanism for an official Malaysian response. In this case, as in many potential trade disputes that surface in the WTO, it appears that the proposal was quietly withdrawn and the problem went away.

The non-discriminatory application of SPS barriers, such as those affecting imports of farmed shrimp into the EU, means that they frequently affect a number of exporters at the same time. Several Pacific Island Forum economies are potentially affected by the EU' s health ban on imports of traditional kava root products. These economies have already banded together in their participation in the WTO, establishing a joint representative office in Geneva to save on funds and to make the best use of experienced personnel. Chakriya Bowman describes in her case study how this initiative will help Papua New Guinea, Samoa and Fiji to work closely together to respond to the unique threat to their multi-million dollar exports of kava-based products.

Industries seeking protection press governments of both developed and developing countries to implement standards or SPS barriers, because they can offer much higher levels of protection than most tariffs. Isidro Morales-Moreno's case study of Mexican agricultural policies following the implementation of NAFTA describes instances of the use of SPS barriers to reduce adjustment pressures on Mexican farmers.

Intellectual property.

One of the most controversial aspects of the 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was the evidence that rights-holders of trade-related intellectual property were mostly in industrialized countries and that developing countries were mostly importers of trade-related intellectual property. Critics said that the TRIPS Agreement was more advantageous to the former than to the latter WTO members who, nonetheless, faced heavy implementation obligations.

The cases set out in this book do not resolve the controversy, but it is interesting that those we received that relate to TRIPS show developing country export interest in intellectual property and some success stories, as well as challenges on the import side.

S. C. Srivastava has provided a detailed account of the determined legal defences mounted by the Tea Board of India to protect its registered geographical indication (GI) of 'Darjeeling' in France, Japan and Russia. Although the Tea Board's objections to the registration of marks that they considered infringed their rights were not always successful — notably in France, where the Indian registration was not given reciprocal rights according to Srivastava — the case points to the heavy legal burden that the maintenance of a GI, like the maintenance of any trademark, can impose.

Amir Muhammed and Wajid H. Pirzada have compiled a case study related to recent negotiations between Pakistan and the EU on European access barriers to Basmati rice, in which the authoritative designation of rice as 'Basmati' may hold the key to maintaining Pakistan's access to the EU market. Unfortunately, as the authors point out, the government of Pakistan has not yet implemented its proposed legislation on the registration of such names.

Of course, copyright is unique among the major intellectual property categories in not requiring any registration process. One of the happiest outcomes for a developing country intellectual property rights-holder is to be found in Abul Kalam Azad's case on the triumphant defence of their copyright by the well-known Bangladedshi rock band, Miles. The band was able to obtain summary judgment in the Indian courts against the piracy of their music by a Bollywood producer, thanks to the rights established by the TRIPS Agreement.

Darker and more complex problems figure in Ben Sihanya's case study on the parallel importing and compulsory licensing of patented AIDS drugs in Kenya. The case provides an insider's report on efforts to ensure a supply of effective, low-cost drugs for the fight against AIDS in Africa, and examines the controversy over the TRIPS Agreement's restrictions on trade in compulsorily licensed drugs. The Kenyan objective, according to Sihanya, was to ensure that the patents served the interests of both rights-holders and consumers. This balance was expressed in Kenyan law as well as in the TRIPS Agreement. Part of the challenge in 'reinterpreting' the provisions of the TRIPS Agreement was to maintain this balance of interests when the compulsorily licensed drugs were made available for export. But, in Sihanya's view, the change to the TRIPS provisions did not necessarily address the most significant barriers to effective public health delivery to AIDS victims.

Services.

Although services form a rapidly growing part of developing country trade and already provide a significant contribution to a higher balance in their trade account, the level of developing member commitments under GATS remains low. A developing country with significantly higher service

commitments than many others is Argentina. As Roberto Bouzas and Hernán Soltz argue, this is most likely to be the result of a coincidence in time between multilateral liberalization efforts and domestic policy reform. In this case the multilateral negotiations were seized upon as an opportunity to push domestic reform.

Soledad Salvador and Paola Azar study the efforts made in Uruguay to develop a new 'institutional channel' for public/private-sector co-ordination on GATS issues. The authors believe that the dialogue suffered from a lack of commitment on both sides, and from some institutional resistance and poor information flows that fed existing suspicions — on the part of unions and civil society organizations, for example — about the objectives and consequences of services liberalization. They point to the need to evaluate objectively the domestic impacts and opportunities of services market access. Without such evaluation, the authors argue, the personal views of negotiators and officials may assume more importance than agreed national objectives in determining the GATS commitments eventually subscribed.

J. P. Singh presents a case that contrasts the superficially similar approaches to GATS negotiations of two small Central American economies, Belize and Costa Rica. Noting the low level of commitments offered by developing countries in the GATS negotiations, he asks why economies with vibrant service sub-sectors and in serious need of foreign investment or with sizable service export surpluses make such low commitments.

> **The evidence that follows for the two countries confirms the essentially bottom-up nature of GATS: both countries choose particular sectors for commitment — at levels acceptable to domestic actors. Interestingly, they also exhibit significant policy differences: Costa Rica was positioning itself to take advantage of being a service-based export-led economy; Belize remains ambivalent about the role of services in general and GATS commitments in particular.**

Linda Schmid has a services success story to tell about the experience of telecommunications liberalization in the small Caribbean island economy of Barbados, whose flavour can be represented by this cameo from her account:

> **An itinerant gardener who makes his way to work and carries his tools with him on his bicycle passed me while I was in a traffic jam. I needed help with my garden, flagged him down, and asked if he might be available. I reached for a pen and paper. He pulled out his cell phone, entered my data, and that evening I had a phone message to schedule a garden site visit. He was using his cell phone as a client database. Individuals with minimal economic means are employing this lower cost technology to enhance the way they work and communicate with others.**

She notes, however, that creating regulatory institutions to oversee a competitive market in telecommunications or other newly liberalized services sectors such as banking, insurance or securities is a challenge to WTO members with limited financial and human resources.

Malathy Knight-John and Chethana Ellepola would, presumably, agree about the regulatory challenges. Their account of the implementation of the provisions of the GATS Telecommunications Reference Paper points to gains for Sri Lanka from the liberalization of the telecoms market that followed GATS. But they also identify wide gaps between the global expectations reflected in the Reference Paper and Sri Lanka's performance in the crucial area of interconnection. The authors

describe a complex political economy created by a large number of small players and a small number of large public switched telecommunication network operators who, in the absence of an effective post-liberalization regulatory regime, have been able to cartelize aspects of the market.

Advocacy and 'democratic accountability.

Where do WTO decisions come from? From the member governments: there is no other source of decisions in the WTO. Not even the recommendations of the disputes panels or the Appellate Body become decisions of the WTO until the member governments say so.

So, how do individual member governments decide what to say on any particular issue? That question lies at the heart of what might be called the 'democratic accountability' issue for any intergovernmental organization like the WTO. Do the decisions of the WTO have 'democratic' credentials in the sense that the member governments' policies and regulations are based on a democratic mandate and on the processes that we expect in any democracy such as public information, consultation with stakeholders and accountability to citizens for the decisions taken?

The case studies in this book show that the answer is, in general, 'yes'. We see evidence in almost all cases that governments are ready to *inform* and *consult* with private-sector stakeholders when they are preparing for a WTO decision or negotiation. Most governments seem to appreciate, too, that such consultations are essential to ensure that government is well informed about the consequences of its actions in the WTO.

There are, however, two different aspects to this co-ordination with stakeholders: *advocacy* — which can be 'lobbying' for private benefit or something more public-spirited — and *accountability*, which means, at a minimum, government responsiveness to the demands of stakeholders and citizens.

In most of the cases in this book there is an element of advocacy by producers that prompts governments to inform and consult. Producers whose interests are at stake in a trade policy measure are likely to lobby for government consideration and support particularly where a foreign trade remedy measure is involved (Pakistan — cotton, India — shrimp, Costa Rica — garments) or some other external event threatens changes in market access terms (Thailand — tuna, Malaysia — condoms, Chile — poultry). In most of these cases we see the formation or expansion of producer coalitions designed to address a specific, WTO-related trade challenge to trade in a particular product. In several of these case studies the authors also suggest that the experience gained by the coalition, and the links it develops with the government in the course of the events recounted in the case, will continue to provide a base for co-ordination in the future.

Jean-Marie Paugam, for example, tells the story of the co-ordination of French negotiating positions, particularly on agriculture, in the lead-up to the Cancún ministerial meeting. Although France exercises its influence on the WTO agenda through the European Community's position, Paugam provides an analysis of a very well-informed, experienced, sophisticated stakeholder community whose inputs into both the French and Community's negotiating position is persistent, co-ordinated and effective. 'Overall', Paugam notes, 'in keeping with theoretical predictions, protected producers are more likely to organize themselves efficiently when their interests are concentrated and their consumers dispersed. In a context of declining agricultural support, concentrated potential "losers" proved very active.'

Two other case studies also use the agricultural sector to analyze the challenges of including non-governmental actors in the decision-making process. The study on Venezuela by Rita Giacalone and Eduardo Porcarelli shows that the issue is not simply whether both government and the private sector are serious about engaging in dialogue. They refer to the need for 'avoidance of politicization' in consultative processes and argue that 'private-sector associations should carefully tread the waters of domestic politics in order to have the right to participate . . . ' Shishir Priyadarshi's study of decision-making on agriculture in India traces an open and generally successful consultative process. But he also notes that this inclusiveness and transparency may have pre-conditioned the government's stance and favoured a defensive posture.

Niel Joubert's study of the development of the anti-dumping regime in South Africa reveals that even where consultative mechanisms are well established, they may simply serve to bless decisions that have already been taken or positions that have been defined in anticipation of negotiations with other countries. Joubert notes that governments may well have to choose trade-offs that disregard non-governmental stakeholder inputs, but this does not necessarily mean that these were disregarded from the outset.

There seems to be a qualitative difference between the lobbying of producers in the context of WTO negotiations — where the potential responses of the government are constrained by the need to reach reciprocal agreements with trading partners — and lobbying where the government is not so constrained.

From Nigeria, for example, Ademola Oyejide, Olawale Ogunkola and Abiodun Bankole bring us a case of an import prohibition policy that seems to escape the constraints of the General Agreement on Tariffs and Trade (GATT) rules because it falls under a WTO exception. The authors argue that the policy has failed despite a degree of popular support. Although its nominal purpose is to secure the economy's balance of payments, the latter is determined primarily by developments in the world oil market; the import prohibitions have relatively little impact. The real force behind the use of this policy instrument, according to the authors, is the protection of domestic producers, but there is little evidence that protection has produced the desired result of a greater degree of import replacement or higher export earnings.

Sometimes producers join in sector-wide or even cross-sector advocacy that may include non-producer interests (Philippines — co-ordination, Brazil — G20, India — agriculture, Kenya — co-ordination, France — co-ordination). Here the need to accommodate divergent interests is likely to defeat attempts at 'lobbying' on behalf of product or sector objectives and to result in more strategic 'advocacy' by the private sector, taking account of economy-wide goals.

Pedro da Motta Veiga brings us an example of this broadly based policy advocacy in his insider's account of Brazil' s role in the formation of the G20 group of developing countries and the interaction of Brazilian ministries and industry in those events. He writes:

> **Brazil's negotiations strategy was driven not only by the internal dynamics of the agricultural negotiations in the WTO, but also by a broader shift in the country's foreign economic policies — especially in its trade negotiations strategy — towards a view where the North-South axis acquired a growing relevance. Brazil's leadership in the setting of the G20 is perhaps the best example, at the multilateral level, of the country's new 'southern' stance in trade negotiations.**

In several cases, too, we see evidence of *accountability*: that is, the willingness of governments to take responsibility for their decisions or to share with stakeholder representatives responsibility for

decisions (India — agriculture, Chile — poultry, Thailand — tuna, Brazil — G20, Barbados — telecommunications, Philippines — agriculture, China — consultation).

Donah Sharon Baracol gives us an insight into the Philippines formal consultation process on agriculture negotiations: the Task Force on WTO Agriculture (Re)Negotiations (TF-WAR). The Task Force was formed as a result of grass-roots demand for a review of the Philippines negotiating approaches before the Seattle Ministerial meeting, and it remains, according to Philippines officials, a principal source of information for agricultural industry stakeholders as well as of guidance for the government in formulating its position. The strength of the consultation process and its broad base provides, according to the author, a form of security for Philippines negotiators against the pressures of third parties in the negotiations.

But consultation and co-ordination are expensive: they use resources that are scarce in any economy — especially small and developing economies — such as the time and attention of government officials and private-sector representatives. We also find several cases where the challenges described by the author are due to consultation and accountability mechanisms that are under-resourced and unco-ordinated (Uruguay — services, Kenya — co-ordination, Botswana — co-ordination) or slow to start (Pakistan — textiles, Uganda — co-ordination, Malawi — co-ordination).

Several African case studies contain examples of co-ordination problems and failures due in part to the cost of building appropriate institutions.

Walter Odhiambo, Paul Kamau and Dorothy McCormick are critical of the consultative process in Kenya that is managed through the National Committee for the WTO (NCWTO). The membership of the national consultative body — responsible for recommendations on all aspects of Kenya's participation in WTO — was based in part on its 'enquiry point'/notification obligations under the Uruguay Round agreements. The committee is large and hierarchically structured, and has a heavy agenda of meetings. But without political commitment, funding, legal status, decision-making powers or consistent participation from the private sector it has provided limited inputs into government decisions. For all its shortcomings, however, the authors believe that it has had an impact on the dissemination of information and on an increased private-sector awareness of the WTO in Kenya.

Tonia Kandiero argues that stakeholders in Malawi have reason to be disappointed with the organization of their representation in the WTO, and suggests that changes are needed in the co-ordination of technical assistance to Malawi to ensure that its need for a better understanding of the WTO and more effective representation can be met.

Nichodemus Rudaheranwa and Vernetta Barungi Atingi-Ego from Uganda list six areas of investment needed to support full participation in the WTO, and argue that developing countries need to consider investments in trade negotiating capacity and the resourcing of their stakeholder consultation mechanisms as a development project, creating the institutions needed for trade-led growth.

The case studies related to accession to the WTO (see above) show that the process frequently leads to the creation of organized coalitions.

An 'agent of restraint.'

The authors of the Nigerian case study draw a lesson that may have wider application:

> **Nigeria's membership of the WTO provides it, in principle, with a strong external trade policy surveillance mechanism. But the role of the WTO as an 'agent of restraint' in favour of good trade policy is feasible only to the extent that two important conditions are met. First, the government whose behaviour is to be 'restrained' must be committed to good trade policy and thus be willing to tie its own hand and use an external treaty obligation to strengthen its hand against local vested interests.**

Governments are usually aware that to change a trade measure such as a tariff, a quota or a subsidy means hurting someone — possibly someone now relying on low-cost imports — who will never forget the hurt. It also means helping someone else who will never remember that the government did them a favour by raising a trade barrier.

Thus many governments learn to be grateful that the rules of the WTO limit what they could otherwise easily do: lift rates of protection or give new subsidies. As a matter of fact, it is rare that the WTO rules absolutely prohibit a government from taking whatever action the latter deems necessary. But the role of the WTO as an 'agent of restraint' in favour of good trade policy proves valuable to governments around the world every day, because every day governments are under pressure to raise a barrier — or simply to maintain a barrier — to help some industry or other.

Take the case of the Philippines customs valuation measures brought to us by Ramon L. Clarete. The case provides a history of efforts by the Philippines government and Congress to develop a transparent, effective means of valuing imports to ensure that neither importers nor, potentially, customs officials could defraud the government of its revenue from duties and that protection levels would be maintained while the government met its obligation to base collections on transaction values. Working within the restraints imposed by the WTO Agreement on Customs Valuation enabled the Philippines authorities to bypass pressure from interested lobbies and adopt a more transparent system, with post-entry audits, that has lowered barriers to trade and has increased customs revenue.

Two special regions.

We have taken special care in this book to include cases from the smallest and most disadvantaged economies, particularly the island economies of the Pacific such as Vanuatu, Papua New Guinea and Fiji, and land-locked economies such as Botswana, Laos, Mongolia, Nepal and Zambia.

We expected to find that these economies faced specific problems and we hoped to find some useful ideas or perspectives that would emerge from their common experience and help them — and others — to find specific solutions in the future.

What we found was that these economies face many of the same problems and opportunities as other economies, but have fewer resources to manage them and face greater penalties if things go wrong.

In Botswana, a land-locked economy of southern Africa, the narrowness of the economy's productive base and its dependence on a very small number of export destinations has resulted in informal and

ad hoc trade policy-making, according to Kennedy K. Mbekeani. He reports, however, that a lack of information resources in the responsible agency — experienced personnel, analytical capacity and relevant inputs from stakeholders — is the single biggest challenge to the management of Botswana's trade policy.

Botswana's land-locked neighbour, Malawi, has similar resource problems and similar failures of stakeholder consultation according to Tonia Kandiero, who describes the complex of supply-side constraints and policy shortcomings that have prevented Malawi from taking full advantage of its WTO membership.

Small, resource-limited economies often face difficulties in finding adequate resources to participate in negotiations. Sanoussi Bilal and Stefan Szepesi ask whether Zambia and Mauritius have been able to 'economise' on these resources by using possible synergies between different negotiating fora and multilateral negotiations. The issue was whether these two countries were able to use their participation in regional negotiations under the Southern African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA) to facilitate participation in the WTO. The answer was that little exists by way of direct impact, but that there could be indirect synergies such as raising awareness, training, making information available and capacity building. But the ability to make use of these opportunities depends crucially on pre-existing capacity, and this was clear from comparisons between Zambia and Mauritius.

Buavanh Vilavong and his colleagues detail the difficulties faced by the Laotian garment industry after the garment quotas were eliminated in some of the largest export markets in January 2005. They show how, in a small, land-locked economy that is still on the road to WTO membership, the challenges of increasing productivity while maintaining access to tariff preferences are linked, creating some crucial hurdles for the industry.

Andrew Stoler paints a picture of the tough choices facing Fiji with the erosion of sugar preferences in the European market. Preference erosion is a widespread problem for developing economies; Fiji has moderated it by securing the extension of some regional preferences. But it appears that Fijians may be failing to make the best of their options for growth due to failures of consensus and co-ordination at a policy level.

Fiji's approach to dealing with its many problems compares poorly to what is happening in another small island state, Mauritius, which, as Andrew Stoler explains, is wrestling with many of the same kinds of issues. In Fiji, political tensions stand in the way of successful co-operation between government and business. In Mauritius, government and business have a long tradition of working together for mutual benefit.

The government of Papua New Guinea (PNG), like the governments of the other islands of the Pacific, faces a major challenge sustaining its membership of the WTO. Despite having the largest economy in this group, the burdens of membership weigh heavily on PNG according to Chakriya Bowman. But, with the help of donors including Australia and the EU and with the support of the WTO Secretariat, the island economies of the Pacific Islands Forum have found a unique response to this challenge to their administrative resources: a Joint Representative Office in Geneva. Chakriya Bowman describes a specific instance in which this joint representation has helped the Pacific Islands Forum manage a standards-based threat to their exports of kava to Europe.

Who's in charge?

What do these case studies tell us about the role of the WTO in an economy's trade policy?

There are probably as many answers to that question in this book as there are cases: the role that the WTO plays is subtly different in each account, depending on the history of the economy or its economic or constitutional circumstances. But it is clear in every case that WTO rules and WTO activities comprise only one factor among many economic, administrative, social and even constitutional factors that affect the way in which trade and related policies are decided.

In several cases governments are struggling to develop or to prosecute successful trade policies or to participate in the WTO because they lack human, administrative or financial resources. The challenge is particularly evident in the poorest economies such as Malawi, Botswana and the island economy of Vanuatu. But the case studies of Nigeria and Venezuela suggest that greater wealth does not necessarily bring with it more successful trade policy administration. Something else is needed.

Nor is the size of the economy necessarily an indicator of whether it will enjoy success in the protection of its rights or prosecution of its objectives in the WTO. We have case studies from some of the largest economies (France, Brazil and India) that show a sophisticated process of policy development based on contributions from well-informed private-sector organizations and experienced trade policy administrators. But we also have case studies — such as those from Costa Rica, Pakistan and Thailand — that show how middle-sized and even small economies with less experience in multilateral affairs can achieve significant 'wins' in the WTO.

Cases from southern Africa and the Pacific confirm that there is a 'threshold' level of the human and administrative capacity and resources that are needed to implement WTO agreements and to maintain an effective presence 'at the table' of WTO negotiations. The Papua New Guinea case indicates that there may be innovative ways to overcome some of these constraints, but this possible 'exception' only proves the rule.

Beyond that threshold, however, the case studies in this book show over and over again that the key to the successful management of participation in the WTO and the global trading system is co-ordination: among government agencies (as we see in case studies from India, Brazil and France), and between the government and private sectors (as we see in case studies from the Philippines, India (shrimp), Thailand, Mauritius, Costa Rica, Chile, Nepal (accession), Pakistan (textiles) and Argentina (services)).

Cases revealing a high level of interaction, information exchange and collaboration between business or civil society institutions and government are all 'success stories'. Cases where, for a variety of reasons, this collaboration and information exchange breaks down (Venezuela, and to a lesser extent Uruguay) or where it does not get going (Kenya (co-ordination), Vanuatu) or where there is a misalignment of priorities between government and the private sector (Fiji, Canada (automobiles), Mongolia) tell a less happy story.

This common thread through the stories of success on the one hand and failure or frustration on the other leads, we think, to a conclusion about the role of the WTO that deserves specific emphasis. Beyond the 'threshold' mentioned earlier, the crucial factors in the success of an economy's trade policy are home grown. The WTO itself is not the prime determinant of whether an economy achieves its objectives in the world trading system. The Agreements constrain government actions in the

regulation of trade, but none of those constraints appears in any of these case studies as a hurdle for governments or for businesses. On the contrary, where WTO members in the stories told here directly invoke the rules (Pakistan (rice), Costa Rica (textiles), South Korea (television)) or make use of the framework of rules and obligations (Bangladesh (copyright), Chile (SPS)) the outcome is positive for developing country business. Where the rules act to constrain or direct government choices (Nigeria, Vietnam, Canada) the constraints seem likely to lead to more opportunities for trade and growth.

Decisions by the WTO determine the outcome in a small number of the case studies we have collected; for example, in some of the disputes case studies (Pakistan (textiles), Costa Rica (textiles etc.)). But in most case studies, including some disputes that were resolved without WTO adjudication (Thailand (tuna), Pakistan (rice)), there is no direct intervention by the organization in the events or trends described. The case studies tell us that the decisions that matter to members most of the time are not made in Geneva. They are decisions made by governments in direct contact with other members within the framework of the WTO system, or they are decisions made autonomously by governments about the allocation of resources within their own economies.

Perhaps the question we should ask is not 'who's in charge' but 'where does the responsibility lie' for trade policy and for achieving success in the global economy. The answer is not — in either case — the WTO. The answer is the 'stakeholders' — in each member economy of the WTO, public and private sectors together.

MANAGING THE CHALLENGES OF WTO PARTICIPATION: CASE STUDY 7.

Brazil Case Study: Brazil and the G-20 Group of Developing Countries.

http://www.wto.org/english/res_e/booksp_e/casestudies_e/case7_e.htm

I. Introduction.

It is widely known that Brazil, as a major exporter of agricultural and agro-industrial goods, has adopted an offensive stance in negotiations on the liberalization of trade in agriculture taking place in the WTO, as well as in other negotiating processes. In line with this Brazil has participated actively in the Cairns Group — a coalition of developed and developing countries exporting agricultural products — both during and after the Uruguay Round. As the launching of a new multilateral round of trade negotiations was being discussed, Brazil pushed for including in the agenda ambitious goals related to market access and the reduction or elimination of export and domestic support schemes. Moreover, in the Free Trade Area of the Americas (FTAA) and EU-Mercosur negotiations, Brazil has presented proposals consistent with those developed in the multilateral arena.

However, in the months preceding the WTO Ministerial Conference in Cancún in September 2003, an interesting process of strategy-shifting took place, involving Brazil's stance in negotiations on agriculture.
Without breaking with the Cairns Group and giving up its pro-trade liberalization stance in agricultural negotiations, Brazil led the setting of an issue-based developing countries' coalition aimed at bargaining jointly during the Ministerial Conference and beyond. This new coalition, the G20, brought together developing countries which traditionally adopted differing — even opposed — positions in the agricultural negotiations in the WTO; the simultaneous presence of Argentina and India in the group is the best example of this novelty.

It is worth noting that the shift in Brazil's negotiations strategy was driven not only by the internal dynamics of the agricultural negotiations in the WTO, but also by a broader shift in the country's foreign economic policies — especially in its trade negotiations strategy — towards a view where the North-South axis acquired a growing relevance. Brazil's leadership in the setting of the G20 is perhaps the best example, at the multilateral level, of the country's new 'southern' stance in trade negotiations.

II. The local and external players: roles and interaction.

One of the more interesting features of the decision-making process leading to the establishment of the G20 was that it involved intensive interaction between public and private domestic actors and between these actors and external players. Even more interestingly, the domestic and external dynamics became more and more interconnected as the G20 was set up and became a relevant player in agricultural negotiations at the WTO.

The 'domestic' interplay involved continuous co-ordination between public agencies and between public- and private-sector representatives, leading to the setting up of new structures and institutions, including a non-governmental organization (NGO) focused on technical research related to agricultural negotiations which is financed by the main private associations of the Brazilian agribusiness.

On the domestic front, the adoption by Brazil of increasingly assertive and autonomous positions in agricultural trade negotiations has been backed, in structural terms, by the impressive modernization Brazilian agribusiness underwent during the 1990s.

By the late 1980s, agricultural exports concentrated on primary goods — coffee, cocoa and cotton, among others — and were strongly regulated by state-owned sectoral bodies. As a consequence of this and until the beginning of the 1990s, the private sector did not show a great deal of interest in trade negotiations, and the participation of agribusiness representatives in the Uruguay Round was very timid. During the negotiations to launch the sub-regional integration process, the private sector adopted an essentially defensive stance, focused on the alleged risks of competition in the domestic market arising from the elimination of tariffs among Mercosur member countries.

From 1995 onwards, driven by large investments, a strong expansion of agribusiness productivity took place in Brazil. This process speeded up at the end of the decade, and sector representatives began to push the government to adopt more aggressive negotiating positions in agriculture, in the FTAA and EU-Mercosur trade talks. In the WTO, the new position taken by the private sector was crucial for the government's decision to ask for the setting up of agricultural-products-related dispute settlement panels in their actions against the United States and the European Union (EU).

In early 2003, summing up these evolutions in attitudes, the Brazilian Minister of Agriculture called for the adoption of an 'autonomous position' in the agricultural negotiations, a position which also reflected — as shown below — some disappointment towards the recent performance of the Cairns Group. At that time, the main sectoral Brazilian agribusiness associations created a research institute geared to providing technical support to the ongoing agricultural negotiations at the WTO as well as at the preferential fora.

As the so-called 'Harbinson paper' was made public in the WTO talks, during the first half of 2003 a working group, created as a joint initiative by the ministries of Agriculture and Foreign Affairs, undertook a cautious and detailed analysis of the paper, criticizing it and formulating technically sound proposals on each of the points it raised. Later on, the working group expanded to integrate other ministries, governmental agencies and private representatives related to the agriculture and agribusiness sectors.

A similar position was adopted once the joint EU-US document on agriculture was made public, in the weeks preceding the Cancún Ministerial Conference: 'the day after the document was issued, the working technical group began to work on this new proposal, analyzing and assessing each paragraph, deconstructing it', according to a participant of the group from the private sector.

On the external front, the political origin of this coalition can be traced back to the Brasilia Declaration signed between Brazil, India and South Africa in June 2003. According to the Brazilian Minister of Foreign Affairs, the G20 'was not born in Cancún or in Geneva, during the weeks preceding the WTO Ministerial Conference. It emerged from the political trust built up between Brazil, India and South Africa some months earlier.'

The creation of the new coalition also seems to be related to a growing feeling of disappointment with the Cairns Group and its positions on agricultural negotiations before Cancún.

In the view of a private-sector representative, the WTO informal mini-ministerial, held in Egypt in July 2003, made it explicit that Australia was exerting the strongest leadership within the Cairns Group; however, it did not wish to adopt a more aggressive stance in the negotiations, favouring instead the EU-US bilateral understanding as a first step towards untying the agricultural knot in the multilateral negotiations. According to this private sector representative, 'the G20 began to emerge in Egypt, when it became clear that Australia and the Cairns Group would not seek to counterbalance the EU and US common interests'.

The timid reaction of the Cairns Group to the EU-US joint document on agriculture — issued some weeks before Cancún — strengthened the incentives, on the Brazilian side, to look for political alternatives to what was being perceived as a new Blair House Agreement, excluding the interests of developing countries. As a Brazilian diplomat put it, 'Cairns was paralyzed and Brazil seized the opportunity created by this "leadership vacuum" to gather support to its paper in Geneva'.

However, the document prepared by the public-private working group in Brasilia turned out to be very aggressive as far as market access demands were concerned. In the view of high-level officials, this stance could isolate Brazil in the negotiations, jeopardize efforts to build a coalition around the Brazilian paper, and compromise the objective — most valued by the Brasilia authorities — of attracting some of the most important developing countries to this new coalition.

One of the consequences of this, according to a Brazilian diplomat, was that

> **Brazil had to reduce its ambition in market access issues in order to gather the support of India and China for its demands against developed countries' domestic and export subsidies. It had also to emphasize the idea of proportionality of concessions to be made during the negotiations:**

> **developing countries were supposed to pay less than the developed ones in the agricultural negotiations.**

The historical evolution of G20 also includes a period of intense activity in Geneva prior to Cancún. As a Brazilian diplomat puts it,

> **the group met frequently at the level of heads of delegation in Geneva prior to Cancún. The group also met (and continues to meet) at the technical level to discuss specific proposals in the context of the WTO agriculture negotiations, and to prepare technical papers in support of the group's adopted common platform. The frequent contacts and meetings at the ministerial level in Cancún further consolidated the group and made it possible for the G20 to resist the strong pressure to break its common position.**

In the words of a leading negotiator,

> **Since its inception the G20 had established close relationships with other groups in the WTO with a special interest in the agricultural negotiations. The G20 is not a closed group. On the contrary, it is open to the participation of other interested countries that share its objectives and positions. It is thus only natural for the group to have close contacts with other groups. A majority of G20 countries are members of the Cairns Group and there is a large degree of coincidence between the positions of both groups which naturally support each other and try to co-operate for their common purpose: the faithful implementation of the Doha mandate.**

The frequent contacts with other groups and coalitions did not jeopardize the identity of the newly born G20. Making reference to the relationship between the G20 and the Cairns Group, a Brazilian diplomat stressed that

> **each has its own personality. The G20 tries to strike a balance between the interests of trade liberalization and the development objectives of its members. Cairns is more focused on trade liberalization. Their respective agendas and interests coincide as regards the need to end trade-distorting policies in agriculture and for the opening of developed countries' markets. The difference lies in the definition of special and differential treatment for developing countries, especially in the area of market access. The G20 clearly accepts the need for a dual approach to market access that fully takes into account the needs of rural development and the situation of countries with a large rural population. The Cairns Group acknowledges in its platform the need for special and differential treatment for developing countries, but defends — as is only natural due to its composition, where major exporters of agricultural products play a central role and where developed and developing countries are present — a policy more committed to open markets in agriculture, in both developed and developing countries.**

As the G20 is composed only of developing countries and as it tries to combine the broader interests of economic and social development, especially in rural areas, with trade liberalization, it has established strong ties to other developing country groups: 'the African Group recognized the existence of common ground with the G20 in the Cairo Communiqué and some African countries have joined the group since Cancún. Others have indicated their interest in the group's work and may join in the future', according to a high ranking diplomat.

These ties and contacts produced some non-negligible impacts on the dynamics of the agricultural negotiations at the Cancún Ministerial Conference: 'At Cancún, the G20 maintained frequent dialogues with the Cairns Group and the African Group and the G20's reaction to the Derbez text incorporates elements of the position of both groups. In the case of the African Group the issue of cotton was taken up by the G20 as part of its platform.'

III. Challenges and the outcome.

The first challenge: the establishment and the composition of the G20 ……..….

The G20 was created in response to the EU-US text on agriculture. Why the focus on agriculture? The common position reached by the United States and the EU created the risk of reducing the scale of ambition set in Doha with consequences, in the light of the central role of agriculture in the Doha Development Agenda (DDA), for the whole of the Round. And why an alliance of developing countries? The US-EU common paper revived the North-South polarization in a crucial area of negotiation and generated concrete risks of marginalization for the interests of the developing countries in this central issue. The understanding between the two major trading partners had the potential to affect the ambitious targets set at Doha, especially as far as developing countries' interests and development issues were concerned: 'developing countries from both sets of interests came together when they realized that the EU and the United States had joined forces and come up with a text that was highly unsatisfactory'.

Hence the first challenge faced by Brazil's strategy was the setting up of an issue-based coalition composed exclusively of developing countries. On the one hand, southern coalitions — bloc-type coalitions — in trade negotiations were broad in scope but their effectiveness has proved very limited. On the other side, the most successful experience in the setting up of a North-South issue-based coalition — the Cairns Group — had, in the view of Brazilian diplomacy, run out of steam. As stressed by two analysts, 'the coalitions of today, including the G20, having learnt from the failings of their predecessors, utilize some elements of both the bloc-type coalitions and issue-based alliances'.

As emphasized by one of the leading official Brazilian negotiators, 'the establishment of the group and its composition involved a political decision and sent a message to all participants in the Round, especially the developed countries, that there was a new factor to be taken into account in the negotiations. The creation of the group was a political statement.'

According to a representative of the Brazilian private sector, the setting up of G20 'challenged not only the agricultural policies of the developed countries, but the legitimacy of the model adopted by those countries to negotiate in multilateral fora, presenting their agreed position as a fait accompli to developing countries'.

From the Brazilian point of view, the decision to form a coalition of developing countries with heterogeneous interests in the agricultural negotiations represented a significant shift in the country's negotiation position on this issue; it was now driven by the offensive interests of a large exporter but also by the objective of breaking the North-South protectionist front in agricultural negotiations through the setting up of a new 'southern agenda' on agriculture, albeit less ambitious than the Cairns Group's agenda.

The second challenge: building consensus and retaining cohesion in the G20 ……..…..

The second challenge faced by Brazil in the emerging coalition involved the ability to build a consensus among developing countries with heterogeneous interests in the multilateral negotiations on agriculture. Cohesion of the coalition has been a major concern of Brazilian diplomacy, and consensus-building within the G20 required that much attention be directed to the design of negotiating technically consistent proposals in order to avoid the G20 being labelled as a coalition that merely sought to block progress and was uncommitted to a positive outcome for the WTO Ministerial Conference. As a Brazilian diplomat recalled, 'At Cancún, the group not only presented its views and influenced the elaboration of the proposed final text of the conference, but, also, after the presentation of this text, it met for several hours and prepared a number of concrete amendments to the text for the final round of negotiations which unfortunately never took place.'

The co-ordination between technical experts from the Brazilian government and the private sector, and the experience accumulated in Brasília during the months preceding Cancún played here a central role, allowing Brazil — and then the G20 — to develop a sound, substantive position dealing with the complex issues involved in the agricultural negotiations.

The battle to maintain the cohesion of the G20 was described by one of the main Brazilian negotiators at Cancún as follows:

> **Even before the Ministerial Conference, some developed countries tried to dismiss the group, by refusing to take its proposals seriously and by accusing the group of trying to introduce an ideological dimension in the negotiation, by importing into the WTO positions and tactics that had their origin in the North-South dialogue. This reflected a sort of annoyance with an attempt by a group of developing countries to try to interfere with the agreement between the EU and the United States which should represent the basis for the results on agriculture at Cancún. The attempts by many countries from the G20 and other groups to change the bilateral deal to better reflect their interests were met with a negative reply.**
>
> **Once the G20 was set up, another battle began at Cancún, as some developed countries attempted to divide the Group and to create difficulties in its relations with other groups in the WTO, especially the Cairns Group and the African Group. In spite of strong pressures put on members of the group, the G20 remained united during the whole of the conference, with the withdrawal of only one delegation from the group. Another delegation, Nigeria, joined the group in the final stages of the meeting. After Cancún a small number of countries also left the group, but others became members, for example Tanzania and Zimbabwe.**

The outcome: a high level of legitimacy and Brazil becomes a major player in agricultural negotiations ……..

In spite of criticisms from developed countries and the fact that no agreement on agriculture was reached at the end of the day in Cancún, the G20 was perceived by public opinion, in both the North and the South, as a legitimate and constructive effort by developing countries to advance their interests in the WTO negotiations and to defend the idea, officially agreed in Doha, of a development round.

Since Cancún, the G20 has been widely recognized as a major new player in agricultural negotiations, and one whose interests should be taken into account if some agreement on this issue is to be reached in the WTO. In December 2003 the EU's chief negotiator, Pascal Lamy, participated in the G20

ministerial meeting, held in Brasília, implicitly confirming this understanding. Another G20 ministerial meeting was held in São Paulo in June 2004, and during the first half of 2005 the group embarked on technical and political consultations with a view to injecting momentum in ongoing agricultural negotiations.

The G20 is clearly today an important partner in the agricultural negotiations in the WTO and the five main partners remain in the group. The failure of the Cancún Ministerial Conference and the consolidation of the G20 help to explain the Non-Group-5 (NG-5), created in March 2004, which put together three major developed players in the agricultural negotiations (United States, EU and Australia — the leader of the Cairns Group) with Brazil and India, respectively the most liberal and the most protectionist member of the G20.

In the view of Brazilian diplomats and representatives from civil society organizations, once the period of 'blame-shifting' that followed Cancún was left behind, the initiative of setting up the NG-5 reflected the recognition that the process of decision-making in agricultural negotiations had to change to integrate the G20.

Beyond that, the setting up of the NG-5 is considered to be a very important initiative, as the technical and political work of its members paved the way for concrete proposals which proved essential to consensus-building in Geneva on the negotiations framework. As one NGO representative put it, 'After the meeting of the NG-5 in São Paulo in June 2004, consensus was reached among members as far as the export and domestic subsidies were concerned, and the market access issues remained as the only area of dissent. A very important step was made in this meeting, making the work carried out in Geneva in July 2004 easier.'

According to Brazil's Minister of Foreign Affairs, 'The G20 has produced a change in the dynamics of agricultural negotiations, which migrated from the Blair House model to the NG-5 model as far as decision-making is concerned…. It is not by chance if the text on framework presented for discussion in July 2004 represents a progression from the G20 point of view as compared with the text presented at the beginning of the WTO Ministerial in Cancún.'

The official view in Brazil on the 1 August 'package' is quite positive, although it is widely recognized that a lot of work remains to be done. The adopted framework is perceived as a text which respects the Doha mandate and its level of ambition, and represents a substantial improvement as compared with the text submitted in Cancún as far as agricultural negotiations are concerned.

IV. Learning from the experience.

The assessment of the strategy of setting up the G20 is widely positive in Brazil, despite the setback of the WTO Ministerial Conference where the coalition made its début. Brazil continues to participate in the Cairns Group, and has made significant efforts to keep the G20 coalition alive and has involved itself — with India — in the NG-5, which put together the major players in the multilateral negotiations on agriculture.

Many lessons can be learnt from the Brazilian experience of setting up the G20, but two will be emphasized here. The first relates to the importance of the domestic dimension in the formulation of the national position on a negotiation issue central to Brazil. The domestic dimension is about political negotiations involving groups with different views and interests as far as trade negotiations are concerned: in the case of Brazil, these negotiations played an important role in shaping the option of

building a coalition with other developing countries and in balancing liberalization goals and development objectives.

The technical and institutional component of the domestic dimension in setting up the G20 are worth highlighting. Technical preparation and permanent co-ordination among public agencies and with the private sector helped to build domestic consensus supporting the official position in the negotiations. These mechanisms have been kept active before, during and after the Cancún Ministerial, and it seems correct to assert that they have become more and more dense and complex. Capacity-building initiatives in the private and public sector made their contribution in this way: the Ministry of Agriculture has created a specific institutional structure to deal with trade negotiations in a systematic manner; agribusiness sectoral associations have supported a research institution charged with presenting technical proposals for agricultural negotiations, and they have participated in the Brazilian Business Coalition — a forum representing industrial, agribusiness and services sectors in trade negotiations.

The second lesson refers to the convenience (or not) of replicating the coalition-setting initiative in the area of non-agricultural market access. The assessment of one leading negotiator is clear-cut on this point:

> **After Cancún, and in the light of the role the G20 played at the conference, there have been some suggestions that the group could perhaps play a larger role encompassing other areas of the WTO agenda or even the broader agenda of co-operation for development. Perhaps this is only natural and reflects the need that is felt in many quarters for a new coalition to revitalize the debate on development issues in international fora. This is even more true in the light of growing fatigue with orthodox adjustments, self-regulating market forces as an answer to development problems and the negative aspects of globalization. Nevertheless, the G20 is perhaps not the answer and to try to expand the mandate of the group would possibly jeopardize its unity. One of the strengths of the G20 is its ability to combine a political stance with a focused approach to agricultural negotiations.**

MANAGING THE CHALLENGES OF WTO PARTICIPATION: CASE STUDY 17.

Indian Case Study: The Indian Shrimp Industry & Anti-Dumping Threat.

http://www.wto.org/english/res_e/booksp_e/casestudies_e/case17_e.htm

This case study deals with the way in which the Indian shrimp industry responded when faced with an anti-dumping action in the United States. It also indicates the potential impact of the anti-dumping action on the fragmented, small-producers-dominated.

I. The case history.

On 31 December 2003, the Ad Hoc Shrimp Trade Action Committee (ASTAC), an association of shrimp farmers in eight southern states of the United States, filed an anti-dumping petition against six countries — Brazil, China, Ecuador, India, Thailand and Vietnam. The petition alleged that these countries had dumped their shrimps in the US market. Though the actual petition was made by the Ad Hoc Shrimp Trade Action Committee, whose members are located in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Texas, the Southern Shrimp Alliance (SSA) had been organizing the process of seeking redress.

The petition meeting statutory requirements, on 21 January 2004 the US Department of Commerce (DOC) announced the initiation of anti-dumping investigations against the six countries. Products covered include warm water shrimp, whether frozen or canned, wild caught (ocean harvested) or farm-raised (produced by aqua-culture), head-on or head-off, shell-on or peeled, tail-on or tail-off, deveined or not deveined, cooked or raw, or otherwise processed in frozen or canned form.

The Department notified the International Trade Commission (ITC) of its decision on initiation. On 17 February 2004 the International Trade Commission announced its decision that there was a reasonable indication that the US shrimp industry is materially injured or threatened with material injury by imports, allegedly at less than fair value, from the six identified countries. As a result, the Department of Commerce continued with its investigations and gave its preliminary determination on 28 July 2004. The ratio of preliminary duty varies between 3.56% and 27.49% for three mandatory respondents selected by the DOC. The weighted rate for India is 14.2%, and the average rate for China is 49.09%, for Brazil 36.91%, for Vietnam 16.01%, for Ecuador 7.3%, and for Thailand6.39%.

II. The national and international context.

The trouble had started much earlier than December 2003. On 26 February 2002, Reggie Dupre, a Louisiana state senator, alleged that tainted farm-raised Asian shrimp was being diverted from Europe and dumped on the US market. Dupre was calling for a congressional investigation into food safety and unfair pricing, as local fishermen voiced concern that imports had depressed the prices they got for the locally harvested shrimp. By September 2002, shrimp industry representatives from eight southern states had got together to fight the case against imported shrimp from certain countries. 'We stand a better chance of success when all shrimp-producing states come on board', as George Barisich, president of the United Commercial Fisherman's Association, observed.

On 22 October 2002, representatives of the shrimp industry from the eight southern states voted to form the Southern Shrimp Alliance to fight unfair competition from imported farm-raised shrimp from certain countries. There was, however, a basic problem. It was estimated that it might cost more than US$3 million in terms of legal expenses to go for an anti-dumping petition.

There were also problems associated with divergent trade interests. Shrimp importers and distributors were afraid that a long-drawn-out battle would affect the supply of imported shrimp and adversely affect their business. Wally Stevens, president of the American Seafood Distributors Association, described how the salmon industry in Maine had filed an anti-dumping petition against Norway in 1990, hoping to stabilize prices. Twelve years after winning and spending up to $10 million, salmon was selling at half the price prevailing at the time of the beginning of the dispute. 'This is definitely not the right way to go. It consumes an immense amount of money and is not a long-term solution in terms of maintaining viability.' In a statement in January 2003, Stevens said that his organization, in support of 'free and fair trade', would oppose any anti-dumping action by the SSA.

In the meantime, countries threatened with the prospective action started reacting. Vietnam, one of the countries identified almost at the beginning of the SSA exercises and also highly dependent on the US market for shrimp exports, was the first to protest. Foreign Ministry spokeperson Phan Thuy Thanh said in a statement on 12 September 2002 that 'I can say with certainty that Vietnam has never dumped its shrimp, and its shrimp have been sold at market prices.' Thailand was another country to lodge a protest. Kenneth Pierce, of Willkie Farr & Gallagher, representing the Thai Frozen Foods Association, condemned the move to consider anti-dumping action against Thai shrimp exports.

'Thailand's shrimps have never been dumped in the United States, nor have they caused material damage to US shrimp', he said in a statement on 25 November 2002. As evidence mounted of the SSA's determination to go ahead with the petition on anti-dumping, other threatened countries also started taking preventive actions. Rokhmin Dahiri, the Indonesian Maritime and Fisheries Minister, denied allegations that the Indonesian government subsidized its shrimp farmers. He said in a statement on 25 August 2003 that the price of shrimp on the domestic market was much lower than the export price. The dumping charge was baseless and, therefore, the United States should exclude Indonesia from the proposed anti-dumping investigations. The government of Bangladesh took similar action, and Vietnam also started working out alliances. Nguyen Thi Hong Minh, Vietnamese Deputy Fisheries Minister, said in a statement on 4 August 2003 that the Vietnamese shrimp businesses and their counterparts in south-east Asia, India and China as well as US shrimp importers were considering measures including lobbying to prevent a lawsuit.

The Indian government and the Indian shrimp industry were aware of the threat. Arun Jaitley, the then Minister for Commerce, made a statement in June 2003 after his official visit to the United States: 'We are anticipating an action against our shrimp exports because our share in the US market is on the rise.' During the whole of 2003, the SSA went through the process of raising the required resources and trimming the number of countries against which dumping action was to be brought, as the cost of the legal battle increased with the number of countries. After a compromise with the Mexican shrimp industry, the number of countries was ultimately brought down to six.

The main contentions of the petitioners were as follows.

- **The six named countries accounted for 74% of shrimp imports in the US market.**
- **Imports from the six countries increased from 466 million lb. in 2000 to 650 million lb in 2002.**
- **Import prices of the targeted countries had dropped by 28% in the previous three years. The average unit value of the targeted countries in 2000 was $3.54; this had fallen to $2.55 in 2002, on a headless, shell-on equivalent basis.**
- **The average dockside price for one count size of gulf shrimp dropped from $6.08 to $3.30 per pound from 2000 to 2002.**
- **The United States was the most open market in the world. High tariff rates in other large importing countries provided a powerful incentive for exporters to increase shrimp shipments to the United States. Likewise, the US market also served as the market of last resort when shrimp shipments were denied entry to other markets such as the European Union due to the discovery of unacceptable levels of contaminants.**

III. The Indian shrimp industry and its response.

The first concrete signal that India might be included in the US industry's anti-dumping petition was received by the Indian government in June 2003. That anti-dumping investigations against Indian shrimp imports might be initiated was hinted at during bilateral talks when the then Commerce and Industry Minister Arun Jaitley had met his counterpart in Washington at that time. The reason given was that India's shrimp exports to the United States had been rising rapidly during the previous three years, from $255.93 million during 2000-1 to $299.05 million during 2002-3.

India's marine products industry has been one of the major export success stories. From an export base of just Rs. 450 million in 1971-2, it increased to Rs. 68,810 million in 2002-3. Shrimp is the mainstay of India's marine product exports.

Japan has traditionally been the biggest export market for India's marine products, followed by the United States, China and several EU countries. There was an over-dependence on the Japanese market, as shrimp is the major export item which Japan imports in huge volume. However, in the recent past, there has been a gradual decline in the intake from Japan with an increasing absorption in the United States, as well as some other countries. The United States, traditionally a buyer of small-sized shrimp from India, has now started buying many other varieties, including black tiger shrimp, resulting in its occupying the top slot in India's export markets of marine products, replacing Japan in 2002-3.

Success in India's shrimp export is directly attributable to the development of shrimp culture. Assisted by the Marine Products Export Development Authority (MPEDA), shrimp culture has developed as a major industry in several coastal states. It is mostly an enterprise of small and medium farmers, and has led to the utilization of otherwise unproductive areas in the coastal region, contributing to improvements in the socio-economic conditions of the rural poor in the shrimp farming areas. It has created direct employment of about 300, 000 people and indirect employment to over 700, 000.

The Indian government has played an important role in the promotion of marine product exports, including the development of shrimp farming. The MPEDA is a government-sponsored body whose mandate covers the development of the industry as a whole, including export promotion. It is under the administrative control of the Department of Commerce and is headed by a senior officer of the Indian Administrative Service. Its governing council comprises senior officials of the central and state governments as well as representatives of the marine products industry.

The Seafoods Exporters Association of India (SEAI) is the nodal body of the exporters community and is represented on the MPEDA governing council. There is, therefore, close co-ordination between these two bodies which are primarily responsible for organizing the shrimp industry's as well as the government's response to the US anti-dumping investigations.

After the statement of the Commerce Minister on the possible threat to Indian shrimp exports to the United States, these two bodies went into action. To explore the possibilities of avoiding the anti-dumping action and, if necessary, to take legal action, a delegation comprising senior members of the SEAI went to Washington in September 2003, and after discussions in various quarters, decided to sign an agreement with the law firm, Garvey Schubert and Barer, to be the counsel in the United States for the anti-dumping investigations. After returning to India, the SEAI informed its members through a circular letter that 'Ms Lisbeth Levinson, a partner in the firm, will personally and exclusively handle our case.'

Regarding the extremely damaging potential of the proposed anti-dumping action, the SEAI pointed out to its members that in July 2003 the United States had imposed anti-dumping duty ranging from 44% to 63% on catfish fillet imports from Vietnam which would remain in force for five years. There will be annual reviews to decide whether the duties need any adjustments upwards or downwards. The Association warned its members that any such move against India's shrimp exports would ring the death knell of the industry.

The Association also realized the importance of other related regulatory provisions for Indian shrimp exports to the United States. The SEAI informed its members that within twenty days of filing the case, the United States could start imposing anti-dumping duties which would be returned only if the

Indian exporters won the case. Since this anti-dumping duty would have to be paid by the US importers, the SEAI cautioned that they might stay away from India, and therefore the business would start to become affected long before the case came to its final conclusion.

The game plan worked out by the MPEDA and the SEAI was comprehensive. It involved approaching the central government, developing contacts with counterpart bodies in other countries which might be named in the petition, and putting their house in order, to raise resources.

By October 2003, the plan had started taking shape. In a statement on 8 October 2003, K. Jose Cyriac, the chairman of the MPEDA, said, 'We are discussing the issues with other countries which are likely to be labelled with dumping charges.'

The SEAI president, Abraham Tharakan, after describing the petition as extremely unfair, said that in addition to calling for government support it would seek to co-operate with major exporting associations in Vietnam, Thailand and China and to forge an alliance among the Asian exporters. Some twenty-five Indian companies export to the United States, and the industry anticipated that the case might be filed against six or seven big players. However, the SEAI decided to fight the case from the platform of the organization as a mark of solidarity.

We will back each indicted company', said Ranjit Bhattacharye, secretary-general of the SEAI, whose management committee decided that it would defend the industry's position, meet the cost of the legal process and not leave the cost to be borne by those Indian firms that might be selected for investigations.

The SEAI has estimated a total budgetary requirement of Rs. 70 million to fight the case. Of this, SEAI would mobilize Rs. 40 million internally and the remaining Rs 30 million would be collected from its members, depending on the volume and value of their individual exports to the US market.

When the initiation decision came on 21 January 2004, both the organizations were unhappy, but they were expecting it and were therefore ready to act. According to the SEAI, 'with over 75% of the US producers having signed the petition, proceeding with the hearing was a fait accompli'.

Both Jose Cyriac and Abraham Tharakan left for the United States to take further action to protect the interests of the Indian shrimp exporters.

The SEAI had worked out plans to contest the dumping allegations on various grounds. It put forward two major differences between the Indian and the US sea-caught shrimp and offered reasons why Indian shrimp is cheaper.

First, there are specific variations between the shrimp caught off the south-west coast of the United States and in Indian waters, so that prices are bound to be different. 'The threat for the domestic shrimp farmer in the United States comes from China, Thailand, Indonesia and Ecuador. India's shrimp exports are predominantly of black tiger and scampi varieties which are not cultivated in the United States', according to the president of SEAI.

Second, while fishing in the United States is a capital-intensive activity calling for major investment, in India shrimp capture is carried out with a very low level of capital and requiring hardly any investment. This makes the cost of production considerably lower in India compared with that for shrimp sea-caught off the US coast.

Jose Cyriac observed, after the decision to initiate investigations, that the cost of cultured and captured shrimp in India was far lower than that of shrimp caught and bought in the US market, enabling Indian exporters to compete with US shrimp in price. Further, the petition filed before the US Department of Commerce had mixed up count and weight (shrimp is sold by size and the number of shrimp constituting 1 kg), providing another avenue to contest the case.

When the ITC decision on the preliminary affirmative decision came on 17 February 2004, the Indian shrimp industry termed it 'discriminatory and unjust'. Tharakan of the SEAI said, 'We are deeply disappointed and upset by the verdict.' Asserting that the Indian shrimp industry has not been resorting to dumping, he was confident of ultimate victory: 'We have a strong case against US shrimpers. We are certain that we will win the case despite the setback.' Tharakan said that there was no possibility of the United States succeeding in imposing an anti-dumping duty on Indian shrimp as it was not sold below the cost price. On the contrary, it was sold to US importers at a price higher than that for Japan and for other countries.

On receipt of the preliminary decision, Indian exporters who were mobilizing funds said that they would fight the case till the end. Jose Cyriac commented: 'The government is unhappy with the US verdict. But it is only a preliminary finding. We will help the Indian exporters fight the case in the United States.'

The government itself came out with a statement on 18 February 2004, when S. N. Menon, special secretary in the Department of Commerce, said, 'We will fight it out. We are all geared up to fight the case and the industry has already hired lawyers for this.' Menon observed that India had a strong case as India was exporting mainly 'tiger shrimps which are not found there and that too, in unprocessed form'. Noting that 80% of shrimp consumption in the United States is met through imports, Menon said that unprocessed Indian shrimps generated about 1 million jobs in the US food processing industry, therefore, any action against Indian shrimp would adversely affect the US food processing sector. The SEAI and its members were getting ready for the next set of actions. After the preliminary positive determination by the ITC, the next step was for the Department of Commerce (ITA) to prove whether there had been dumping and at what level. As part of that exercise, a few leading firms would be selected from each country and detailed questionnaires would be sent to them.

According to Sandu Joseph, the secretary of the SEAI, a team of US DOC officials would visit Kerala, a major shrimp producing state, in June or early July. 'They will visit our shrimp farming factories and verify our accounting practices. Our factories and accounts are open. We want to prove that we are not producing and exporting cheap shrimp to the United States.'

Joseph also referred to the support the Association could mobilize in the United States. The SEAI had been receiving 'favourable support' from a group of US congressmen to fight the anti-dumping investigations. Joseph said that more than a dozen members of the Congress had written to US Commerce Secretary Donald Evans, asking him to use fair and reasonable procedures in the investigative process.

While the industry and the SEAI, as well as the Indian government, are fairly confident of the strength of their case, the biggest problem being faced by the shrimp exporters is the uncertainty caused by the anti-dumping investigations.

After the announcement of the preliminary ITC determination, Sandu Joseph commented that 'We have been badly affected. There is no shrimp export happening to the US now.' He said that Indian shrimp exporters had not received any export order from the United States since 17 February 2004.
By April 2004 there was widespread concern among the exporters, growers and other stakeholders. Shrimp exports to the United States had come almost to a standstill due to the uncertainty regarding the contingent applicability and incidence of the anti-dumping duty.

According to Joseph Zavier, general secretary of the Kerala Boat Owners Association, with almost insignificant exports to the United States since February the shrimp catch had been reduced by 40-45%. The price per kilogramme of white shrimps, Rs. 280 a few months previously, had crashed to Rs. 100 in April, while the price per kilogramme of another variety of prawn had fallen from Rs. 80 to Rs. 40.

In Tamil Nadu and Andhra Pradesh, two large southern states, shrimp farming is done in large barren areas converted into farms. Mohammad Nayeem, once a prosperous shrimp farmer in Andhra Pradesh, is now a broken man. He owns 100 acres of shrimp farm and used to sell the products at a price of Rs. 450-600 per kilogramme, but after the ITC decision the price had crashed to Rs. 220, while the cost of production was Rs. 250.

In Kerala, shrimp farming is mostly done in paddy fields, converted into shrimp farms, on the fringes of backwaters. According to Rajan P. Mambaly who is one of those who has given his land under lease for shrimp farming, the duty, if imposed, will hit him and the farmers hard, as the net price to the growers would come down to the extent of the anti-dumping duty.

The preliminary determination came on 28 July 2004. In a media briefing on 29 July 2004 the chairman of the MPEDA observed, 'We are not happy with the preliminary determination of the duty rates. The final determination would be on 16 December 2004 and we will fight the case further and try to bring it down to zero level.'

The investigation has now moved into the final determination stage. As part of the procedure, DOC officials visited India in August-September 2004 for onsite verification of the information and data submitted by the mandatory respondents during the preliminary phase of the investigations.
WTO-related issues.

India's shrimp export to the United States came under difficulties before, when the United States banned the import of captured shrimp from certain countries, including India, in 1976. It was on the ground that trawling for shrimp by mechanized means had been adversely affecting certain varieties of sea turtles. The dispute on the US ban on the import of shrimp caught without using turtle extruder devices during harvesting was taken to the WTO Dispute Settlement system by the affected countries, including IndiaThe trade lobbyists in the United States, such as the Consuming Industries Trade Action Coalition (CITAC), the Seafood Distributors Association and others which were against the imposition of anti-dumping duties on imported shrimp, have raised the issue of the Continued Dumping or Subsidy Offset Act 2000, popularly known as the Byrd Amendment. They want the Act to be repealed or modified to make it WTO-compatible.

Under the Amendment, the US government distributes the anti-dumping and anti-subsidy duties to the US firms that brought forward the cases.

The Act was perceived to violate WTO rules by several countries. Eleven members of the WTO (Australia, Brazil, Canada, Chile, India, Indonesia, Japan, South Korea, Mexico, Thailand and the EU) requested the establishment of a Panel, while six others (Argentina, Costa Rica, Hong Kong, China, Israel and Norway) joined as third parties, supporting the complainants.

On 16 September 2002, the Panel Report recommended the repeal of the Byrd Amendment, as it was held to be a WTO-incompatible response to dumping and subsidization. Offset payments constitute a remedy, in addition to the imposition of an anti-dumping or anti-subsidy duty and this is not envisioned under the WTO rules. Following a US appeal in October 2002, the Appellate Body in its report in January 2003 confirmed the Panel's central finding that the Byrd Amendment is WTO-inconsistent.

The deadline for the US to bring the Byrd Amendment into WTO conformity expired on 27 December 2003. As a consequence, the EU has requested the WTO to authorize retaliatory measures in January 2004. The issue is currently before the WTO and the United States has, as yet, taken no action towards ensuring WTO compliance. However, at the meeting of the WTO Negotiating Group on Rules (26-28 April 2004), the United States said that it was 'beyond question that countries have the sovereign right to distribute government revenues as they deem appropriate', but added that the United States intended to implement the Byrd Amendment ruling.

IV. Lessons learnt.

The crisis caused by the anti-dumping petition of the Ad Hoc Group has been so far handled competently. The two nodal agencies, one a government body (the MPEDA) and the other a private trade body (the SEAI) have co-ordinated their approaches. One reason for this of course is that the SEAI is represented in the management of the MPEDA. Several visits by the representatives of those two bodies to Washington at critical points also helped to bring an understanding of the nature of the problem and how to face it. This resulted in the selection and appointment of the legal counsel, as early as September 2003. The importance of co-ordinated action by the threatened partners, even those outside India, was appreciated and was worked on by the trade representatives with their counterparts in several Asian countries included in the petition.
Another achievement has been the speedy resolution of the issue of financing. The fact that the Association decided to bear more than 50% of the total costs from its internal resources and the rest from the contribution of members according to the value of their respective exports was critical. Equally critical has been the government's steadfast support for the shrimp industry.

But what remains unaddressed is the issue which is in fact generic and therefore affects all cases, including the shrimp case. Anti-dumping cases take a long time to be finally decided. During this period, trade is affected because importers are risk-avoiders and will, therefore, be likely to shift to new sources of supply until the uncertainty is resolved. Industry people pointed out that an anti-dumping case was initiated against Indian leather goods in South Africa two years ago. Although the case was ultimately settled in India's favour, the market was lost to India, because of the uncertainty caused by the transitional decisions.

There is, therefore, a huge human element in such cases where the products originate in small and medium-sized enterprise sectors, and a large number of poor and marginal farmers, artisans or unskilled or semi-skilled labour are engaged in the production of such goods. As of now, there is no institutional mechanism, in the form of a safety net, to take care of this problem. The Indian shrimp industry is one where the problem is acute because of the way in which it is organized. As observed earlier, the industry is fragmented and dominated by small fishermen and farmers. Uncertainty for any reason create risks which they are not equipped to bear. This case has highlighted the need for the government to look at this issue. Since the Indian government has already indicated its decision to fight an adverse judgment, the need is more acute.

The shrimp industry in India had always focused on one or two major markets for growth. Previously it was Japan and during the last few years, it has been the United States. It has now learnt the importance of diversification. A. J. Tharakan, the SEAI president, has said that they are exploring alternative markets to make up for the loss of the lucrative US market. 'But it will be a long drawn-out process. It is not easy to establish your presence.'This is why it is important to start early — a lesson the industry appears to have learned from this experience.

GAO & CRS REPORTS ON WTO LAW & LITIGATION.

[GAO Reports]-

GAO Report – (January 2006) – GAO/06-231.

U.S.-CHINA TRADE.

Eliminating Nonmarket Economy Methodology Would Lower Antidumping Duties for Some Chinese Companies.

http://www.gao.gov/new.items/d06231.pdf

What GAO Found.

Commerce's methodology for calculating AD duties on nonmarket economy products differs from its market economy approach in that (1) since NME prices are unreliable, it uses price information from surrogate countries, like India, to construct the value of the imported products and (2) it limits eligibility for individual rates to companies that show their export activities are not subject to government control. Companies that do not meet the criteria or do not participate in Commerce investigations receive "country-wide" rates.

China has been the most frequent target of U.S. AD actions. On 25 occasions, Commerce has applied duties to the same product from both China and one or more market economy. China (NME) duties were over 20 percentage points higher than those applied to market economies, on average. This is because average China country-wide rates were over 60 points higher than comparable market economy rates. Individual China company rates were similar to those assigned to market economy companies, on average.

Commerce can declare China a market economy if the country meets certain criteria, thus ending the use of surrogate price information and country-wide rates in China AD actions. These changes would have a mixed impact. Duties would likely decline for Chinese companies not assigned individual rates. Individual company rates would likely diverge, with those that do not cooperate with Commerce receiving rates that are substantially higher than those that do cooperate. In any case, it appears that the actual trade impact of the NME methodology will decline as the portion of total export trade conducted by Chinese companies assigned individual rates increases and as the country-wide rates that largely account for the comparatively high average rates applied to China decline in importance.

Imports from China have grown rapidly over the last decade, from a total value of about $42 billion in 1995 to over $196 billion in 2004. While the prices of these Chinese goods are often lower than U.S. prices and, therefore, benefit consumers, this growth has presented a major challenge for U.S. producers that compete with Chinese products in the U.S. market. Some

U.S. companies adversely affected by this growth have alleged that Chinese success in the U.S. market has come partly as a result of unfair trade practices. U.S. companies that are adversely affected by unfair imports from China (or other countries) may avail themselves of a number of relief measures, including antidumping (AD) duties. The United States has classified China as a "nonmarket economy" (NME) country since 1981 and employs a special NME methodology to calculate AD duties on unfairly traded products from that country. This methodology is commonly believed to result in duty rates that are significantly higher than those applied to market economy countries.

In light of increased concern about China's trade practices, the conference report on fiscal year 2004 appropriations legislation requested that GAO monitor the efforts of U.S. government agencies responsible for ensuring free and fair trade with that country. In subsequent discussions with staff from the House Appropriations Committee's Subcommittee on Science, State, Justice, and Commerce and Related Agencies, we agreed to provide a number of reports on import relief mechanisms and the manner in which these mechanisms have been applied to China. To date, we have issued three such reports, focusing on textile safeguards, safeguards applicable to other products, and countervailing duties.

This fourth and final report on China import relief mechanisms focuses on AD duties. In this report, we

- explain the special methodology that the United States employs to calculate AD duties on products from China and other NME countries,
- analyze the application of AD duties to China over the last 25 years and compare the duty rates applied to Chinese products with the duty rates applied to products from market economy countries, and
- explain the circumstances in which the United States would stop using its NME methodology to calculate AD duties on Chinese products and evaluate the potential impact of this step.

To conduct our review, we examined applicable U.S. laws and regulations and World Trade Organization (WTO) agreements, including relevant portions of the agreement through which China acceded to WTO membership in 2001. We reviewed scholarly literature and consulted with trade and legal policy experts from the U.S. government, private sector trade associations, consulting and law firms, and academic institutions, as well as representatives of the WTO, the government of China, and other governments. In order to analyze U.S. application of AD duties to China and compare the duties applied to China with those applied to market economy countries, we used information from the Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC), including notices of Commerce determinations appearing in the *Federal Register*, to construct a database on all U.S. antidumping investigations from 1980 through 2004. We verified this database to the official sources. Our analyses focused on the 68 AD duty orders that Commerce issued against Chinese products during this period and especially on the 25 cases in which Commerce also imposed duties on the same products from market economy countries. We performed additional (multivariate regression) analyses to determine the extent to which duty rate variations could be attributed to differences between China and these other countries, or to

other factors, such as the type of product involved. Appendix I contains a detailed description of our scope and methodology.

Results in Brief.

Commerce's special methodology for calculating the AD duties that it applies to China and other NME countries differs from its usual (market economy) approach in two key respects. First, since prices in NME countries do not reliably reflect the fair value of the merchandise, Commerce uses price information from surrogate countries (like India) to construct the value of NME products—and thus provide an appropriate basis for calculating AD duty rates—rather than relying entirely on information from the exporting country itself. Second, Commerce requires NME companies to demonstrate that their export activities are not subject to government control in order to be considered eligible for individually determined duty rates, rather than considering all companies eligible for such rates, as it does in market economy cases. NME companies that do not meet these criteria, or do not participate in Commerce's investigations receive "country-wide" rates.

Over the last 25 years, the United States has applied AD duties against China more often than against any other country. On 25 occasions, Commerce applied duties to the same products from both China and at least one market economy country. The duty rates assigned in these cases varied greatly. On average, however, the rates applied to China were over 20 percentage points higher than those applied to market economy countries. This difference is attributable primarily to the comparatively high country-wide duty rates applied to Chinese companies not eligible for individual rates. These country-wide rates averaged about 98 percent—over 60 percentage points higher than the average duty rates assigned to market economy companies not receiving individual rates. In contrast, when Commerce calculated individual rates for Chinese companies, these rates were not substantially different, on average, from those assigned to individual market economy companies.

Commerce has administrative authority to declare China a market economy, or find individual Chinese industries to be "market-oriented" in character—provided that China overall or individual Chinese industries meet certain criteria. Such a declaration would end application of the NME methodology to China, in whole or in part. This would (1) eliminate country-wide duty rates against China and (2) eliminate use of surrogate country information to calculate AD duty rates on Chinese products. These changes would have a mixed impact. Eliminating country-wide rates would likely reduce duty rates applied to companies not receiving individual rates. Individually determined rates would likely diverge into two distinct groups, with companies that do not cooperate in Commerce investigations receiving rates that are substantially higher than those that do cooperate. The impact of applying Chinese price information would likely vary by industry, and AD rates applied against China would continue to vary widely, both within and among cases. However, it appears that the significance of the NME country-wide rates is declining as more Chinese companies receive individual rates, although data that would permit quantification of the potential trade impact of these changes is not available. This suggests that the trade significance of the NME methodology now applied to China will likewise decline over time.

Background.

Dumping refers to a type of international price discrimination wherein a foreign company sells merchandise in a given export market (for example, the United States) at prices that are lower than the prices that the company charges in its home market or other export markets. When this occurs, and when the imports have been found to materially injure, or threaten to materially injure, U.S. producers, U.S. law permits application of antidumping duties to offset the price advantage enjoyed by the imported product.6Any domestic industry that believes it is suffering material injury, or is threatened with material injury, as a result of dumping by foreign companies may file a petition requesting imposition of AD duties. Interested domestic industries file petitions simultaneously with Commerce and ITC. If Commerce determines that the petitioning parties meet certain eligibility requirements, ITC determines whether the domestic industry has suffered material injury as a result of the alleged dumping (or is threatened with material injury). While ITC is completing its work, Commerce conducts an investigation to establish the duty rates, if any, that should be applied. To determine the duty rates to apply in an antidumping investigation, Commerce identifies (1) the foreign product's export price entering the U.S. market and (2) its "normal value." Commerce then compares these prices to determine whether—and by how much—the product's export price is less than its normal value. AD duty rates are based on these differences, which are called dumping margins.

To establish a product's export price, Commerce generally refers to the prices charged in actual sales of that product to purchasers in the United States.10 To establish its normal value, Commerce generally refers to the prices charged for the product in the exporting company's home market. In the event that the product is not sold in the exporter's home market, Commerce may refer to prices charged for the product in another export market or construct a normal value based on costs of production in the exporting country, together with selling, general and administrative expenses, and profit.11 The two agencies make preliminary and, after additional investigation, final determinations as to whether injury has occurred (ITC) and the size of the duty, if any, that should be imposed (Commerce). When warranted, Commerce issues "duty orders" instructing Customs and Border Protection to apply duties against imported products from the countries under investigation. Both ITC and Commerce publish their decisions in the *Federal Register*.

Since AD duties address unfair pricing practices, and pricing decisions are generally made by individual companies, Commerce generally calculates and assigns AD duty rates on an individual company basis. As a result, AD investigations generally produce a number of individually determined, company-specific rates, reflecting differences in the extent to which companies have dumped their products—that is, exported them at less than their normal value.12 In addition, AD duty orders also generally specify a duty rate for other companies that have not been assigned an individually determined rate.

In principle, Commerce bases its AD duty determinations on information obtained from interested parties—including foreign producers and exporters. Commerce obtains needed information from foreign companies by sending them questionnaires and following up with additional questions, as needed, and with on-site visits.

However, both U.S. law and WTO rules recognize that, in some cases, officials charged with completing these investigations will be unable to obtain sufficient information. In such cases, Commerce officials apply facts available to complete their duty determinations.14 This may include secondary information, subject to corroboration from independent sources.

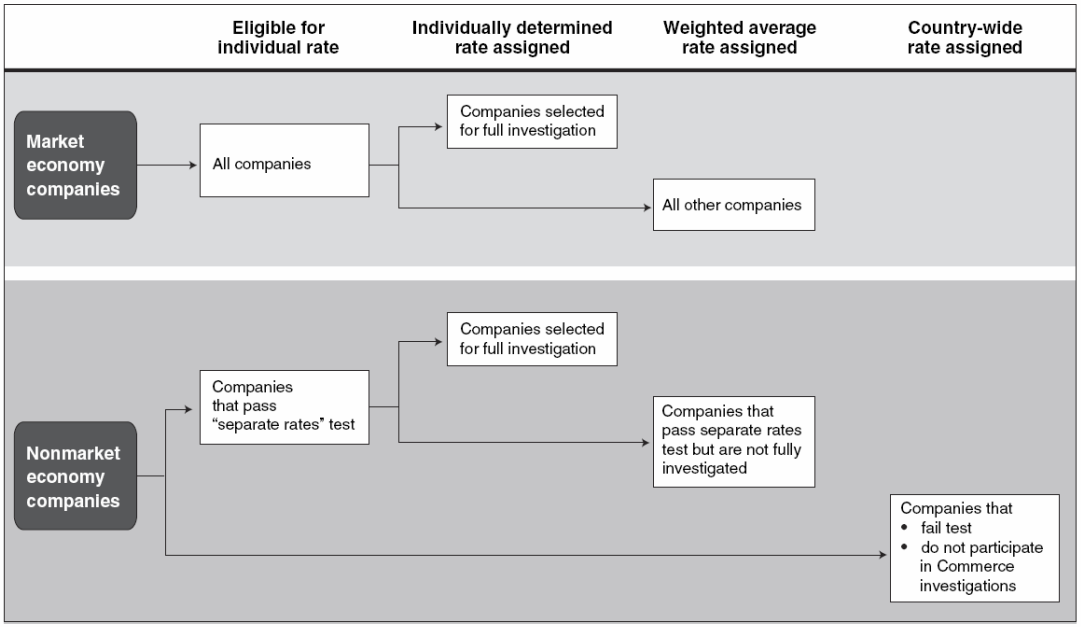
Moreover, if Commerce finds that an interested party, such as a foreign company under investigation, "has failed to cooperate by not acting to the best of its ability to comply with a request for information" then, in selecting among the facts available, Commerce may apply an inference that is adverse to the interests of that party. In applying adverse inferences, Commerce can use (among other things) information contained in the petition filed by the domestic industry seeking imposition of AD duties, the results of a prior review or determination in the case, or any other information placed on the record.

NME Companies Must Meet Certain Criteria to Be Considered Eligible for Individual Duty .

While all companies from market economy countries are eligible for individually determined or weighted average AD duty rates, companies from China and other NME countries must pass a separate rates test to be eligible for such rates. This test requires NME companies to meet two closely related criteria: they must demonstrate that their export activities are free from government control both in law and in fact. To provide a basis for deciding whether companies meet these criteria, Commerce requires these companies to submit information regarding:

- **whether there are restrictive stipulations associated with an individual exporter's business and export licenses,**
- **any legislative enactments decentralizing control of companies,**
- **any other formal measures decentralizing government control of companies,**
- **whether export prices are set by or subject to approval by the government,**
- **whether the company has authority to negotiate and sign contracts**
- **whether the company has autonomy in selecting its management, and**
- **whether the company retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.**

Figure 1: Different Approaches to Determining AD Duty Rates



Source: GAO analysis of Commerce information.

As shown in figure 1, Commerce treats companies from China and other NME countries that pass Commerce's separate rates test like market economy countries when assigning duty rates. When practical, Commerce fully investigates and establishes individually determined duty rates for each eligible NME company, just as it does for each market economy company. To the extent that fully investigated NME companies cooperate with Commerce, they receive rates based on the information that they provide. As explained in the background section of this report, Commerce uses facts available, and may use adverse inferences, to calculate duty rates when the companies under investigation cannot or will not provide the information that Commerce needs.

In both NME and market economy cases, Commerce may limit the number of companies it fully investigates when it is faced with a large number of companies. In such situations, Commerce generally calculates individual rates for the companies that account for the largest volume of the subject merchandise.21 In market economy cases, Commerce then calculates a weighted average of these rates and applies the resulting "all others" rate to companies that it has not fully investigated.22 Commerce does not routinely calculate weighted average duty rates in NME cases. However, when the number of NME companies eligible for individually determined rates exceeds the number that Commerce can fully investigate, Commerce calculates a weighted average rate and informs Customs of the companies entitled to this rate.

In cases involving China or other NME countries, Commerce calculates a country-wide duty rate for companies that could not (or did not attempt to) pass Commerce's separate rates test. In NME cases, Commerce assumes that all exporters and producers of a given product are subject to common government control and that all of these companies should, therefore, be subject to a single country-wide duty rate. Commerce begins its NME antidumping investigations by requesting information from the government of the country in question and from known producers and exporters. If Commerce cannot identify all relevant producers and exporters, or if one or more of the identified companies refuses to cooperate in the

investigation, Commerce relies on adverse inferences to calculate a country-wide rate. Commerce then instructs Customs to apply the country-wide rate against shipments from any company other than those specifically listed as eligible for an individually determined or weighted average rate.

Table 1: Products Affected by AD Duty Orders against China, 1980–2004

Type of product	Examples of affected products	Number of orders
Chemicals, plastics, pharmaceuticals	Barium chloride Polyethylene retail carrier bags Bulk aspirin	26
Steel, other metals	Carbon steel butt-weld pipe fittings Chrome-plated lug nuts Pure magnesium	20
Agricultural products	Crawfish Garlic Honey	5
Other products	Brake rotors Hand tools Cotton shop towels Automotive replacement glass windshields Folding gift boxes	17

Source: GAO AD database.

The average AD duty rates imposed on Chinese (NME) exporters over the last 25 years have been significantly higher than those imposed on market economy exporters of the same products. Taking all rates into consideration (including those calculated for individual companies, weighted averages of these rates, and country-wide rates applied to China) the average rate applied to Chinese companies in the 25 cases we examined was about 67 percent—over 20 percentage points higher than the average rate of 44 percent applied to market economy companies. As figure 5 shows, the overall average rates applied against China were higher for 18 of the 25 products in which there were AD orders against both China and at least one market economy.

The difference between average China and average market economy duty rates was due primarily to the fact that the NME country-wide duty rates applied to China were substantially higher than the comparable all-others duty rates applied against market economy countries. In contrast, the individually determined duty rates assigned to Chinese companies in these cases were not substantially different, on average, from the individually determined rates assigned to market economy companies.

On average, there was little difference between the individually determined rates applied to companies from China and those applied to market economy companies. The average individually determined rate applied to Chinese companies in these cases was 53 percent—a little less than the average rate of 55 percent applied to market economy companies 32. The median rate for Chinese companies was 42 percent—the same as the median rate for market economy companies. Figure 7 displays the average individual company rates assigned to Chinese and market economy companies in the 18 cases in which Commerce assigned individual rates to both. As the figure shows, the rates assigned to Chinese companies were higher than the market economy rates in ten of these cases and lower in the other eight.

Our statistical analyses provided additional support for the importance of the country-wide rates in accounting for the overall difference between the duty rates applied to China and to market economy countries. Using multivariate regression analysis, we found that a number of variables, such as the type of product involved, accounted for some of the overall variation in duty rates. However, after accounting for the China country-wide rates there was no statistically significant difference between the duty rates applied to China and those applied to market economy countries. As explained in more detail in appendix III, we found essentially the same results when we expanded our analyses to include data on AD actions against NMEs other than China.

Commerce has administrative authority to reclassify China and other NME countries as market economies or individual NME country industries as market-oriented in character. Such reclassifications would end Commerce's authority to apply its NME methodology to such countries or industries. Also, China's WTO accession agreement specifies that members may apply third-country information to calculate AD duty rates against that country, but this provision expires in 2016.

Commerce has the authority to reclassify China as a market economy country, in whole or in part. As we explained in more detail in a prior report,34 U.S. trade law authorizes Commerce to determine whether countries should be accorded NME or market economy status and specifies a number of criteria for Commerce to apply in making such determinations.35 Countries classified as NMEs may ask for a review of their status at any time.36 China has actively sought market economy status among its trading partners, and a number of them have designated China as a market economy. However, Commerce informed us that Chinese officials have not yet officially requested a determination as to whether their country merits reclassification under the criteria specified in U.S. law. In April 2004, the United States and China established a Structural Issues Working Group under the auspices of the U.S.-China Joint Commission on Commerce and Trade. This group is examining structural and operational issues related to China's economy that may give rise to bilateral trade frictions, including issues related to China's desire to be classified as a market economy.

Commerce also has the authority to designate individual NME industries as market oriented in character, but has denied all such requests to date. Commerce determined in a 1992 case against China that, short of finding that an entire country merits designation as a market economy, it could find specific industries within such countries to be market oriented in character. Commerce officials noted that on several occasions Chinese industries responding to antidumping duty petitions have requested designation as market-oriented industries. To date, Commerce has denied such requests—primarily on the grounds that the Chinese companies in question submitted information that was insufficient or was provided too late in Commerce's process to allow an informed decision.

China's WTO Commitment Allowing the Use of Third-Country Information Expires in 2016.

When joining the WTO, China agreed that other WTO members could use third-country information to calculate normal values in antidumping actions against Chinese companies. Specifically, China's WTO accession agreement provides that in determining price comparability in antidumping investigations WTO members may use "a methodology that is not based on a strict comparison with domestic prices or costs in China." However, the accession agreement also specifies that this provision will expire 15 years after the date of the agreement—that is, by the end of 2016.

After 2016, the ability of WTO members to continue using third-country information in AD calculations involving China would be governed by generally applicable WTO rules, according to

officials at the Office of the U.S. Trade Representative. These rules recognize that when dumping investigations involve products from a country that "has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the state," importing country authorities may have difficulty making the price comparisons through which AD duty rates are normally established. In such situations, importing countries may "find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate." WTO rules do not provide any specific guidance about how this provision should be implemented; such decisions appear to be left up to individual members.

The elimination of country-wide duty rates against China would likely reduce the duty rates applied to some Chinese companies. If Commerce applied its market economy approach to China, duty rates for companies not receiving individually determined rates would, in most cases, no longer be determined by applying facts available. Rather, Commerce would, for the most part, determine these rates by averaging the rates applied to fully investigated. Chinese companies, with some exclusions. The default rate for uninvestigated Chinese companies would move, in most cases, from being the highest rate found to the average rate found among companies that cooperate in Commerce investigations.

The impact of using Chinese price information on China AD duty rates would likely vary from one industry to another under the market economy methodology. Chinese prices are widely viewed as distorted to varying degrees. Where prices for key inputs are artificially low, relying on Chinese price information would produce an artificially low normal value. The result would be an AD duty that is lower than would be obtained by applying surrogate country input prices. Conversely, where Chinese prices are artificially high, AD duty rates may be higher if based on Chinese prices. To the extent that Chinese economic reforms bring Chinese prices more into line with world markets, the impact of abandoning the use of surrogate country information can be expected to decline. At any point in time, however, the probable effect of such a methodological change in an individual industry investigation would depend on the particular facts applying to that industry. The net impact of changing the source of price information on overall China duty rates cannot be estimated with confidence.

Available evidence suggests that the volume of trade affected by country-wide rates is declining and that, consequently, the trade impact of China duty orders will in the future depend increasingly on the magnitude of the individually determined rates. Commerce officials observed that in the early 1980s it was not unusual for China AD duty investigations to produce only a country-wide rate. However, as the Chinese economy has evolved, individual Chinese companies have become more likely to request—and receive—individually determined or weighted average rates. Since 1980, Commerce has applied country-wide rates alone in only 15 of 68 Chinese AD orders, and the last of these occasions was in 1995. The majority of all Chinese AD orders (about 78 percent), and all such orders issued over the last 10 years, have included at least one individual company rate.

The net effect of these changes cannot be predicted. Such a prediction would require knowledge of price distortions in diverse Chinese industries, changes in these distortions over time, pricing decisions by Chinese companies in reaction to these changes, and decisions by U.S. companies about whether they should seek relief. Nonetheless, while the NME methodology is applied, it appears that the actual trade impact of using this methodology will decline as the portion of total export trade conducted by Chinese companies assigned individual rates increases, and as the country-wide rates that largely account for the comparatively high average rates applied to China decline in importance.

GAO-05-1056

U.S.-CHINA TRADE –

The United States has not Restricted Imports under the China Safeguard.

http://www.gao.gov/new.items/d051056.pdf

(September 2005)

The China safeguard permits WTO members, including the United States, to address disruptive import surges from China. In the United States, the China safeguard is implemented under section 421 of the Trade Act of 1974, which allows U.S. firms to petition for relief and establishes a three-step process. This process involves the International Trade Commission (ITC), Office of the U.S. Trade Representative (USTR), and the President and determines whether Chinese imports are causing market disruption to domestic producers and whether a remedy is in the national economic interest. The entire process takes about 150 days. Under the terms of China's WTO accession agreement, WTO members may use the China safeguard until 2013. To date, the United States has not applied the China safeguard in five cases brought by domestic producers. In a sixth case, ITC has not yet reached a decision. In two cases, ITC found no market disruption. In three cases, ITC found market disruption and USTR evaluated the pros and cons of various options and made a recommendation to the President. In all three cases, the President declined to provide relief to the domestic industry after he found it would not be in the national economic interest because the costs would outweigh the benefits. The success rate for China safeguard petitions is similar to communist country safeguard petitions, but differs from that of global safeguard petitions. The President's decisions not to provide import relief after ITC found market disruption generated controversy, including a lawsuit claiming that he exceeded his authority. The relevant House committee intended that the law create a presumption in favor of relief upon an ITC injury finding. Nonetheless, the U.S. Court of International Trade found the President has broad discretion not to apply a China safeguard. Moreover, the President considers the question of whether to provide relief from a broader perspective than ITC. The President weighs the benefits of relief against the costs and considers factors such as the effect on consumers and downstream users, which ITC does not. The President cited third-country imports in all his decisions denying relief under both the Chinese and communist country safeguards. Under the global safeguard, third-country imports generally cannot diminish the potential benefits of import relief to the domestic industry and the President has often provided relief, especially since 1988 when U.S. trade laws were revised.

Results in Brief.

The China safeguard allows WTO members to restrict surging imports from China that cause market disruption to the domestic industry. In the United States, the safeguard is implemented by section 421 of the Trade Act of 1974,5 which establishes a three-step process to consider its application. First, after receiving a petition, ITC determines whether there is market disruption by investigating whether imports from China have injured U.S. producers. If ITC does not find market disruption, the case ends. If ITC finds market disruption, it proposes a potential remedy for USTR's and the President's consideration. Second, USTR consults with China to seek an agreement that would address ITC's finding of market disruption. Concurrently, USTR obtains and evaluates information from interested parties on the appropriateness of any proposed remedy and makes a recommendation to the President. Finally, section 421 requires the President to provide relief unless he determines that doing so is not in the national economic interest, or would cause serious harm to U.S. national security. The China safeguard was modeled after the communist country safeguard and contains similar features. A number of these features differ from the U.S. global safeguard, which generally must be applied to products from all U.S. trading partners.

The United States has yet to apply the China safeguard, even though it has completed its consideration of five petitions for relief filed by U.S. producers. In a sixth case, ITC is expected to make a determination in early October 2005. In two instances, ITC found no market disruption and the cases ended. In the three other cases, ITC found market disruption and recommended a remedy to USTR and the President. In these three cases, USTR's consultations with the Chinese did not result in any agreements to address the market disruption. USTR held public hearings and heard testimony on a number of remedy options, including ITC-proposed tariffs, quotas, and not providing any relief. USTR evaluated the pros and cons of the various options and made a recommendation to the President. In all three cases, the President declined to provide relief because he found it would not be in the national economic interest of the United States. Presidents have made similar decisions to deny relief under the communist country safeguard. In contrast, Presidents have granted relief in half of the global safeguard cases in which ITC recommended relief, and in all such cases after Congress revised U.S. trade law in 1988.

The President's decisions not to provide import relief after ITC found market disruption generated controversy, including a legal challenge to his first safeguard decision before the U.S. Court of International Trade claiming that he exceeded his authority. The legislative history of section 421 shows that the relevant committee intended that there would be a presumption in favor of the President's providing relief once ITC found market disruption. While section 421 court held that the President still has broad discretion not to apply the China safeguard. Furthermore, the President considers the question of whether to provide relief from a broader perspective than ITC, which focuses on the domestic industry. In contrast, the President focuses on the national economic interest when weighing the benefits of relief against the costs, and considers factors such as the effect on consumers and downstream users, which ITC does not. Furthermore, the President cited third-country imports in all his decisions denying relief under both the Chinese and communist country safeguards. Conversely, under the global safeguard, third-country imports generally cannot diminish the potential benefits of import relief to the domestic industry. The President's decisions have been different under the global safeguard.

We provided ITC and USTR a draft of this report for their review and comment. Both agencies chose to provide technical comments from their staff. We incorporated their suggestions as appropriate.
Background.

In general, safeguards are temporary import restrictions that provide an opportunity for domestic industries to adjust to increasing imports. Both the WTO Agreement on Safeguards and article XIX of the General Agreement on Tariffs and Trade establish general rules for the application of safeguard measures. Safeguard actions taken under the WTO usually apply to all imports of a product irrespective of source.6 Other multilateral and bilateral trade agreements also contain safeguard provisions. China's WTO accession agreement is an example of such an agreement. Its provisions contain a transitional product-specific safeguard that permits WTO members, including the United States, to take measures to address disruptive import surges from China alone. Under the terms of China's WTO accession agreement, members may use the China safeguard until 2013.

In addition to the China safeguard, three other safeguards have been applied to imports from that country in the United States. First, a communist country safeguard applied to China prior to its WTO accession and still applies to import surges from other communist countries that are not WTO members.7 Second, Chinese imports are subject to a U.S. global safeguard that applies to all WTO members.8 Third, a textile safeguard provided for in China's WTO accession agreement covers textile and apparel imports from China.

U.S. Law Establishes Three-Step Process for China Safeguard Decisions.

In the United States, the China safeguard is implemented under section 421 of the Trade Act of 1974, as amended, which Congress enacted as part of the legislation authorizing the President to grant China permanent normal trade relations status.10 Under section 421, U.S. firms may petition the government to apply a China safeguard. The section establishes a three-step process to consider China safeguard petitions. This three-step process involves ITC, USTR, and the President, and it results in determinations about whether import surges from China have caused market disruption and whether a remedy is in the national economic interest or, in extraordinary circumstances, would cause serious harm to national security. The entire process takes approximately 150 days (see fig. 1). The China safeguard was modeled on the communist country safeguard, which applied to China before it became a WTO member.

U.S. Producers May File Petitions Claiming Market Disruption Due to Chinese Imports.

U.S. producers and certain other entities may file petitions to initiate China safeguard investigations with ITC. These include trade associations, firms, certified or recognized unions, or groups of workers that represent an industry. The President, USTR, the Senate Committee on Finance, and the House of Representatives' Committee on Ways and Means can also request investigations.

The petition must include certain information supporting a claim that imports from China are causing market disruption to an industry. Petitions must include, among other things, the following: product description, import data, domestic production data, and data showing injury. Petitions must also include information on all known producers in China and the type of import relief sought.

The Role of ITC Is to Determine Market Disruption and Recommend a Remedy**.**

ITC determines whether imports from China are causing market disruption to U.S. producers and, if so, recommends a remedy to address it. Upon receiving a petition, ITC initiates an investigation by publishing a notice in the *Federal Register* and holding public hearings to afford interested parties the opportunity to present information. ITC receives information on both market disruption and potential remedies from parties through written submission and oral testimony. ITC has 60 days to determine whether the imports from China are causing–or threatening to cause–market disruption to domestic producers. More specifically, ITC must determine whether imports from China are entering the United States in "such increased quantities or under such conditions as to cause or threaten to cause market disruption" to domestic producers. According to section 421, to determine that market disruption exists ITC must make the following three findings:

- **Imports of the subject product from China are increasing rapidly, either absolutely or relatively.**
- **The domestic industry is materially injured or threatened with material injury.**
- **Such rapidly increasing imports are a significant cause of the material injury or threat of material.**

If a majority of ITC commissioners determine that market disruption does not exist, the case ends.13 After an affirmative determination, ITC must propose a remedy. This could include the imposition of a duty, or an additional duty, or another import restriction (such as a quota) necessary to prevent or remedy the market disruption. Within 20 days after making a determination of market disruption, ITC must transmit a report to the President and USTR. The ITC report must include the determination, the reasons for it, recommendations of proposed remedies, and any dissenting or separate views of commissioners. The report must also describe the short- and long-term effects that recommended remedies are likely to have on the petitioning domestic industry, other domestic industries, and consumers. In addition, the report must describe the short- and long-term effects of not taking the recommended action on the petitioning domestic industry, its workers, the communities where production facilities of the industry are located, and on other domestic industries.

The Role of USTR Is to Make a Recommendation to the President.

If ITC renders an affirmative determination, USTR undertakes two parallel efforts. First, USTR consults with China about ITC's finding and seeks to reach an agreement that would prevent or remedy the market disruption. If the U.S. and Chinese governments do not reach agreement after 60 days (or if the President determines that an agreement reached is not addressing the market disruption), the United States may then apply a safeguard. Concurrently, USTR obtains and evaluates information from interested parties on the appropriateness of ITC's or any other proposed remedy and makes a recommendation to the President. Within 20 days after receiving the ITC report, USTR issues a *Federal Register* notice to solicit comments from the public (e.g., importers and consumers). USTR must hold a public hearing if requested to do so. USTR evaluates the information it receives and consults with the other agencies of the Trade Policy Staff Committee (TPSC).15 Within 55 days after receiving the ITC report, USTR must make a recommendation to the President about what action, if any, to take to prevent or remedy market disruption.

The Role of the President Is to Decide Whether Relief Is in the National Interest.

Under section 421 the President makes the final decision on the provision of import relief. Within 15 days after receiving a USTR recommendation, the President must decide whether and to what extent to provide relief. Section 421 states: "the President shall provide import relief… unless the President determines that provision of such relief is not in the national economic interest of the United States or, in extraordinary cases, that the taking of action… would cause serious harm to the national security of the United States." Although the law does not define "national economic interest," it further states that the President may determine "that providing import relief is not in the national economic interest of the United States only if [he] finds that the taking of such action would have an adverse impact on the United States economy clearly greater than the benefits of such action." Finally, section 421 requires the President to publish his decision and the reasons for it in the *Federal Register*.

China Safeguard Modeled on Communist Country Safeguard.

The China safeguard was modeled on the communist country safeguard. In fact, according to its legislative history, it was intended to replace the communist country safeguard for China since it would no longer apply once China became a member of the WTO. As shown in table 1 below, the safeguards share several important characteristics. Both safeguards are limited in scope to imports from particular countries; while the former is limited to imports from China, the latter is limited to imports from one or more communist countries. They also share similar criteria with regard to ITC market disruption determinations and identify the President as final decision maker on whether to provide relief. In addition, both safeguards have a 150-day determination period. In contrast, the China safeguard is significantly different from the global safeguard. The China safeguard is narrower in scope than the global safeguard; it can only be applied to imports from that one country, whereas the global safeguard generally must be applied to all foreign sources of a particular product. Also, the China safeguard's market disruption standard is regarded to be easier to meet than the criteria for determining injury due to imports under the global safeguard. Furthermore, the standard for presidential action is also different under the global safeguard as it places more emphasis on assisting the domestic industries' efforts to adjust to international competition (including worker adjustments), and sets forth a broader range of factors for the President to consider in determining whether to provide relief. Finally, the time frame for the China safeguard process is shorter than the global safeguard.

The United States Has Never Applied the China Safeguard.

Between August 2002 and September 2005, the United States considered five petitions from domestic producers to apply the China safeguard but it has not provided relief. ITC made negative determinations on two petitions and, in three other cases, found market disruption and recommended restricting imports to remedy the situation, ITC is expected to make a determination in a sixth case in early October 2005. In each of the three cases where ITC found market disruption, USTR formulated a presidential recommendation after evaluating various options. The President then decided not to provide any import relief. The success rate for China safeguard petitions is similar to communist country safeguard petitions, but differs from that of global safeguard petitions.

President Decided Not to Apply the China Safeguard.

The President declined to provide relief in all three cases. He found that imposing remedies such as duties and quotas would not be in the national economic interest. The President's reasons for not providing relief were printed in the *Federal Register* and are summarized in table 3. The President's decisions did not cite national security concerns as a reason in any of the three cases.

The President Has Exercised His Broad Discretion in Deciding Not to Apply Relief.

The President's decisions not to impose relief in the three China safeguard cases in which ITC found market disruption have been criticized. Nevertheless, the President has broad discretionary authority under section 421 to consider U.S. national economic and security interests when weighing the facts and circumstances particular to each case. This broad discretion was upheld by the U.S. Court of International Trade. This, together with the fact that the President considers factors that ITC does not, including consumer cost and the potential for imports from other countries, allows him to reject relief even when it has been recommended by ITC.

Presidential Decisions Not to Apply Safeguards Have Generated Controversy.

Several different groups have criticized the President's decisions not to apply China safeguard relief. For example, company officials and trade lawyers who were unsuccessful in obtaining relief criticized the President's decisions in several congressional hearings. As we discuss later, one company subsequently filed a lawsuit against the President claiming he exceeded his authority in rejecting ITC's recommended remedy.

In July 2005, legislation was introduced in Congress to change the President's discretion.22 Some congressmen expressed disapproval over the President's decisions based on the fact that ITC made unanimous, affirmative determinations in two of these cases. One representative in particular argued that the President was not following the intent of the law in rejecting the safeguard actions. Also, 21 other House members wrote the President stating their belief that Congress had carefully limited the President's discretion to deny relief. In this regard, the legislative history of section 421 shows that the House Committee on Ways and Means intended a presumption in favor of relief. The House report stated: The bill establishes clear standards for the application of Presidential discretion in providing relief to injured industries and workers. If the ITC makes an affirmative determination on market disruption, there would be a presumption in favor of providing relief. That presumption can be overcome only if the President finds that providing relief would have an adverse impact on the United States economy clearly greater than the benefits of such action, or, in extraordinary cases, that such action would cause serious harm to the national security of the United States. This legislative history, together with the China safeguard's shorter time frames and lesser injury standard, and other procedural characteristics, may have created an expectation that the likelihood for relief under the China safeguard was going to be greater compared with the global safeguard.

Similarly, the U.S.-China Economic and Security Review Commission, a body established by Congress to monitor and investigate the security and economic implications of the bilateral economic relationship between the United States and China, held hearings and criticized the administration for failing to apply the safeguard after an affirmative ITC injury determination. In March 2005, this commission recommended that Congress consider amending the China safeguard to either eliminate the President's discretion or limit it to the consideration of noneconomic national security factors after an affirmative ITC finding. In addition, the lack of any positive decisions by the President in

these cases may have discouraged other U.S. producers from seeking relief under the China safeguard. Several trade lawyers representing domestic U.S. producers with whom we spoke told us about their reluctance to bring additional China safeguard cases in the future because they thought that the President would reject them based on political considerations. The U.S.-China Economic Security Review Commission expressed similar concern that repeated presidential refusal to apply the safeguard had undermined the instrument's efficacy. Indeed, until August 2005, when producers filed a petition on steel pipe, no China safeguard petition had been filed since March 2004, when the President rejected an ITC recommendation to provide relief from imports of Chinese ductile iron waterworks fittings.

Court Has Found that the President Has Broad Statutory Discretion.

Despite criticisms, the President's discretion under the China safeguard is quite broad. The President must provide relief unless he finds that it is not in the national economic or security interest. With regard to the former, the President is authorized to deny relief when he finds that the relief would have an adverse impact on the United States economy clearly greater than the benefits.

In June 2004, the U.S. Court of International Trade affirmed the President's broad discretionary authority in a case brought by the petitioner in the first China product safeguard case.24 In that case, Motion Systems Corp. contended that the President had exceeded his authority under section by not providing relief. In particular, Motion Systems argued that the President was required to quantify the adverse impact of providing relief and demonstrate that the adverse impact was clearly greater than the benefits that the relief would provide to the domestic industry. In this regard, Motion Systems maintained that section 421 created a presumption of relief once ITC made an affirmative determination of market disruption. In affirming the President's decision,26 the Court held that the President had not exceeded his authority and said the law granted him "considerable discretion."27 The Court found that section 421 made no reference to evidence or a burden of proof that the President must satisfy to support his conclusion that the imposition of a safeguard would have an adverse impact on the U.S. economy clearly greater than its benefits.28 The Court also noted that the President was not prohibited from considering political factors in making a finding about the adverse impact on the U.S. economy, including trade relations between the United States and China.29 Finally, the Court did not specifically comment on the presumption of relief issue.

President Considers a Broader Range of Factors than ITC.

While ITC makes remedy recommendations that would alleviate market disruption, the President considers a broader range of factors than ITC in determining whether to apply China safeguard relief. Specifically, under section 421, ITC focuses on the *domestic industry* involved in the proceeding, both in the context of making injury determinations and recommendations for relief. For example, among the factors ITC considered in determining material injury were the idling of U.S. production facilities and the ability of firms within the industry to produce at reasonable profit, wage, and employment levels.30 Thus, ITC did not weigh the interests of other groups such as consumers and downstream industries against potential benefits to the domestic industry when developing its recommendations for the President to consider. Nevertheless, ITC reports on the potential economic effect of its recommended remedies, as described earlier. However, section 421, does not require ITC to consider these broad economic effects when developing its recommendations.
In contrast, as discussed above, section 421 authorizes the President to consider *overall U.S. economic and security interests* in deciding whether to impose China safeguard relief.32 In each of the three cases where ITC found injury and recommended a remedy, the President found, among other things,

that relief would have an adverse impact on other participants in the economy. The President determined that relief would carry substantial costs for consumers or downstream users of the products involved. Specifically, the President cited the increased costs to aged and disabled consumers of mobility scooters as a reason for not providing relief in the pedestal actuator case. In the wire hangers case, the President stated that relief would have an uneven impact on wire hanger distributors and impose increased costs on dry cleaning companies. Finally, in the waterworks fittings case, the President found that the costs to consumers would substantially outweigh producer income benefits. The President's decisions also took into account the unique facts and circumstances in each case. For example, in the pedestal actuator case there was only one petitioner seeking relief and one dominant purchaser. In the wire hanger case, domestic producers had different business models that affected whether a remedy would benefit or disadvantage them. In addition, the U.S. Trade Representative noted in a March 2004 congressional hearing that, while not necessary to the President's decision, in the waterworks fittings case the petitioner faced serious problems besides competing Chinese imports.33 Although the President did not provide import relief in these cases, he stated that he remains committed to applying the China safeguard when circumstances warrant.

President Cites Third Country Imports When Denying Relief.

The President has considered whether relief would benefit the producers involved in every case.34 In his decisions denying relief the President stated that imposing a safeguard would have limited benefits. One factor that the President has cited in all three cases is that applying a safeguard would lead to production being shifted from China to other countries rather than to U.S. producers. In the waterworks fittings case, the President specifically identified other current suppliers to the U.S. market such as India, Brazil, Korea, and Mexico. Similarly, in all but one communist country safeguard determinations, the President found, among other things, that providing relief would have resulted in imports shifting from the communist country involved to other offshore sources. With only one exception, the President has never approved a remedy under the communist country safeguard. In contrast, under the global safeguard, imports from other countries generally cannot diminish the potential benefits of import relief.35 Since the global safeguard statute was enacted in 1974, the President applied relief in approximately half of the cases in which ITC has made a positive injury determination. Moreover, since it was substantially amended in 1988, the President has provided relief in every such global safeguard case. It is not possible to identify all the factors that contribute to such opposite results among the different safeguards. However, one consistent factor has been that the China and communist country safeguards, respectively, are limited in scope to products from one or a few countries; this allows other foreign sources to gain market share of the product and reduce the potential benefit of the safeguard to the domestic producers.

GAO-05-295T

U.S.-China Trade: Observations on Ensuring China's Compliance with WTO.

http://www.gao.gov/new.items/d05295t.pdf
February 4, 2005

Summary:

The complexity, breadth, and ongoing nature of many of the problems with China's WTO compliance demonstrate the need for a cohesive and sustained effort from the key U.S. agencies to effectively monitor and enforce China's implementation of its commitments. The U.S. Trade Representative (USTR), and the Departments of Commerce, State, and Agriculture (USDA) have coordinated on policy issues and increased staff resources to enhance their capacity to carry out these efforts. However, there are three areas in which we noted that these key agencies should take steps to improve their efforts and maximize the effectiveness of the resources allocated to the task of securing the benefits of China's membership in the WTO. First, although U.S. Government efforts to ensure China's compliance emphasize high-level bilateral engagement, we recommended that USTR take steps to maximize the potential benefits of the WTO's annual multilateral review of China's compliance, referred to as the Transitional Review Mechanism (TRM). Second, to more effectively plan and measure results, we recommended that each of the key agencies improve performance management of their China-WTO compliance efforts. Third, we recommended that, in an environment of high and regular staff turnover, the key agencies should direct additional management attention to ensuring that staff have an opportunity to acquire training relevant to their China-

WTO compliance responsibilities.

Given the strong congressional interest in China's role in the world economy, we have both issued and ongoing work related to various aspects of the U.S.-China economic and trade relationship. For example, GAO recently completed reports on U.S. efforts to protect intellectual property overseas, offshoring, and textile transshipment. Additionally, our ongoing work on the U.S. application of trade remedies against China and our review and analysis of how the Department of the Treasury makes its currency manipulation determinations may be of specific interest to the commission as it carries out its mandate.

Background:

China became the 143rd member of the WTO on December 11, 2001, after almost 15 years of negotiations. These negotiations resulted in China's commitments to open and liberalize its economy and offer a more predictable environment for trade and foreign investment in accordance with WTO rules. The United States and other WTO members have stated that China's membership in the WTO provides increased opportunities for foreign companies seeking access to China's vast market. The United States is one of the largest sources of foreign investment in China, and total merchandise trade between China and the United States was projected to exceed $234 billion in 2004, according to U.S. trade data. However, the United States still maintains a $158 billion trade deficit with China: imports from China were estimated to total more than $196 billion, while exports were estimated to be about $38 billion in 2004.

The U.S. government's efforts to ensure China's compliance with its WTO commitments are part of an overall U.S. structure to monitor and enforce foreign governments' compliance with existing trade agreements.[Footnote 3] At least 17 federal agencies, led by USTR, are involved in these overall monitoring and enforcement activities. USTR, USDA, and the Departments of Commerce and State have relatively broad roles and primary responsibilities regarding trade agreement monitoring and enforcement. Other agencies, such as the Departments of the Treasury and Labor, play more specialized roles. Federal monitoring and enforcement efforts are coordinated through an interagency mechanism comprising several management-and staff-level committees and subcommittees. The congressional structure for funding and overseeing federal monitoring and enforcement activities is similarly complex, because it involves multiple committees of jurisdiction. Congressional agencies, including GAO, and independent commissions such as the U.S.-China Economic and Security Review Commission also support Congress's oversight on China-WTO trade issues. In addition to the executive branch and congressional structures, multiple private sector advisory committees exist to provide federal agencies with policy and technical advice on trade matters, including trade agreement monitoring and enforcement.

Recommendations to Improve the U.S. Government's Efforts to Ensure China's Compliance with its WTO Commitments:

Ensuring China's compliance with its WTO commitments is a continuing priority for the U.S. government. The complexity, breadth, and ongoing nature of many of China's problems complying with its obligations demonstrates the need for the U.S. government to have a well-coordinated, sustained effort to ensure China's compliance. To that end, we have recommended that the key agencies involved in this effort take steps to maximize the potential of the WTO's annual review of China's compliance, improve performance management, and ensure that staff have adequate opportunity to acquire the training necessary to carry out their responsibilities.

Problems with China's WTO Compliance Are Broad in Scope, Complex, and Ongoing:

China's WTO obligations span eight broad areas and include hundreds of individual commitments on how China's trade regime is to adhere to the WTO's agreements, principles, and rules and allow greater market access for foreign goods and services. Some of these commitments are relatively simple and require specific actions from China, such as reporting information to the WTO or lowering tariffs. Other commitments, however, are significantly more complex and relate to systemic changes in China's trade regime. For example, some commitments require China to adhere to WTO principles of nondiscrimination in the treatment of foreign and domestic enterprises. China has

successfully implemented many of its WTO commitments, but a significant number of problems arose in the first years of China's membership. Problems implementing these obligations spanned all areas in which China had made commitments. Importantly, many of these compliance problems have persisted from year to year, and many concerns relate to China's inability thus far to make some of the systemic changes that its WTO commitments require. For example, USTR's most recent report on China's WTO compliance cites continuing problems with lack of transparency and protection of intellectual property.

U.S. Government Should Take Steps to Maximize the Potential of WTO Annual Review of China's Compliance:

We also found that, while the U.S. monitoring and enforcement activities reflected increased high-level bilateral engagement by executive branch officials, some multilateral efforts did not achieve their full potential. Specifically, the WTO's annual TRM was intended to be a thorough review of China's implementation, but many U.S., WTO, and foreign officials agree that the mechanism has limitations and that participation has declined. Nevertheless, the TRM and the benefits it provides could be enhanced by increased member participation and more timely U.S. preparation, which would improve the chances for full and informed responses from Chinese officials and maximize the potential exchange of information. Thus, the TRM can continue to provide an important avenue to pursue U.S. trade interests, even with a continued U.S. emphasis on bilateral and other multilateral engagement outside of the TRM.

To improve multilateral engagement with China on WTO compliance issues, we recommended that USTR take steps to maximize the potential benefits of the TRM. These steps could include establishing and meeting internal deadlines to submit written questions to the Chinese delegation 4 to 6 weeks or more before each TRM and coordinating with other WTO members to increase participation in the review.

Key Agencies Need to Improve Performance Management of China Compliance Efforts:

We found weaknesses in the key agencies' ability to assess the effectiveness of their China-WTO compliance efforts and determined that agencies would benefit from increased emphasis on planning and performance management. The Government Performance and Results Act and our substantial body of work on planning emphasize the importance and usefulness of developing unit-and program-level plans and measures that are connected to an agency's overall mission. We acknowledge the challenges of developing measurable goals, given the extent to which external factors can influence agencies' trade compliance efforts; however, we believe that it is possible to better quantify and measure results annually.

We recommended that USTR and the Secretaries of Commerce, State, and USDA take steps to improve performance management pertinent to the agencies' China-WTO compliance efforts. Specifically, USTR should set annual measurable predetermined targets related to its China compliance performance measures and assess the results in its annual performance reports. The Secretary of Commerce should take further steps to improve the accuracy of the data used to measure results for the agency's trade compliance-related goals. The Secretary of State should require its China mission to assess results in meeting their goals and report this information as part of the annual Mission Performance Plan. The Secretary of USDA should further examine the external factors that may affect the agency's progress toward achieving its trade-related goals and present the

agency's strategies for mitigating those potential effects. Furthermore, the head of each agency should direct their main China compliance units to set forth unit plans that are clearly linked to agency performance goals and measures, establish unit priorities for their activities, and annually assess unit results to better manage their resources.

Key Agencies Should Take Steps to Improve Training Opportunities**:**

We found that the key agencies have opportunities to better manage their human capital involved in China-compliance activities. Specifically, in an environment of high and regular staff turnover, new staff are called upon to take up monitoring and enforcement activities that involve complex, long-term issues. New staffs' effectiveness and efficiency is reduced when formal training is not available to help them with their day-to-day activities, and when staffing gaps prevent them from learning from their more-experienced predecessors. Increased management attention to providing an adequate mix of on-the-job training and formal training can help ensure that new employees have the necessary tools for doing their jobs well.

We recommended that USTR and the Secretaries of Commerce, State, and USDA undertake actions to mitigate the effects of both anticipated and unplanned staff turnover within the agencies' main China-WTO compliance units by identifying China compliance-related training needs and taking steps to ensure that staff have adequate opportunity to acquire the necessary training.

GAO-05-979

Issues and Effects of the Continued Dumping and Subsidy Offset Act.

http://www.gao.gov/new.items/d05979.pdf

September 26, 2005

What GAO Found.

Congress enacted CDSOA to strengthen relief to injured U.S. producers. The law's key eligibility requirements limit benefits to producers that filed a petition for relief or that publicly supported the petition during a government investigation to determine whether injury had occurred. This law differs from trade remedy laws, which generally provide relief to all producers in an industry. Another key CDSOA feature requires that Customs and Border Protection (CBP) disburse payments within 60 days after the beginning of a fiscal year, giving CBP limited time to process payments and perform desired quality controls. This time frame, combined with a dramatic growth in the program workload, presents implementation risks for CBP.

CBP faces three key implementation problems. First, processing of company claims and CDSOA payments is problematic because CBP's procedures are labor intensive and do not include standardized forms or electronic filing. Second, most companies are not accountable for the claims they file because they do not have to support their claims and CBP does not systematically verify the claims. Third, CBP's problems in collecting duties that fund CDSOA have worsened. About half of the funds that should have been available for disbursement remained uncollected in fiscal year 2004. Most of the CDSOA payments went to a few companies with mixed effects. About half of these payments went to five companies. Top recipients we surveyed said that CDSOA had beneficial effects, but the degree varied. In four of seven industries we examined, recipients reported benefits, but some non-recipients noted CDSOA payments gave their competitors an unfair advantage. These views are not necessarily representative of the views of all recipients and non-recipients.

Because the United States has not brought CDSOA into compliance with its WTO obligations, it faces additional tariffs on U.S. exports covering a trade value of up to $134 million based on 2004 CDSOA disbursements. Recently, Canada, the European Union, Mexico, and Japan imposed additional duties on various U.S. exports. Four other WTO members may follow suit.

Results in Brief.

CDSOA has the following three key features that guide agency implementation:

- **First, in passing CDSOA, Congress aimed to strengthen the remedial nature of U.S. trade laws, restore conditions of fair trade, and assist domestic producers. However, the law provides criteria restricting company eligibility for disbursements to a subset of domestic producers. Only those companies that filed or publicly supported petitions that resulted in an antidumping or a countervailing (AD/CV) duty order, while the government was conducting its investigation for injury, and remain in operation producing the product subject to the AD/CV order, are eligible for CDSOA disbursements. As a result, a number of U.S. companies, such as those that began production after orders covering their products came into effect, are ineligible. This means that CDSOA operates differently from trade remedies, such as AD/CV duties, which generally provide relief to all producers in an industry.**
- **Second, the law identifies AD/CV duties collected as the source of funds for the disbursements and provides a *pro rata* formula for allocating disbursements so that those making the largest claims generally receive the largest payments.**
- **Third, the law requires CBP to disburse all AD/CV duties collected in a given fiscal year within 60 days after the first day of the following fiscal year. CBP officials say this tight time frame means payments are sent to companies before the agency can complete all the desired quality controls.**

CBP has faced three major problems in implementing CDSOA: (1) processing CDSOA claims and payments, (2) verifying claims, and (3) collecting AD/CV duties. First, processing of CDSOA claims and payments is labor intensive and its associated workload is increasing; however, the agency lacks plans for managing and improving its CDSOA program's processes, staffing, and technology. Because CBP does not require companies to file claims using a standardized method (e.g., an electronic form), CDSOA program staff must review each claim to ensure it contains the required information, enter the data into a "standalone" database, and check for data entry errors. CBP uses complex procedures to manually calculate the amounts available for distribution and allocate disbursements among companies because its computer systems do not have the capabilities to produce these figures. CBP's CDSOA program is facing more than a 10-fold increase in its claim processing workload in fiscal year 2005. Second, although CBP has disbursed over $1 billion under CDSOA, CBP generally does not require companies to provide any claims-related supporting documentation. It has comprehensively verified the claims of only 1 of the 770 companies receiving disbursements. Even though this verification revealed significant problems, CBP does not plan to systematically verify CDSOA claims. Finally, CBP only distributed about half of the CDSOA money that should have been available for distribution in 2004 because it failed to collect about $260 million in applicable AD/CV duties. CBP has taken some steps to identify and address AD/CV duty collection problems, which undermine both the effectiveness of related trade remedies and the size of the amount available for disbursement under CDSOA. However, because its actions to date have not fixed these problems, CBP recently reported to Congress that it is working with other U.S. agencies to develop legislative proposals and other solutions by the end of 2005.

Most of the $1 billion in CDSOA disbursements in fiscal years 2001-2004 were concentrated in only a few companies and industries, with mixed effects reported. About half of all CDSOA disbursements in terms of value went to only 5 of the 770 recipient companies, and 80 percent of all disbursements went to 39 companies. Similarly, two-thirds of the payments went to three industries: bearings, candles,

and steel. Top recipient companies that responded to our questions generally indicated that the CDSOA disbursements had beneficial effects on their companies and industries, but the degree varied from slight to substantial. Leading recipient and non-recipient companies we contacted in the seven industries also reported mixed effects. In two industries—steel and semiconductors—leading recipients we contacted reported positive effects. In four other industries—crawfish, candles, bearings, and pasta— recipients generally reported benefits, but some non-recipients said that disbursements to competitors were having negative effects on them. Several non-recipients complained that, although they would like to receive

disbursements, they were ineligible to receive them. In the final industry, softwood lumber, both recipient and non-recipient respondents indicated that disbursements to date have been too small to have a discernable effect, but non-recipient respondents expressed concern about potential future adverse effects because disbursements might grow dramatically. Critics have expressed concerns that CDSOA may increase the number of AD/CV petition filings and the scope and duration of AD/CV duty orders. However, the available evidence is inconclusive.

Some U.S. industries are facing the imposition of additional tariffs by key U.S. trading partners as authorized by the WTO because CDSOA does not comply with WTO agreements.6 In response to separate complaints about CDSOA by 11 WTO members, the WTO ruled in January 2003 that CDSOA violated U.S. WTO obligations. The rationale for the WTO's ruling was that CDSOA was not among the allowed trade remedy responses to injurious dumping and subsidies specifically listed in the applicable WTO agreements. The United States pledged to comply with the adverse ruling, but it did not do so by the December 2003 deadline. Although the President proposed CDSOA's repeal, no change has been enacted by Congress. Three countries agreed to give the United States more time to come into compliance; the other eight members requested and received WTO authorization to retaliate by imposing additional tariffs on imports from the U.S. WTO arbitrators found that each of the eight members would be entitled to suspend concessions against U.S. exports in an amount equal to 72 percent of the CDSOA disbursements associated with AD/CV duties on that member's products each year. The total suspension authorized for 2005 could be up to $134 million based on the fiscal year 2004 CDSOA disbursements. Specifically, for the fiscal year 2004 disbursements, the WTO arbitrators authorized the imposition of additional duties covering a total value of trade not exceeding $0.3 million for Brazil, $11.2 million for Canada, $0.6 million for Chile, $27.8 million for the European Union (EU), $1.4 million for India, $52.1 million for Japan, $20.0 million for Korea, and $20.9 million for Mexico. On May 1, 2005, Canada and the EU began the imposition of additional duties on various U.S. exports. On August 18, 2005, Mexico began imposing additional duties on U.S. exports. On September 1, 2005, Japan began imposing additional duties on U.S. exports as well. The remaining four members say they might suspend concessions.

This report contains matters for congressional consideration and recommendations to CBP. Specifically, given the results of our review, as Congress carries out its CDSOA oversight functions and considers related legislative proposals, it should consider whether CDSOA is achieving the goals of strengthening the remedial nature of U.S. trade laws, restoring conditions of fair trade, and assisting domestic producers. If Congress decides to retain and modify CDSOA, it should also consider extending CBP's 60-day deadline for completing the disbursement of CDSOA funds. If Congress retains the law, we also recommend that CBP take several steps to improve the processing of claims and payments, the verification of claims, and the collection of AD/CV duties.

We received written comments on a draft of this report from CBP (see app. IV) indicating that it concurred with our recommendations. We also received technical comments on this draft from CBP,

the ITC, and the Office of the U.S. Trade Representative (USTR), which we have incorporated where appropriate.

Background.

The United States and many of its trading partners have long used laws known as "trade remedies" to mitigate the adverse impact of certain trade practices on domestic industries and workers, notably dumping (i.e. sales at below fair market value), and foreign government subsidies that lower producers' costs or increase their revenues. In both situations, U.S. law provides that a duty intended to counter these advantages be imposed on imports. Such duties are known as AD/CV duties. The process involves the filing of a petition for relief by domestic producer interests, or self-initiation by the U.S. Department of Commerce (Commerce), followed by two separate investigations: one by Commerce, which determines if dumping or subsidies are occurring, and the other by the ITC, which determines whether a domestic U.S. industry is materially injured by such unfairly traded imports. If both agencies make affirmative determinations, Commerce issues an order to CBP directing it to collect the additional duties on imports. These are known as AD/CV duty orders.7 No later than 5 years after publication of these orders, Commerce and the ITC conduct a "sunset review" to determine whether revoking the order would likely lead to the continuation or recurrence of dumping and/or subsidization and material injury.

Congress enacted CDSOA on October 28, 2000, as part of the Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act to strengthen the remedial nature of U.S. trade laws, restore conditions of fair trade, and assist domestic producers. Congress noted in its accompanying findings that "continued dumping and subsidization . . . after the issuance of antidumping orders or findings or countervailing duty orders can frustrate the remedial purpose"8 of U.S. trade laws, potentially causing domestic producers to be reluctant to reinvest or rehire and damaging their ability to maintain pension and health care benefits. Consequently, Congress enacted the CDSOA, reasoning that "U.S. trade laws should be strengthened to see that the remedial purpose of those laws is achieved."9 CDSOA instructs Customs to distribute AD/CV duties directly to affected domestic producers. Previously, CBP transferred such duties to the Treasury for general government use.

Two agencies are involved in CDSOA implementation. The law gives each agency—ITC and CBP—specific responsibilities for implementing CDSOA. The ITC is charged with developing a list of producers who are potentially eligible to receive CDSOA distributions and providing the names of these producers to CBP.10 CBP has overall responsibility for annually distributing duties collected to eligible affected domestic producers. CDSOA also makes CBP responsible for several related actions. Specifically, it charges CBP with establishing procedures for the distribution of payments and requires that CBP publish in the *Federal Register* a notice of intent to distribute payments and, based on information provided by the ITC, a list of affected domestic producers potentially eligible for the distribution.

Both agencies had some start-up challenges and have made improvements in response to reports by their Inspectors General (IG). In September 2004, ITC's IG found that the ITC had effectively implemented its part of the act but made several suggestions for enhancing the agency's CDSOA efforts.11 For example, it suggested that the ITC better document its policies and procedures for identifying and reporting eligible producers to CBP and improve its communication with companies regarding eligibility. In response, the ITC implemented these suggestions to, among other things, formalize and strengthen its procedures for identifying eligible producers, developing a list of

potentially eligible producers, and transmitting the list to CBP. For example, the ITC updated its desk procedures, clarified certain responsibilities to support the staff responsible for maintaining the ITC list, and added additional guidance on CDSOA requirements to its website.

In June 2003, the Treasury's IG issued a report finding several major deficiencies in CBP's implementation of CDSOA and made several recommendations.12 The Treasury's IG found that CBP was not in compliance with the law because it did not properly establish special accounts for depositing and disbursing CDSOA payments, did not pay claimants within the required time frame, and did not institute standard operating procedures or adequate controls for managing the program. Specifically, Treasury's IG noted that the absence of proper accounts, accurate financial data, and adequate internal controls had resulted in "overpayments of at least $25 million, and likely more." Treasury's IG also emphasized that several other issues warranted attention, including no routine verification of claims and significant amounts of uncollected AD/CV duties. In response, CBP consolidated the processing of claims and payments by establishing a CDSOA team in Indianapolis, Indiana; instituted procedures for processing claims and disbursements, and for conducting claim verification audits; and started proceedings to secure reimbursements from the companies that had received overpayments. Despite these efforts, CBP still faces issues raised by the Treasury IG, such as the issue of uncollected duties.

The United States has an obligation that its trade remedy actions conform to its legal commitments as part of the WTO, an international body based in Geneva, Switzerland. The WTO agreements set forth the agreed-upon rules for international trade. The WTO provides a mechanism for settling disputes between countries, and serves as a forum for conducting trade negotiations among its 148 member nations and separate customs territories. WTO trade remedy rules involve both procedural and substantive requirements, and a number of U.S. trade remedies have been not complying with their WTO obligations can file a dispute settlement case. The resulting decisions by a dispute settlement panel, once adopted, are binding on members who are parties to the dispute, and WTO rules create an expectation of compliance. Under WTO rules and U.S. law, however, compliance is not automatic. WTO dispute settlement panels cannot order the United States to change its law. Alternatively, the United States may choose not to comply with WTO agreements and instead may choose to offer injured members mutually-agreed upon trade compensation or face retaliatory suspension of trade concessions by the complainant members. A new round of global trade talks aimed at liberalizing trade barriers is now underway and includes discussions of possible clarifications and improvements to the WTO rules on antidumping and on subsidies and countervailing measures. U.S. trade with members of the WTO totaled $2.1 trillion in 2004, giving the United States a considerable stake in these WTO negotiations, which aim to liberalize trade in agriculture, industrial goods, and services.14

Conclusions.

Congress' stated purposes in enacting CDSOA were to strengthen the remedial nature of U.S. trade laws, restore conditions of fair trade, and assist domestic producers. Our review suggests that the implementation of CDSOA is achieving some objectives more effectively than others. One reason is that, as a result of some of the key features of CDSOA, the law in practice operates differently from trade remedies. For instance, while trade remedies such as AD/CV duties generally provide relief to all producers in a particular market, the eligibility requirements of CDSOA limit relief to only a subset of domestic producers—only those that petitioned for relief or that publicly supported the petition by sending a letter to the ITC or filling an ITC questionnaire while the agency was conducting its original investigation and remain in operation. Our analysis of CDSOA disbursement

data and company views on the effects of CDSOA indicate that CDSOA has provided significant financial benefits to certain U.S. producers but little or no benefits to others. As a result, CDSOA has, in some cases, created advantages for those U.S. producers that are eligible and receive the bulk of disbursements over those U.S. producers that receive little relief or are ineligible, by choice or circumstance. Moreover, because the WTO found that CDSOA did not comply with WTO agreements, the EU, Canada, Mexico, and Japan recently retaliated against U.S. exports and this imposes costs on a number of U.S. companies exporting to those markets.

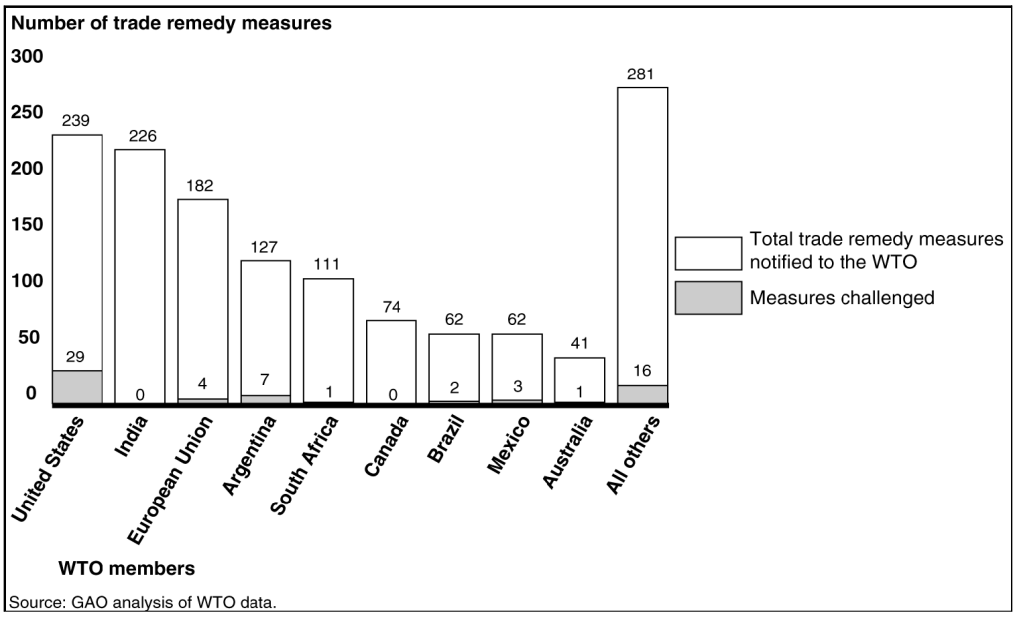
In implementing CDSOA, CBP faces problems processing CDSOA claims and payments, verifying these claims, and collecting AD/CV duties. The CDSOA program's time frame for processing payments is already too tight to perform desired quality controls. The dramatic growth in the program's workload--an estimated 10-fold increase in the number of claims in fiscal year 2005 and the potential disbursement of billions of dollars from softwood lumber duties--heighten program risks. CBP's labor-intensive process for claims could be streamlined through steps such as regularly obtaining from the ITC electronic updates of the list of potentially eligible companies and having companies file CDSOA claims using a standard form and submit them electronically. CBP's recent comprehensive company claim verification effort also indicates that the agency needs additional guidance in place for filing claims. In addition, CBP lacks plans for managing and improving its CDSOA program's processes, staff, and technology. For instance, it needs a human capital plan for enhancing its staff in the face of dramatic growth in workload processing for both CDSOA claims and payments. Accountability for the accuracy of the claims is virtually non-existent and CBP has no plans to verify claims systematically or on a routine basis. Finally, CDSOA has helped highlight CBP's collection problems. Despite reports to Congress on its efforts to address these problems, CBP faced a doubling in the AD/CV collections shortfall in fiscal year 2004, to $260 million. This shortfall not only reduces the amount available for disbursement under CDSOA, but also undermines the effectiveness of the trade remedies generally.

GAO-03-824 (June 2003)

World Trade Organization.
Standard of Review and Impact of Trade Remedy Rulings.

http://www.gao.gov/new.items/d03824.pdf

About a third of the cases filed in the WTO dispute settlement system from 1995 through 2002 challenged members' trade remedies, with the ratio of such cases increasing over time. Although a relatively small proportion of WTO members' trade remedy measures were challenged in the WTO, the United States faced substantially more challenges than other WTO members. The WTO generally rejected members' decisions to impose trade remedies in the 25 trade remedy disputes resolved from 1995 through 2002. However, GAO found that the WTO ruled for and against the U.S. and other members in roughly the same ratios. Overall, WTO rulings resulted in few changes to members' laws, regulations, and practices but had a relatively greater impact on those of the United States. While U.S. agencies stated that WTO rulings have not yet significantly impaired their ability to impose trade remedies, they had concerns about the potential future adverse impact of WTO rulings. Of the legal experts GAO consulted, a majority concluded that the WTO has properly applied standards of review and correctly ruled on major trade remedy issues. However, a significant minority strongly disagreed with these conclusions. U.S. agencies also said that the WTO has not always properly applied the standards and has, in some cases, imposed obligations on members that are not found in WTO agreements. Nonetheless, the experts almost unanimously agreed that the WTO was not treating the United States any differently than other members.



Of the 198 cases filed in the WTO from 1995 through 2002, one-third (64) challenged members' trade remedies, and the ratio of trade remedy cases filed versus other types of cases generally has increased over time. The United States was by far the most frequent defendant in trade remedy cases, acting as defendant in 30 of the 64 challenges, with 17 of those 30 cases filed since January 2000. In contrast, the EU had only 5 trade remedy cases filed against it. On the other hand, the United States was less active in filing complaints against other WTO members. For example, the United States filed only 5 of the 64 trade remedy cases, while the EU filed 16 such cases. Overall, WTO members challenged a small proportion of trade measures imposed. Of the 1,405 trade measures that members notified the WTO that they imposed from 1995 through 2002, WTO members challenged only 63 (4 percent) in the WTO dispute settlement system. The United States imposed the most measures (239) and had the highest proportion of its measures (12 percent) challenged, whereas the next biggest trade remedy users had fewer of their measures challenged.

For example, India had none of its 226 measures challenged, while the EU had 4 of its 182 measures challenged. According to U.S. agency officials, one reason that the United States has been a defendant more often than a complainant in trade remedy cases is that the United States has the world's biggest economy and most desirable market. In the 25 trade remedy cases completed from 1995 through 2002, the WTO generally did not uphold WTO members' domestic determinations to impose trade remedy measures but upheld a higher proportion of members' trade remedy laws that were challenged. In 17 of the 21 cases involving a total of 175 WTO findings10 on domestic determinations,11 the WTO rejected 50 percent or more of the agencies' determinations as not complying with WTO agreements, rejecting all determinations in 5 of those cases. Overall, the WTO rejected about the same percentage of the U.S. and non-U.S. agency determinations in the 21 cases, 57 percent and 56 percent, respectively.12 In 9 of the 25 cases, there were 13 challenges to trade remedy laws, all of which were U.S. laws. The WTO upheld U.S. trade remedy laws in 11 of the 13 challenges and rejected U.S. laws in 2 challenges. WTO rulings in the 25 completed cases we examined have not required numerous changes to members' laws, regulations, and practices but have resulted in the revision or removal of a number of trade remedy measures that members imposed. As a result of the 14 cases in which the United States was a defendant, two U.S. laws, one regulation, and three practices were changed or are subject to change.

In addition, the rulings in 9 of those cases necessitated the onetime revision to, or removal of, 21 U.S. trade measures. However, WTO trade remedy rulings resulted in fewer changes to the laws, regulations, practices, and measures of other WTO members. Specifically, no foreign laws or regulations were affected, and only one foreign practice was changed, in the 11 cases in which other WTO members were defendants. In addition, only 7 foreign trade measures were subject to revision or removal.13 U.S. officials told us hat the trade remedy rulings have not significantly impaired their ability to impose trade remedies to date. However, they were concerned about the potential for rulings to have a greater adverse impact in the future. For example, these officials cited the possible negative ramifications of WTO rulings in the privatization and EU bed linen cases.

U.S. officials also said that some WTO safeguard rulings have been extremely difficult to implement. For instance, some safeguard rulings have placed a greater burden on domestic agencies to establish a clearer link between increased imports and serious injury to domestic industry. In addition, U.S. officials said that the rulings have required U.S. agencies to provide more detailed explanations of their analyses and procedures for applying their methodologies in trade remedy investigations.

The WTO uses two principal standards of review to evaluate the factual and legal determinations of WTO member domestic agencies in trade remedy cases—article 11 of the WTO Dispute Settlement Understanding and article 17.6 of the WTO Antidumping Agreement. Article 11 applies to all cases brought under the WTO dispute settlement system and requires that panels make an objective assessment of the factual and legal determinations of WTO member domestic agencies. The Appellate Body has found that in applying article 11, panels are not to conduct a new review of domestic agency fact-findings nor totally defer to them. Article 17.6 applies only to antidumping cases and is more specific and deferential than article 11. For factual review, article 17.6 requires panels to determine whether domestic agencies have properly established the facts and evaluated them in an unbiased and objective manner, and, if the agencies have done so, it does not allow panels to overturn the agencies' determinations.

For legal review, article 17.6 requires panels to interpret the Antidumping Agreement by applying established international rules for interpreting treaties and international agreements.14 When a panel finds more than one permissible interpretation of the Antidumping Agreement, and one of them is consistent with a domestic agency's determination, article 17.6 requires the panel to uphold the agency's determination. The Appellate Body has concluded that panels should apply article 17.6 in a certain order: first, apply international rules of interpretation; and then, consider whether to uphold the domestic agency's determination. The Appellate Body has found that panels have generally interpreted and applied both standards of review correctly in the relatively few instances where standard of review was specifically an issue in a case. Finally, the panels and the Appellate Body discussed the standards of review in most of the trade remedy cases, but the extent of that discussion varied by trade remedy area, case, and issue.

The most common concern raised by legal experts with whom we spoke, although a minority view, related to the way in which the WTO has applied article 17.6 to evaluate legal determinations of domestic agencies. For example, some experts believed that Appellate Body guidance to apply international rules of treaty interpretation first has resulted in panels' improperly rejecting domestic agency interpretations because, in the experts' view, these rules necessarily lead to only one interpretation. The experts contended that this tendency to find one interpretation made panels less likely to consider alternative domestic agency interpretations.

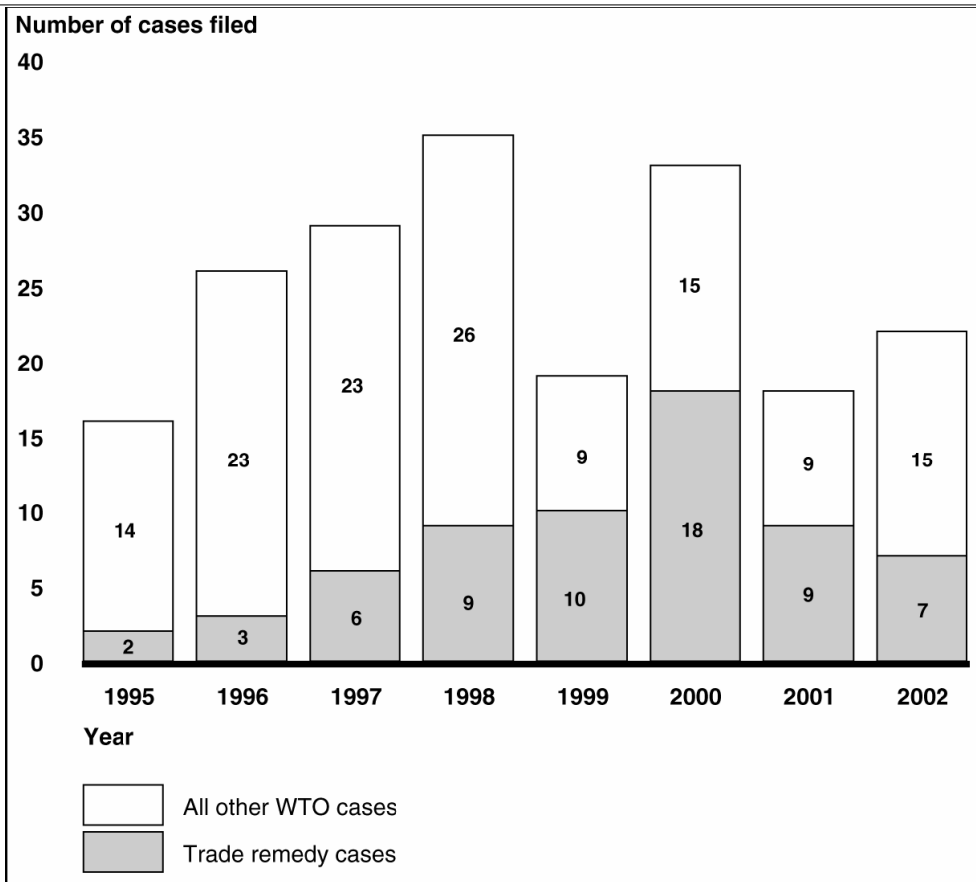
Some experts also stated that the panels and the Appellate Body have not applied article 17.6 in as deferential a manner as the United States intended. Overall, however, a majority of the experts with whom we spoke indicated that the WTO had not exceeded its authority in applying the standards of review, and that the WTO had treated its members the same in trade remedy cases. A majority of experts also said that the WTO has not added new obligations or diminished WTO members' rights in these cases; however, a significant minority of experts strongly disagreed with these views. Finally, many experts considered some of the WTO rulings on safeguards to be unclear and difficult to implement, particularly regarding how agencies should link increased imports and serious injury to domestic industry. The U.S. agencies most involved in trade remedy activities said that the WTO has improperly applied article 17.6(ii) in some trade remedy cases, mainly because it has not applied the article in a way that allows for upholding permissible interpretations of WTO members' domestic agencies. These agencies also said that in certain trade remedy cases, the WTO has found obligations and imposed restrictions on WTO members that are not supported by the texts of the WTO trade remedy agreements.

Trade Remedy Cases Increased Over Time, but Few Measures Were Challenged.

From 1995 through 2002, WTO members brought 198 formal dispute settlement cases against other members.15 One-third (64 cases) involved members' trade remedies, and the ratio of trade remedy cases filed, versus all other types, generally increased over the time period. Among WTO members, the United States has been by far the most frequent defendant in trade remedy cases but relatively less active in filing complaints. Overall, however, WTO members have challenged a relatively small share of the trade measures that their fellow members imposed, although the proportion of U.S. trade measures challenged was larger.

About One-third of All Cases Involved Trade Remedies, and Ratio Increased Over Time.

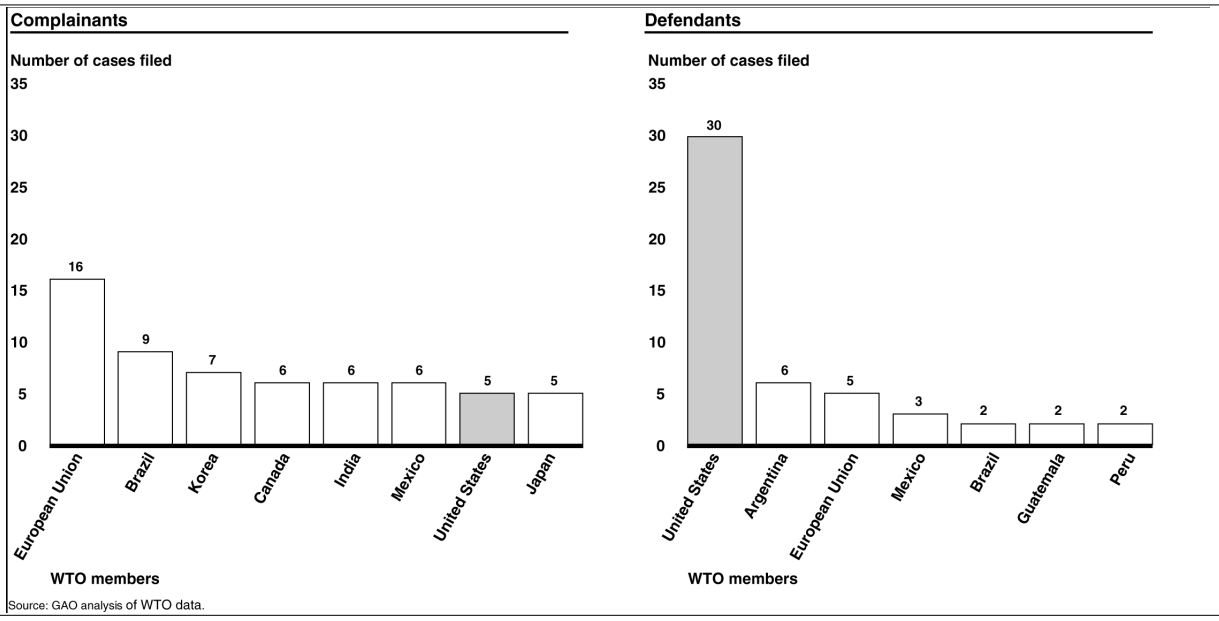
Overall, about one-third (64) of all WTO cases involved members' trade remedies. From 1995 to 2000, an increasing proportion of the cases filed pertained to trade remedy measures and laws, as shown in figure 1. In 2001 and 2002, there was somewhat of a shift in this trend.



Source: GAO analysis of WTO data.

United States Has Been the Most Frequent Defendant, but Less Active as a Complainant.

In comparing WTO members' participation in the trade remedy cases, the United States by far has been the most frequent defendant but less active as a complainant. As shown in figure 2, the United States was a defendant in 30 (47 percent) of the 64 trade remedy cases, a majority of which were filed since January 2000. The next most frequent defendants were Argentina, which defended 6 cases, and the EU, a defendant in 5 cases. On the other hand, the United States was less active than other WTO members in filingtrade remedy cases. As figure 2 also shows, the EU was the most frequent complainant in the 64 trade remedy cases, filing 16 complaints. Six WTO members each filed more complaints than the United States.

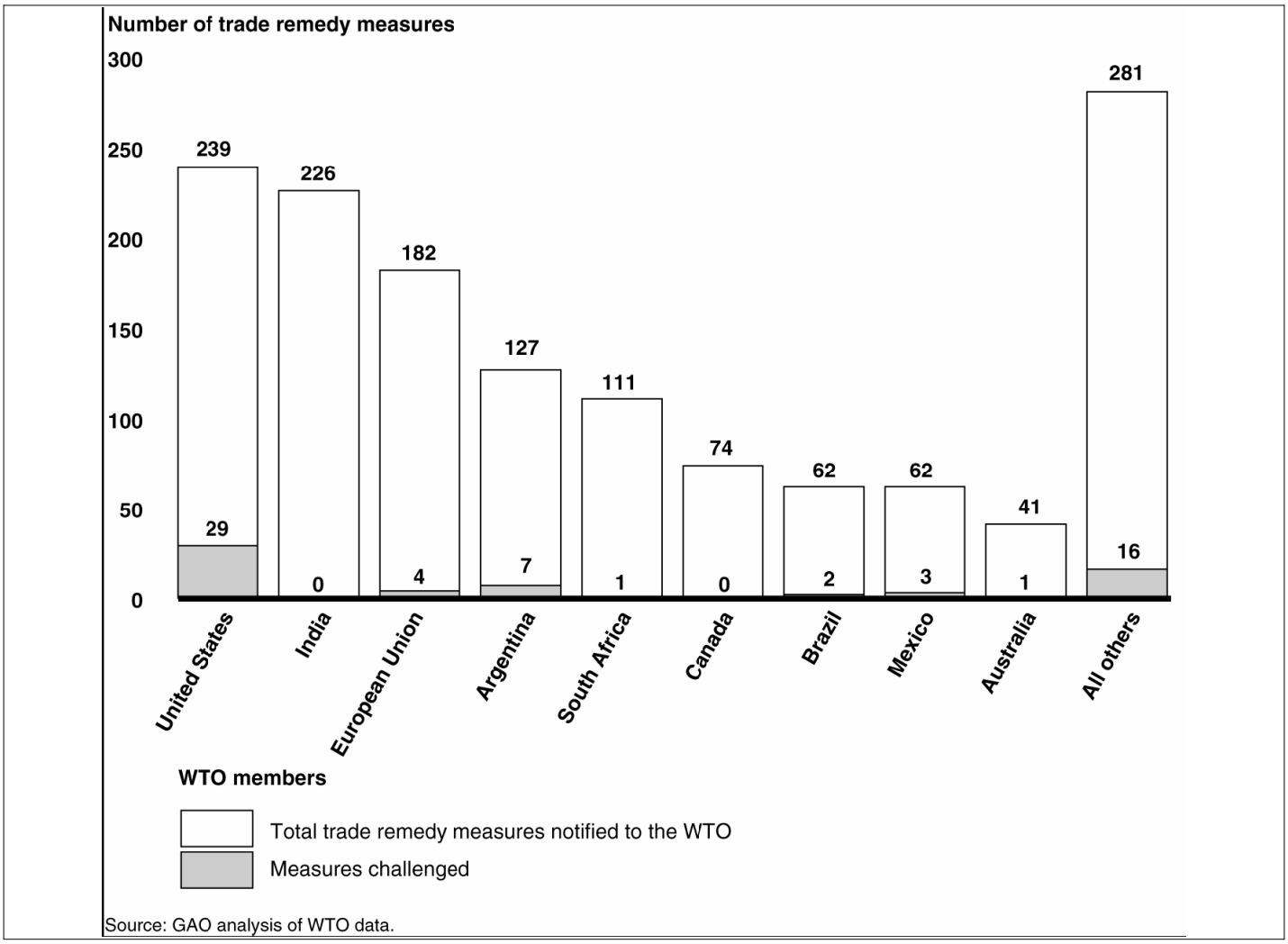


Source: GAO analysis of WTO data.

U.S. agency officials said that it was not surprising that the United States had been a defendant more often than a complainant in WTO disputes since (1) the United States has the world's biggest economy and most desirable market and (2) U.S. laws and procedures are more detailed and transparent than those of other members that are large users of trade remedies. These officials also pointed to the easy availability in the United States of trade lawyers, who could assist in bringing trade remedy actions, as another factor.

Few Imposed Measures Were Challenged, but U.S. Measures Were Challenged Most.

Although members notified the WTO that they imposed 1,405 trade remedy measures from 1995 through 2002, only a small percentage of these measures were challenged in the dispute settlement system. Specifically, WTO members challenged only 63 (4 percent) of the 1,405 measures, but nearly one-half of these challenges involved U.S. trade measures. Over the same period, as shown in figure 3, the United States imposed the most trade remedy measures (239) and had the biggest number and share (29, or 12 percent) of its measures challenged by other WTO members. On the other hand, India, the next biggest user of trade remedy measures, had none of its 226 measures challenged. WTO members challenged 4 (2 percent) of the EU's 182 trade remedy measures and 7 (6 percent) of Argentina's 127 trade remedy measures.



Domestic Determinations Generally Were Rejected, but Statutes Were Upheld.

While the 25 WTO trade remedy rulings completed from 1995 through 2002 generally rejected domestic agency determinations supporting trade measures, the rulings upheld a vast majority of the trade remedy laws that were challenged. The WTO rejected at least half of the domestic agency determinations in most of the 21 cases dealing with such determinations. The WTO also rejected roughly the same proportion of U.S. and non-U.S. domestic determinations. The 21 rulings addressed issues ranging from whether domestic agencies adequately justified imposing a trade remedy measure to whether WTO members followed proper procedures in initiating the disputes. Regarding WTO rulings on members' laws, only U.S. laws were challenged during the period. The WTO upheld more than threequarters of the U.S. laws challenged in 9 cases involving 13 challenges.

WTO Rejected Majority of Domestic Determinations; U.S./Non-U.S. Rejection Ratios Were Similar.

The WTO made findings on a total of 175 domestic agency determinations in 21 of the 25 trade remedy cases completed through 2002. As shown in figure 4, in 17 of the 21 cases the panels rejected 50 percent or more of the domestic agency's determinations—rejecting all determinations in 5 cases.

In all 21 cases, the WTO found at least one aspect of a measure to be inconsistent with WTO requirements.

All WTO Challenges to Trade Remedy Laws Involved U.S. Laws, but Most Laws Were Upheld.

Although to date WTO members have challenged only U.S. laws, the WTO upheld a large majority of these laws. As shown in table 1, in the 13 instances (in 9 cases), in which WTO members directly challenged U.S. laws, the WTO upheld U.S. laws in 11 challenges and rejected U.S. laws in 2 challenges.16

Rulings Resulted in Few Changes to Members' Laws, Regulations, and Practices but Caused Numerous Changes to U.S. Measures.

The 25 WTO trade remedy rulings completed from 1995 through 2002 did not result in many changes to WTO members' laws, regulations, or practices.17 However, the rulings more often resulted in the onetime revision to, or removal of, trade remedy measures. The rulings affected a number of U.S. laws, regulations, practices, and measures; but for other WTO members, no laws or regulations were affected, and only one practice was subject to change. Furthermore, fewer foreign trade measures were subject to removal or revision. Nonetheless, U.S. officials told us that the rulings to date had not significantly impaired their ability to impose trade remedies. However, they told us they were concerned about the potential for rulings to have a greater adverse impact in the future. In addition, U.S. agencies said that, with few exceptions, the rulings did not question U.S. methodologies for determining whether to impose remedies but have required them to provide fuller explanations and justifications for their decisions.

Rulings Caused Few Changes to Members' Laws, Regulations, or Practices.

WTO rulings resulted in a small number of changes to members' laws, regulations, and practices, with all but one of those changes involving U.S. trade remedies. In the 14 completed trade remedy cases in which the United States was the defendant, two U.S. laws, one regulation, and three practices were changed or are subject to change, as shown in table 2. In the 11 cases involving other WTO members, only one practice was subject to change.

Antidumping Act of 1916 and a section of the Tariff Act of 193018 involving calculation of the "all others" rate.19 In the 1916 Antidumping Act case, the WTO found the U.S. law to be in violation of GATT 1994 and the WTO Antidumping Agreement because it authorized imposing fines, imprisonment, and recovery of damages in response to the dumping of products in the U.S. market—remedies that are not provided for in those agreements. Both the U.S. Senate and the House of Representatives have introduced legislation to repeal the 1916 Act.20 The proposed change to the Tariff Act of 1930 involves making calculation of the "all others" rate consistent with the WTO Antidumping Agreement. The WTO granted the United States until the end of December 2003 to comply, but so far Congress has not addressed this change.

The one change to a U.S. regulation stemmed from a case involving U.S. antidumping duties imposed on imports of Korean dynamic random access memory semiconductors (DRAMS). To implement the ruling, the United States replaced its regulatory standard for revoking an antidumping order—that dumping was "not likely" to occur—with the standard in the WTO Antidumping Agreement—that "continued imposition of the antidumping duty is necessary to offset dumping." The three changes to U.S. practices involved a revision of the "arm'slength" 21 methodology in antidumping cases and two

privatization methodologies that the Commerce Department used in countervailing duty cases to calculate the extent to which the benefit of past subsidies are passed on to private purchasers of state-owned enterprises.22 The United States revised its "arms-length" methodology to conform to the WTO Antidumping Agreement by expanding the scope of sales to an affiliated business that could be considered to be made in the ordinary course of trade.

Commerce revised its countervailing duty methodology to conform to the Appellate Body's first privatization decision, but the Appellate Body later ruled that the revised methodology was also inconsistent with the Subsidies and Countervailing Measures Agreement. Commerce revised its methodology a second time23 to reflect the Appellate Body's finding that an arm's-length, fair market value sale of a subsidized, state-owned entity to a private buyer creates a presumption that the privatized entity no longer benefits from past subsidies.

Aside from the changes to U.S. laws, regulations, and practices, 1 case resulted in a change to an EU practice. In that case,24 the WTO ruled that the EU's practice of "zeroing" was not permitted under the WTO Antidumping Agreement. Zeroing25 in that case concerned the EU's changing negative dumping margins to zero when comparing dumping margins of different models of like products—for example, comparing dumping margins of high-end satin sheets with low-end polyester/cotton blend sheets.

Rulings Brought about Increased Removals and Revisions of Specific Trade Measures.

In contrast to the relatively few changes in members' laws, regulations, and practices, most of the rulings in the 25 completed trade remedy cases26 involved a case-specific removal or revision of a WTO member's trade remedy measure. More U.S. measures were affected than those of all other members. In the 14 completed cases brought against the United States, 21 U.S. trade measures were subject to revision or removal, 27 while the 11 completed cases against other countries resulted in 7 trade measures being subject to revision or removal, as shown in table 2. Specifically, the United States reduced antidumping margins on measures in response to 3 WTO rulings,28 removed countervailing duty measures in 1 case as a result of domestic litigation,29 and is revising countervailing duty measures in 2 other cases.30 And in 3 cases, the United States removed, or allowed to expire, safeguard measures that the Appellate Body found inconsistent with the WTO Safeguards Agreement.31 By contrast, other WTO members removed antidumping measures in 3 cases32 and are due to remove or revise antidumping measures in 2 cases.33

U.S. Officials Are Concerned about the Potential Impact of WTO Rulings on U.S. Ability to Impose Trade Remedy Measures.

While U.S. officials told us that WTO trade remedy rulings had not yet significantly impaired the U.S.'s fundamental right and ability to use its trade remedies, they are concerned about the rulings' potential to do so in the future. For example, Commerce Department officials said that implementing the second Appellate Body ruling on privatization may have a substantial impact on similar proceedings in the future as well as existing countervailing duty orders. In addition, U.S. officials expressed concern about the potential negative ramifications of the WTO ruling in the EU bed linen case. First, U.S. officials said that although the United States did not change its "zeroing" practice as a result of the ruling against the EU, they noted that the ruling could affect a current Canadian dispute against the United States involving U.S. zeroing practices.35 Furthermore, the EU has recently challenged 21 Commerce Department antidumping determinations with regard to the U.S.' zeroing practice.

The EU alleged that U.S. application of its zeroing practice is inconsistent with the WTO Antidumping Agreement and GATT 1994. The EU also asserted that U.S. laws and regulations providing for this zeroing practice appear to be inconsistent with those agreements. Asshown by this challenge, U.S. officials believe that when the WTO strikes down a practice, there is significant potential for WTO members to challenge similar practices of other members. Accordingly, these officials said they are monitoring WTO rulings and recommendations in cases not involving the United States in order to prepare for similar, potential challenges against the United States. In the safeguards area, U.S. officials indicated that some WTO rulings36 were confusing and extremely difficult to implement, particularly regarding certain aspects of causation—the extent to which increases in imports cause serious injury, or threaten serious injury, to domestic industry.

U.S. officials also said that they have had to increase the level of detail they provide in explaining their analyses and how they apply their methodologies in safeguard investigations. For example, they citedsafeguard rulings dealing with "nonattribution," an aspect of causation requiring that injury to domestic industry caused by factors other than increased imports not be attributed to increased imports.37 U.S. officials said that these rulings could be viewed as calling for domestic agencies to quantify the amount of injury due to increased imports versus the amount due to other factors—a task they consider to be difficult, if not impossible. Moreover, the officials said they would now have to expend more resources in conducting safeguard investigations.

Two Standards of Review Apply to WTO Trade Remedy Cases.

WTO panels use two standards of review in evaluating the factual and legal determinations of WTO members' domestic agencies in trade remedy cases. Article 11 of the WTO Dispute Settlement Understanding applies to all cases brought under the WTO dispute settlement system and calls for an objective assessment of domestic agency determinations. The Appellate Body has stated that in applying article 11, panels should not conduct a new review of domestic agency fact-finding nor totally defer to domestic agency determinations. Article 17.6 of the Antidumping Agreement applies only to antidumping cases and is more specific and deferential than article 11. Appellate body guidance on article 17.6 calls for panels first to apply established international rules of treaty interpretation to interpreting provisions of the Antidumping Agreement before deciding whether to uphold a domestic agency's interpretation. In the relatively few number of instances in which the Appellate Body has considered standard of review issues, it has found that panels have generally interpreted and applied both standards of review correctly. Finally, panel and Appellate Body decisions generally discuss the standards of review, but the extent of the discussion varies by trade remedy area, case, and issue.

WTO Has Two Principal Standards of Review.

The standard of review that WTO panels and the Appellate Body apply in WTO dispute settlement cases refers to how they evaluate and defer to the factual and legal determinations of domestic agencies of WTO members.38 The two principal standards of review that WTO panels and the Appellate Body use to evaluate these determinations are article 11 of the WTO Dispute Settlement Understanding and article 17.6 of the WTO Antidumping Agreement.39 Article 11 applies to cases brought under all the WTO agreements that are covered by the dispute settlement system and supplements article 17.6 in antidumping cases. Article 17.6 only applies to cases brought under the Antidumping Agreement, which is the only WTO agreement that has a specific standard of review.40

Article 11 Calls for an Objective Assessment.

Article 11 obligates a panel to make an "objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant" WTO agreement.41 The Appellate Body has interpreted this requirement to mean that panels should neither conduct a new review of domestic agency fact-findings, often referred to as a "*de novo* review," nor totally defer to domestic agency determinations. In rejecting both these extremes, the Appellate Body has found that the panels are poorly suited to engage in new reviews and cannot ensure an objective assessment by totally deferring to domestic agency determinations. What the panels should do in safeguards cases, according to the Appellate Body, is ascertain whether domestic agencies have evaluated all relevant facts and provided an adequate, reasoned, and reasonable explanation about how the facts supported their determinations.42

Article17.6 Is More Specific and Deferential than Article.

Article 17.6 is more specific than article 11 and calls for more deference to domestic agency determinations. Article 17.6 is divided into two subparts— factual and legal—and establishes standards of review for panel evaluations of domestic agency determinations. Under the factual standard of review in article 17.6(i), panels must determine whether domestic agencies have properly established the facts and evaluated them in an unbiased and objective manner. When a panel finds that the domestic agency has performed this task, the panel cannot overturn the domestic agency's determination even if it might have reached a different conclusion. The Appellate Body has stated that the panel's obligation under the factual standard in article 17.6(i) closely reflects the obligation imposed on panels under article 11.43 Under the legal standard of review in article 17.6(ii), panels must apply established international rules in interpreting provisions of the WTO Antidumping Agreement. These rules are set forth in articles 31 and 32 of the Vienna Convention on the Law of Treaties44 and provide a method for interpreting provisions of the Antidumping Agreement. When a panel applies these rules and finds that there is more than one permissible way to interpret a provision of the Antidumping Agreement, the panel must uphold the domestic agency's determination if it is consistent with one of the permissible interpretations. The Appellate Body's guidance to panels about how they are to apply this standard is consistent with the sequence implied above. Thus, panels should first use the international rules to interpret the WTO provision in question, and only after completing this task should panels then decide whether to uphold the domestic agency's legal determination. The Appellate Body has stated that application of the international rules could give rise to at least two permissible interpretations of some provisions of the Antidumping Agreement.45

Appellate Body Generally Upheld Panels' Treatment of Standards, but Treatment Was Seldom Challenged.

WTO members did not often challenge panel interpretations and applications of the standards of review, and most challenges involved article 11. In most instances, the Appellate Body upheld the pane s' treatment of the standards. In the 14 instances in which the Appellate Body specifically ruled on panel interpretations and applications of standard of review, it found that the panels had correctly addressed the standards in 11 instances—9 involving article 11 and 2 involving article 17.6.

Panels/Appellate Body Discuss Standard of Review in Cases, but Extent Varied.

As indicated above, panels have the responsibility for applying the standards of review in articles 11 and 17.6 when evaluating determinations of WTO member domestic agencies. The Appellate Body's

function is to review how panels have interpreted and applied these standards and to uphold, modify, or reverse panel actions. For the most part, Appellate Body decisions in trade remedy cases have included longer and more detailed discussions of standard of review than the panels.46 Aside from differences between the panels and the Appellate Body, the extent to which standards of review are discussed vary by trade remedy area, case, and issue. Thus, standards of review are discussed, at least to some extent, in all safeguard and antidumping cases involving determinations of domestic agencies but are not mentioned in a number of countervailing duty cases.

In many of the safeguard and antidumping cases, the panels discuss article 11 or article 17.6, respectively, at the beginning of the case, indicating that they are the standards of review to be applied in evaluating the domestic agency determinations involved, though the amount of introductory discussion varies from case to case. The standards of review are sometimes also discussed, or alluded to, later in panel and Appellate Body reports in connection with evaluations of particular domestic agency determinations. These allusions to the standards of review involve use of language from the sta ndards themselves or interpretations of the standards rather than any specific mention of them. For example, in the safeguard cases, panels often invoke Appellate Body guidance about what kind of domestic agency explanation is necessary— an "adequate, reasoned, and reasonable explanation"—without mentioning article 11. Similarly, in antidumping cases, panels sometimes refer to the requirement in article 17.6(i) to conduct an "unbiased and objective" evaluation of domestic agency fact-finding without specifically mention in 17.6(i). Finally, for some issues, panels neither specifically mention nor allude to standard of review provisions.

Expert Views and U.S. Agency Positions on Standard of Review and Other Trade Remedy Issues.

How the WTO has interpreted and applied the standard of review in trade remedy cases and how it has resolved important trade remedy issues are highly controversial issues in the United States. Further, a number of these important trade remedy issues are highly complex, technical, and not easily explained, as evidenced by their lengthy treatment in WTO panel and Appellate Body reports. Accordingly, we decided to interview a wide range of WTO legal experts to obtain their views on these issues. although a minority view, was about how the WTO was applying article 17.6(ii) in antidumping cases. Notwithstanding this concern, overall a majority of the experts believed that the WTO had not exceeded its authority in applying the standard of review in the trade remedy cases we reviewed. Commenting on more general issues surrounding the WTO trade remedy rulings, almost all of the experts believed that the United States and other WTO members have received the same treatment in trade remedy cases. In addition, a majority of the experts who responded concluded that WTO decisions generally have not added to obligations or diminished rights of WTO members and that it was appropriate for the WTO to interpret vague and ambiguous provisions in WTO agreements, sometimes referred to as "gap filling."

However, a significant minority of experts strongly disagreed with this view about WTO members' obligations and rights and considered gap filling to be inconsistent with several provisions of the Dispute Settlement Understanding. Regarding specific rulings, a number of experts cited some safeguard rulings as confusing and unclear. In contrast to the majority views expressed above, the U.S. agencies most involved in trade remedy activities believed that article 17.6(ii) has been improperly applied in some trade remedy cases, mainly because the WTO has not applied article 17.6(ii) in a way that allows for upholding permissible interpretations of WTO members' domestic agencies. They also believed that in certain trade remedy cases, the WTO has found obligations and imposed restrictions on WTO members that are not supported by the texts of the WTO trade remedy agreements.

Significant Minority Expressed Concerns about WTO Application of Article 17.6(ii).

A common concern raised by a significant minority of experts with whom we spoke was that the WTO was not properly applying the legal standard of review in article 17.6(ii) of the Antidumping Agreement. Specifically, these experts maintained that Appellate Body guidance calling for panels to first apply international rules in the Vienna Convention on the Law of Treaties to interpret provisions of the Antidumping Agreement before they evaluate the domestic agencies' legal determinations necessarily leads to only one interpretation. Consequently, panels never reach the point of applying the part of article 17.6(ii) that allows for multiple permissible interpretations and upholding an agency determination that is based on one of these interpretations.47 In fact, while several experts mentioned specific rulings in which panels or the Appellate Body had upheld domestic agency determinations as permissible, it was unclear whether this was due to these bodies going through the article 17.6(ii) analysis or solely because they agreed with the domestic agency.

In this regard, in the trade remedy cases we reviewed, no expert pointed to a clear instance in which a panel first applied the Vienna Convention, found several permissible interpretations, and then upheld the agency determination because it was consistent with one of them.48 One expert, who was a former U.S. negotiator in the Uruguay Round, stated that U.S. negotiators in the round had not fully appreciated how application of the Vienna Convention would limit the possibility of panels or the Appellate Body finding multiple permissible interpretations of the Antidumping Agreement. Some experts also believed that panels and the Appellate Body have not applied the legal standard of review in article 17.6(ii) in the deferential way intended by the United States, as expressed in the U.S. Statement of Administrative Action (SAA) accompanying the U.S. Uruguay Round Agreements Act.49 The SAA describes article 17.6 as a special standard of review analogous to the deferential standard applied by U.S. courts in reviewing actions by the Commerce Department and the ITC, commonly referred to as the Chevron standard.50 Thus, from the U.S. perspective, article 17.6 was intended to ensure that WTO panels neither second-guess the factual conclusions of domestic agencies, even when panels might have reached a different conclusion, nor rewrite, under the guise of legal interpretation, the provisions of the Antidumping Agreement.

Majority Said WTO Did Not Exceed Its Authority in Applying Standard of Review.

Despite the concerns expressed above, the majority of the experts with whom we spoke indicated that the panels and the Appellate Body generally had not exceeded their authority in applying the standards of review in articles 11 and 17.6 in the trade remedy cases we reviewed.51 These experts indicated that panels and the Appellate Body had properly applied article 11 in safeguards and countervailing duty cases as well as the factual standard of review in article 17.6(i) in antidumping cases. Several of this group even questioned whether article 11 was intended to be a standard of review provision at all and, if it was, that it did not intend the same level of deference as article 17.6.52 Majority support for how panels and the Appellate Body applied the legal standard in article 17.6(ii) included experts who thought the panels and the Appellate Body had generally applied the article correctly and provided the right amount of deference, those who believed the article was not particularly deferential, and those who considered the article to primarily set forth a method for interpreting provisions of the Antidumping Agreement rather than for conferring deference. Finally, a number of experts, including a few with divergent opinions about whether the legal standard in article 17.6(ii) had been properly applied, stated that evaluation of panel and Appellate Body decisions should focus on their substantive rulings and not the technical issue of standard of review.

A majority of experts also maintained that the United States was not successful in getting the standard of review it wanted in the Antidumping Agreement and that the SAA only expresses the U.S.'s view about the intent of article 17.6. They pointed out that while the United States was the main proponent for having a strongly deferential standard included in the Antidumping Agreement,53 numerous WTO members opposed the United States on this issue. Although the experts agreed that the lack of written negotiating history makes it difficult to determine how much deference article 17.6 was intended to provide, a large number believed that the language that was ultimately agreed to did not include the Chevron standard. 54

Large Majority Said All WTO Members Were Treated the Same in Trade Remedy Cases.

Experts with markedly divergent views on other issues were in near unanimous agreement that the United States generally was being treated about the same as other WTO members in trade remedy cases. Although several experts pointed out that the United States was the most frequent defendant and was losing more often than other WTO members, they believed that the panels and the Appellate Body had ruled against other WTO members with the same frequency and in the same or similar manner as they had for the United States. Several experts also were emphatic in describing the WTO as a plaintiff's court in trade remedy cases and pointed out that in nearly all trade remedy decisions and all the safeguards decisions we reviewed, respondents were asked to take some action—for example, to ensure that a safeguard measure was applied consistent with the Safeguards Agreement.

When asked why respondents usually lose trade remedy cases, some experts cited a WTO free trade bias or bias against trade remedies as the principal reason.55 Several others said that WTO members only bring trade remedy actions in the WTO that they are confident they can win. As to why the United States was the most frequent defendant in trade remedy cases, several experts mentioned the fact that the United States was the biggest market as well as the biggest user of trade remedies. In addition, several experts believed that some of the Commerce Department's decisions to impose trade remedy measures were unfounded.

Majority Said No New Obligations or Diminished Rights, but Minority Strongly Disagreed.

A majority of experts who responded to this issue agreed that panels and the Appellate Body generally have not added to the obligations or diminished the rights of the United States and other WTO members in trade remedy cases. They believed panels and the Appellate Body generally had ruled appropriately in these cases, including the rulings on issues that the experts cited most frequently as being important and controversial— zeroing, facts available,56 nonattribution, unforeseen developments, and privatization.57 A number of these experts believed that the panels and the Appellate Body had both the authority and the need to interpret vague or ambiguous provisions, or to fill gaps,58 in the trade remedy agreements when no provision clearly deals with an issue. A number also cited article 3.2 of the Dispute Settlement Understanding, which calls for dispute settlement to "clarify the . . . provisions of the [WTO] Agreements," as support for panel and Appellate Body interpretations of vague or ambiguous provisions. Furthermore, a number stated that it is a common and accepted practice for courts to interpret vague or ambiguous provisions of laws and agreements, or to fill gaps, when the meaning of a legal provision is unclear. A significant minority of experts, however, strongly believed that panel and Appellate Body findings on a number of important issues, including those listed above, had added to obligations or diminished the rights of the United States and other WTO members. For example, some in this group believed that panels or the Appellate Body should have upheld the domestic agency determinations on the antidumping

issues of zeroing, facts available, and nonattribution as permissible under the legal standard of review in article 17.6(ii).

In addition, they contended that gap filling was prohibited by articles 3.2 and 19.2 of the Dispute Settlement Understanding, both of which preclude the Dispute Settlement Body from adding to obligations or diminishing the rights of WTO members as provided in the WTO agreements covered by dispute settlement. Furthermore, they believed that the WTO had engaged in improper gap filling in its rulings regarding the aforementioned issues, including privatization. They said that WTO provisions on these issues were unclear and that privatization was not specifically referred to in the Subsidies and Countervailing Measures Agreement. Finally, some experts concluded that it was improper for the panels and the Appellate Body to rule on issues that the negotiating members had intentionally left unclear. They believed that the proper way to deal with vague and ambiguous language in the WTO agreements was through additional negotiations rather than through panel or Appellate Body rulings.

Experts Believed Some Safeguard Rulings Were Confusing and Unclear.

A substantial number of experts stated that WTO rulings on the safeguard issues of causation and unforeseen developments were confusing and difficult to follow. This group included experts with sharply divergent views on other trade remedy issues. Specifically, these experts believed that the lack of clarity in the rulings on the causation issue of nonattribution has made it difficult for domestic agencies to implement the rulings. Some in this group were concerned that the rulings seemed to require a quantitative analysis of each factor causing serious injury to domestic industry to ensure the factors were not being improperly attributed to increased imports,59 and several questioned whether domestic agencies could perform this kind of analysis.

The experts also had concerns about how domestic agencies could implement the Appellate Body rulings on the issue of unforeseen developments. Specifically, they were unsure how WTO members would show that increased imports causing serious injury resulted from developments they had not foreseen when they made tariff concessions or assumed other obligations under GATT. A few experts were surprised that the Appellate Body had resurrected the GATT requirement on unforeseen developments, which they thought had been abandoned and had not been specifically included in the Safeguards Agreement.

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WORLD TRADE ORGANIZATION -- Issues in Dispute Settlement.

http://www.gao.gov/archive/2000/ns00210.pdf

U.S. participation in the World Trade Organization (WTO) reached the 5-year mark in 2000. The WTO provides the institutional framework for the multilateral trading system, administers rules of international trade, and provides a forum for conducting trade negotiations. It also establishes a quasi-adjudicative dispute settlement system, which has come to be seen as the linchpin for the rules-based system of international trade. The WTO dispute settlement system has also become a lightning rod for those concerned about the direction of the trading system in an era of accelerating globalization.

This is the *second report.* Our first report provided information on how WTO members have used the new system over the past 5 years.1 In this report, we examine (1) the outcome and commercial impact of completed cases involving the United States and (2) the major issues that have emerged in using the system. This report supplements the observations we provided you on these issues in June 2000.

Results in Brief

Overall, the results of the WTO's dispute settlement process have been positive for the United States. Our examination of 42 completed cases involving the United States shows that most led to changes in foreign laws, regulations, and practices that offer commercial benefits to the United States. Conversely, none of the changes the United States has made in response to WTO disputes have had major policy or commercial impact to date, though the stakes in several were important. However, a ruling that U.S. tax provisions violated export subsidy rules has potentially high commercial consequences, but the United States has not fully determined how to comply with the ruling. In addition, WTO rulings have upheld major trade principles important to the United States, such as requirements that imported goods must be treated in the same way as domestic goods in applying internal taxes and regulations.

Four major issues surrounding the dispute settlement system have emerged. These issues are (1) how the dispute settlement system has affected U.S. sovereignty, (2) to what extent WTO members found to be in violation of rules are complying with WTO rulings, (3) how quickly the system resolves disputes, and (4) how open the WTO's proceedings are. Concerns over sovereignty have centered on whether rulings would weaken U.S. protections against unfair trade and on health, safety, and the environment. So far, this possibility has not proved to be the case, but concerns remain. With regard to compliance, members have generally changed their practices to comply with WTO rules, and the

rate of compliance with decisions in U.S. cases is 75 percent, slightly better than that under the General Agreement on Tariffs and Trade. Further, while many U.S. complaints were resolved quickly, most complaints that went through the WTO panel or appellate process took longer than called for in the timetables set forth in the WTO agreements. Although the dispute settlement system has become more open and transparent since it was established in 1995, the public still has limited information about and input into the organization's proceedings. The United States has met resistance from other WTO members in seeking greater openness in the process.

Background.

The WTO provides the institutional framework for the multilateral trading system. The WTO is the successor of the General Agreement on Tariffs and Trade (GATT), which was created by post-World War II U.S. and European leaders who believed that open markets and a rules-based system of trade would promote international stability and prosperity and avoid damaging trade disputes. The 1994 Uruguay Round agreements, which created the WTO, vastly expanded the scope of multilateral trade rules by strengthening disciplines in traditional trade areas and broadening coverage to areas such as services and intellectual property. It also established a new dispute settlement system,2 replacing the procedures that had gradually emerged under GATT. While the dispute settlement system facilitates the resolution of specific trade disputes, it also serves as a vehicle for upholding trade rules and preserving the rights and obligations of WTO members under the WTO agreements. WTO dispute settlement is central to U.S. efforts to monitor and enforce trade agreements—a major focus of U.S. trade policy.

Unlike the GATT, the WTO dispute settlement system discourages stalemate by not allowing parties to block decisions, and establishes a standing Appellate Body, which helps make the system's decisions more stable and predictable. WTO dispute settlement rules also set time limits for each step in the dispute settlement process, including (1) consultations, (2) panel review, (3) Appellate Body review, and (4) implementation of rulings (see fig. 1). Under these timetables, some of which are maximums and others minimums, WTO disputes that go all the way through the system should be resolved within approximately 2-1/2 years from the time an initial request for a consultation is filed through full implementation of a WTO Appellate Body ruling—a minimum of 17 months for the consultation and adjudication phases (if an appeal is involved) and up to 15 months to implement the final ruling. The dispute settlement process is administered by the Dispute Settlement Body (DSB), which is composed of representatives of all WTO members.

Normally, the Appellate Body should complete its consideration of the appeal within 60 to 90 days. The Appellate Body ruling, along with the panel ruling, as amended, is then adopted by the WTO within 30 days, unless member countries decide by consensus to reject it.

- **Implementation. Within 30 days of the ruling's adoption, a country that loses a case must state its intention regarding implementation of the recommendations of the panel or appellate ruling. Losing parties are encouraged to comply with WTO rulings. However, they may accept retaliation or provide compensation to the plaintiff as an interim measure. If complying with the recommendation proves immediately impractical, the country may request or be given an extension for a "reasonable period of time" to do so. This period is normally not to exceed 15 months. The implementation period can be set by agreement.**
- **Retaliation in the event of noncompliance. If a member found to be violating WTO commitments does not conform to the WTO ruling or provide compensation within the established implementation period, the complaining party may seek authorization to retaliate. This shall be granted within 30 days after the implementation period ends, unless there is a consensus against**

doing so. Retaliation takes the form of suspending negotiated concessions or other WTO obligations. For example, a country could raise tariffs on the noncomplying country's goods. The level of retaliation must also be authorized and is to be equivalent to the amount of harm suffered by the complaining country. In case of disagreement regarding the level of retaliation, the original panel may be asked to arbitrate and issue a binding determination to be completed within 60 days from the end of the implementation period.

Overall Positive U.S. Results From Dispute Settlement System.

The United States has generally benefited from its experience with the WTO dispute settlement system, based on our analysis. We examined 42 completed WTO dispute settlement cases in which the United States was either plaintiff or defendant4 and focused on the nature of the case, the commercial significance of the outcome, and the trade principles involved. (See app. I for a brief description of each case.) The majority of the 25 cases in which the United States was the plaintiff resulted in commercial benefits through greater market access or stronger intellectual property protection. In the 17 cases in which the United States was a defendant, the trade policy and commercial consequences of nearly all the challenges so far have been limited. The exception is a European Union (EU) challenge to the U.S. foreign sales corporation tax provisions (case 40), where the WTO ruled that the U.S. provisions constituted a prohibited subsidy. The United States has also benefited from WTO rulings that upheld important principles set forth in the WTO agreements.

The United States Has Achieved Commercial Benefits From Most of the Cases It Has Filed.

The United States has achieved benefits in most of the cases it has brought to the WTO dispute settlement process. The United States brought 25 of the 42 completed cases we examined, primarily in the areas of agriculture and sanitary and phytosanitary5 measures, intellectual property rights, and taxes and subsidies (see fig. 2).

Of the 25 cases the United States filed with the WTO, 19 resulted in some agreed change in foreign laws, regulations, or practices. These have included removal of trade barriers, reductions in subsidies, and changes in intellectual property laws. As appendix II shows, 14 of the 25 cases resulted in commercial benefits for the United States.

Implementation of the WTO panel ruling in four disputes upholding U.S. complaints is either not yet complete or was contested. These four cases involve EU restrictions on banana imports and imports of hormone-treated beef, where compliance has not been attained;6 Australian subsidies to automotive leather manufacturers, where compliance was disputed but resolved through negotiations; and Mexican antidumping measures on high fructose corn syrup, where Mexico has until September 22, 2000, to comply. In two cases, the United States lost its challenge. Both cases involved important markets for U.S. exports. In the Japanese film case (case 19), the United States challenged Japanese government practices that it argued fostered barriers to access and distribution of U.S. photographic film in Japan's approximately $2.5 billion to $3 billion market. The WTO ruled against the United States, finding that it had not demonstrated that Japan had nullified and impaired U.S. benefits or violated specific WTO commitments. In the second case, the EU increased tariffs on certain computer equipment by changing the classification of these products (case 27). At the time, U.S. producers accounted for half of the $5-billion European market. The WTO ruled that the EU did not violate its obligations by changing the classification of these products since its WTO commitments did not

specifically identify them in a particular tariff category. However, the Information Technology Agreement reduced tariffs on these products to zero, mitigating the impact of the adverse ruling.

Challenges Against the U.S. Practices Have Had Limited Impact to Date.

Other WTO members challenged U.S. practices in 17 cases, primarily involving antidumping, textiles, and the section 301 trade law7 (see fig. 3). Of the 17, a WTO panel or the Appellate Body ruled against the United States in 6 cases, in favor in 1 case, and in 10 cases the dispute was resolved prior to a panel decision. As discussed in more detail later, the changes to U.S. policy in response to these cases have been relatively minor.

While some of the 17 cases have also had high commercial stakes, the outcomes of all except one have had limited or no commercial effect. For example, in a case ations of U.S. commitments. The United States has until October 1, 2000, to comply withchallenging U.S. antidumping duties on imports of urea (primarily used as a fertilizer) from the EU (case 28), the United States removed the duties after it found that U.S. industry was not interested in maintaining them. The one case with a potentially very high commercial impact involves U.S. tax exemptions for foreign sales corporations (case 40). The WTO found that the exemptions were prohibited export subsidies and viol the WTO ruling, but has not yet fully determined how it will implement it.

WTO Disputes Have Reinforced Principles of Trade Agreements.

In the disputes involving the United States, WTO decisions upheld trade principles important to the United States. These rulings in the WTO's first 5 years have helped to establish a more consistent interpretation of WTO agreements and members' obligations and have reaffirmed long-standing trade principles.

- **The United States successfully challenged India's quantitative restrictions and import bans on 2,700 products that India justified under WTO balance-of-payments provisions (case 35).9 The WTO panel and the Appellate Body found that India's balance-of-payments situation did not justify the measures, and India agreed to phase out these restrictions. The decision is an important signal to other countries that the WTO will not permit the inappropriate use of balance-of-payments provisions to restrict trade, according to USTR.**
- **Another long-standing trade principle—national treatment—generally requires that foreign goods should receive treatment no less favorable than that accorded to domestic goods. Under this principle, the United States successfully brought WTO challenges against both Japan's and Korea's taxation of distilled spirits (cases 4 and 32). In both countries, certain domestically produced liquor received significantly lower tax treatment than other varieties that were primarily imported. The WTO found that this treatment was discriminatory because the products were either "like" or "directly competitive" with the domestic products. Both countries complied with the decisions by equalizing their tax rates on foreign and domestic distilled spirits. A case regarding Turkey's differential taxes on foreign and domestic films also involved national treatment issues (case 18). The U.S. film industry noted that Turkey is the largest market for films in the Middle East, with 1999 revenues of $23 million. Turkey agreed to equalize its tax rates, and a U.S. film industry association cited this successful resolution of the dispute as useful in discussions with other countries with similar measures.**

Even in cases in which the United States did not prevail, important trade principles were upheld. In a case involving wool shirts from India (case 12), for example, the WTO Appellate Body ruled that a U.S. import restraint was improper but upheld the principle that the burden of showing that the

import restraint was inconsistent with WTO principles was on the complaining party, which in this case was India.

Major Issues Arising in Use of the WTO Dispute Settlement System.

Several important concerns have emerged regarding the WTO dispute settlement system. Some of these issues were identified during the Uruguay Round negotiations.10 Other issues were identified by trade experts and other interested parties based on experience during the first 5 years of WTO dispute settlement. They include (1) the question of how the dispute settlement system has affected U.S. sovereignty, (2) the extent to which members found to be in violation of WTO obligations are complying with the WTO's rulings, (3) the timeliness of the system for resolving disputes, and (4) the transparency of the WTO's proceedings.

Dispute Settlement System's Impact on U.S. Sovereignty.

The nature of the WTO dispute settlement system has been the subject of long-standing concern about how its decisions will affect U.S. sovereignty.11 Our review of the 42 completed dispute settlement cases involving the United States focused on sovereignty issues in three areas. We found (1) the United States has benefited from protections that are built into the WTO dispute settlement system and U.S. implementing legislation that preserve the U.S.' flexibility in responding to WTO rulings; (2) the United States has so far withstood challenges to the use of domestic trade law to act against foreign unfair trade practices, although more are in the pipeline; and (3) WTO rulings to date against U.S. environmental measures have not weakened U.S. environmental protections, but environmental groups remain concerned over the impact of these rulings and the system's capacity to handle such complaints.

Flexibility in Responding to WTO Rulings Protects U.S. Sovereignty.

As an intergovernmental forum, the WTO makes rulings that are fundamentally different in character from rulings by U.S. courts. The WTO itself cannot "strike down" U.S. laws, as U.S. federal courts can, nor can it require the United States to modify domestic laws, regulations, or policies, such as its environmental laws, even if they conflict with WTO trade rules. Instead, WTO rulings identify aspects of the WTO member's policy that conflict with WTO rules and recommend that the member bring them into conformity.

Under WTO dispute settlement rules, compliance is the preferred way of responding to an adverse WTO ruling. However, a member may decide not to comply and either offer equivalent compensation or face foreign retaliation. These options, which are considered under the dispute settlement rules to be temporary, were designed to protect sovereignty. Another sovereignty protection is that both panels and the Appellate Body are expressly prohibited from adding to or detracting from the rights and obligations provided in the WTO agreements. An innovation that the United States sought in the Uruguay Round—the establishment of a standing Appellate Body—has proved to be an important check on the system during the WTO's first 5 years, substantially revising panel rulings the United States argued had raised sovereignty problems.

For example, in the Venezuela gas and shrimp-turtle cases (cases 1 and 25) that challenged U.S. environmental regulations, the Appellate Body modified WTO panel rulings that had, in the U.S. view, unacceptably limited the right of members to take measures to protect the environment. The Appellate Body played a similar role in the U.S. case against the EU's ban on hormone-treated beef

(case 8) when it affirmed that a member retains the right to set its own levels of human health protection, provided that the member complies with WTO requirements in promulgating measures to achieve that level.12 In joining the WTO, however, the United States committed itself to abide by the WTO rules. The United States played a major role in shaping those rules through its active participation in eight rounds of multilateral trade negotiations over a 50-year period. These and any new WTO rules are only established after a consensus is reached among WTO member governments to do so. The United States maintains that it has the right not to comply with WTO rulings. However, the United States recognizes that it may bear a penalty for not complying with WTO rulings, both in the form of retaliatory duties on U.S. exports and in terms of its reputation as a key player in the world trading system.

WTO dispute settlement rulings against the United States are not implemented unless and until Congress or the executive branch takes action to do so through legislation, regulation, or other administrative processes.13 USTR is required to consult with Congress, statutory private sector trade advisory committees, and state officials before U.S. agencies can make changes in U.S. agency regulations or practices in response to a WTO ruling. The head of the relevant agency must also provide an opportunity for public comment.

As a result of the 17 WTO cases against the United States, one U.S. law, two regulations, and one set of guidelines have been changed. To date, the changes have been relatively minor. For example, in May of this year, the United States amended a 1996 law for determining the country of origin of U.S. textile and apparel imports, in response to a WTO case filed by the EU (case 31). The amendment changed the country of origin of certain fabrics including silk, and of certain goods such as scarves, from where the raw fabric was made to where the product was both dyed and printed with two additional finishing operations.15 According to Department of Commerce statistics, the affected EU exports to the United States are relatively small.

WTO Cases Challenging U.S. Domestic Trade Law.

In implementing the Uruguay Round agreements, Congress sought assurance that the WTO's new dispute settlement mechanism would not undermine U.S. ability to act against foreign unfair trade practices, particularly under section 301 of the Trade Act of 1974 and under statutes designed to counter foreign subsidies or dumping (sales of products abroad at prices below those charged in the home market).

Despite three WTO complaints involving section 301,16 the United States has continued to use the law to address foreign trade barriers. The average number of section 301 investigations that the United States initiated actually increased from 1995 through 1998 compared to the previous 5 years.17 However, the United States is referring significantly more cases to the WTO for resolution now as compared to the 1990 through 1994 period.18 These cases often involve new trading rules, such as those on intellectual property, agricultural subsidies, and trade-related investment. Three challenges of U.S. section 301 actions have been brought before the WTO, but only one resulted in a WTO ruling, which upheld the ability of the United States to use the law consistent with WTO requirements.

- **A challenge launched just shortly after the WTO began operating involved a request by Japan for WTO consultations in response to a U.S. announcement of retaliatory duties under section 301 on $5.9 billion worth of Japanese auto imports (case 3). Japan questioned the U.S. action's consistency with WTO rules since the United States acted without WTO authorization, but a**

bilateral deal was reached on the day set for the United States to actually impose the duties, and Japan did not pursue the matter further in the WTO.

- **The EU made a largely unsuccessful challenge against U.S. section 301 and related provisions, alleging that aspects of the U.S. legislation effectively required the USTR to make decisions about foreign trade barriers before a WTO determination on whether a foreign trade practice had violated WTO rules or whether retaliation was warranted (case 42). The WTO panel found that though on its face the statute conflicted with WTO requirements, it did not violate WTO rules because of U.S. assurances that the United States would abide by WTO timetables and decisions in implementing the law.19 Only one of the four cases against U.S. antidumping measures resulted in a WTO ruling, and none of the cases against U.S. antidumping measures were seen as resulting in weakened U.S. protections. In the case involving a ruling, Korea challenged a U.S. Department of Commerce decision not to revoke an antidumping order on semiconductors (case 36). The WTO panel rejected almost all of Korea's arguments. However, it ruled against the United States on one of the Korean complaints. In response to this panel ruling, Commerce modified one of its antidumping order review procedures. After completing a review under the new procedures, Commerce determined that the antidumping duties should remain in effect. According to Commerce officials, the change in procedures does not weaken the U.S. antidumping regime.**

A number of challenges to U.S. antidumping and countervailing duties (tariffs levied to offset government export subsidies) that were beyond the scope of our study are in the pipeline, mostly in the steel sector. However, it is too early to predict the commercial or policy consequences of these cases for U.S. sovereignty. The pending challenges include challenges to U.S. antidumping measures on imports of Korean stainless steel and Japanese hot rolled steel, a U.S. countervailing duty action against lead bar and steel imports from the United Kingdom, and challenges by the EU and Japan to the 1916 Antidumping Act,20 which provides for antitrust-like remedies (treble damages) against price underselling of foreign goods.

WTO Cases Involving U.S. Health, Safety, and Environmental Measures

Concerns have also been expressed by Members of Congress, some legal experts, and interest groups that the WTO dispute settlement system may interfere with the U.S.' ability to set and enforce health, safety, and environmental measures. Such concerns surfaced in two U.S. cases dealing with environmental issues, both of which the United States lost. WTO members may claim exceptions to WTO rules in certain circumstances to set and enforce health, safety, and environmental measures. These exceptions, found in GATT article XX, protect U.S. sovereignty. When WTO members challenged two U.S. environmental measures as discriminatory, the United States acknowledged that it treated foreign products differently but said these differences were based on valid policy concerns, not disguised protectionism. Specifically, the United States argued as follows:

- **In the gasoline imports case brought in 1995 against the United States by Venezuela and Brazil (case 1), the United States said that the Environmental Protection Agency was concerned that it would be difficult to enforce the same rules for gasoline domestic products and imports in setting baselines, which are used to assess refiners' performance in meeting the goals of the 1990 Clean Air Act.**
- **In the 1996 shrimp-turtle case brought by four Asian countries, the United States argued (case 25) that shrimp trawling was among the leading factors driving sea turtles to the brink of extinction. The United States noted that the U.S. law in question22was designed to**

encouragenations to require comprehensive use of turtle extruder devices, which reduce turtle deaths. Since not all nations had adopted such requirements, the United States banned imports of shrimp from those that had not.

Despite the U.S. arguments in these cases, the WTO ruled that the U.S. measures violated WTO obligations. Nevertheless, the U.S. environmental objectives were maintained.

- **First, the WTO Appellate Body found the U.S. measures were eligible for one of the exceptions enumerated in article XX, after the initial panel had ruled they were not. This means that the United States is allowed to take these kinds of trade measures to attain its U.S. environmental objectives of conserving air quality and protecting sea turtles and still meet its WTO obligations, so long as they are consistent with the introductory clause of article XX. The clause requires that measures not be a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.**
- Second, the United States was ultimately able to comply with the WTO rulings by making changes in the way the affected laws are administered. Agency officials say these changes do not compromise their environmental objectives. In a case brought by Venezuela and Brazil (case 1), the Environmental Protection Agency changed a regulation implementing the 1990 Clean Air Act pertaining to the cleanliness of conventional gasoline in 1997. The change gives foreign suppliers the option of using a baseline for calculating gas cleanliness, based on their own performance rather than on an agency-established baseline (this treatment was already afforded to domestic suppliers). The Environmental Protection Agency also put in place a mechanism to offset any deterioration in the overall cleanliness of gas imports. In the shrimp-turtle case, the United States took steps to make the process it uses to certify that countries have comprehensive sea turtle conservation programs fairer and more open. It also began pursuing negotiations with countries toward adoption of multilaterally agreed-upon sea turtle conservation measures. However, environmental groups are still concerned about another change in U.S. guidelines made during the shrimp-turtle case that allows shrimp to be imported into the United States from countries that do not have comprehensive turtle conservation requirements.

Beyond the outcome of these specific cases, concerns remain about the dispute settlement system's capacity to deal with complex regulatory issues. Dispute settlement cases involving health, safety, and environmental matters necessitate that WTO panels balance trade against other concerns and weigh scientific and technical evidence. This raises two issues: (1) whether the WTO is the appropriate forum for such decisions and (2) whether the WTO is adequately equipped to make such decisions. Regarding the first issue, some U.S. health, consumer, and environmental organizations say that decisions involving balancing trade with other concerns are inherent policy choices best made by national governments and their citizens, not the WTO. In this regard, some maintain that as an organization dedicated to reducing trade barriers, the WTO cannot impartially address issues that involve policy goals that may conflict with free trade. For example, some consumer and environmental groups maintain that WTO dispute settlement panels in these U.S. cases did not show sufficient deference to domestic regulators' enforcement concerns. Regarding the second issue, there is concern that WTO panels, which are generally composed of trade officials, may lack or fail to seek the scientific and other technical expertise needed to fully evaluate complaints over complex factual matters such as health risks or alternative means of attaining regulatory goals.24 While U.S. courts are often asked to review such issues, some nongovernmental organizations and legal experts say U.S. courts are better equipped to do so than the WTO dispute settlement process, which in their view lacks sufficient procedural protections to ensure impartiality and due process.

Members Generally Complying With WTO Rulings, but Some Problems Remain.

Compliance with WTO rulings has generally been achieved in the 42 completed cases we examined. In 4 cases, however, it has been alleged by the complaining countries that some countries, including the United States, have failed to fully comply with the WTO rulings. In other cases, countries have complied with the rulings in ways that provide limited improvements in market access. The United States has proposed changes to improve compliance with WTO rulings.

In disputes involving the United States, WTO members have complied with WTO rulings about 75 percent of the time (see fig. 4). This is somewhat better than the overall rate of member compliance with WTO rulings (65 percent). It is also better than the average rate of full compliance under the GATT dispute settlement mechanism during its first 40 years of operation (67 percent).

Failure to comply with the WTO ruling was alleged to have occurred in four of the cases we examined. First, U.S. compliance is currently being contested in a case involving a U.S. antidumping order on Korean semiconductors (case 36). Although the United States changed its antidumping procedures as a result of the WTO panel ruling, Korea claims the change does not fully comply with the ruling. Second, the EU chose not to lift its ban on beef treated with growth hormones to comply with WTO rules and instead accepted retaliation (case 8). Third, in a case involving the EU's banana import regime (case 6), the WTO subsequently authorized the United States to retaliate.26 Fourth, in a case brought by the United States against Australian subsidies to an automotive leather manufacturer (case 24), the WTO panel ruled that Australia had not complied with its ruling, but the United States and Australia reached a negotiated solution. Compliance with WTO panel rulings does not always guarantee the desired outcome, because WTO members can sometimes comply with WTO rulings in ways that remove discrimination but do not liberalize market access. In the 1997 Korean liquor tax case (case 32), for example, Korea equalized barriers, rather than lowering them, by raising taxes on its domestic products to the level of taxes on imports. In the case involving Canada's restrictions on imports of U.S. magazines (case 10), Canada complied with the ruling but then introduced legislation that, if enacted, would have placed new restrictions on advertising by foreign magazine publishers. Canada and the United States ultimately resolved the dispute through additional bilateral negotiations that resulted in an agreement easing the Canadian restrictions and lowering other barriers.

U.S. proposals to improve compliance with WTO rulings include clarifying procedural ambiguities and allowing more aggressive U.S. retaliation in cases where compliance is not attained.

- **The United States and other WTO members are considering procedural changes to the agreement establishing the dispute settlement mechanism to avoid a situation in which the timing of authorization to retaliate and the review of the sufficiency of compliance measures may be in conflict,27 an issue that arose in the EU banana regime case.28 In the meantime, procedural ambiguities about the timing of these procedures have generally been resolved by agreement among the parties to disputes.**
- **The Trade and Development Act of 200030 requires the U.S. Trade Representative to periodically rotate the list of products subject to retaliation if implementation of a WTO ruling is not imminent.31 U.S. legislators introduced this provision in the act, referred to as a "carousel," because initial U.S. retaliation failed to prompt the EU to comply with WTO rulings on the EU's ban on hormone-treated beef and EU banana regime cases. The U.S. Trade Representative is considering changes to the U.S. retaliation list in both cases to meet the provisions of the act. However, the EU has recently questioned the carousel provision's**

consistency with U.S. WTO obligations by requesting WTO dispute settlement consultations with the United States.

Ultimately, compliance with WTO dispute settlement procedures must be evaluated on a relative scale, since compliance cannot be mandated, and retaliation cannot necessarily compel countries to change. Indeed, some business and consumer interests question the wisdom of U.S. retaliation, because it restricts trade and hurts consumers. At a more fundamental level, most legal experts say it is unrealistic to expect the system to produce 100 percent compliance, given its design. Several international legal experts suggested to us that diplomacy offers the best hope of resolution of politically sensitive disputes as was done, for example, in the case of the EU challenge to the U.S. Helms-Burton law, which codified U.S. economic sanctions against Cuba (case 16). They also said that retaining the option of noncompliance (through acceptance of retaliation or provision of compensation) is an important safety valve for broader acceptance of the WTO's essentially automatic dispute settlement system.

Timeliness of the WTO Dispute Settlement System.

While WTO disputes have generally been resolved within several months of the established timetables,32 the timeliness of WTO dispute resolution remains a concern to U.S. businesses interested in achieving the negotiated benefits of the WTO agreements. Although many U.S. complaints were settled quickly, of the 15 U.S. complaints we examined that went to adjudication, about 80 percent are taking longer than the established timetables call for. However, the time given countries to implement WTO rulings is generally within established guidelines.

- **Many of the U.S. cases—20 of 42—have been resolved quickly by the parties to the dispute. For example, all but one (India patent mailbox-case 21) of the five intellectual property rights cases were resolved without resort to a panel. On average, the 10 cases the United States initiated that were resolved prior to a panel ruling took about 11 months to resolve. The 10 cases brought against the United States that were resolved prior to a panel ruling were resolved even faster—4 months on average.**
- **The 15 cases the United States filed that went to panel and/or appellate adjudication resulted in adoption of final WTO rulings within an average of 21 months of the date of the initial U.S. request for consultations. This is longer than the 17 months in the agreed timetables for the consultation and adjudication processes. Only 3 of the 15 U.S. cases resulted in a ruling within 17 months. Difficult cases, such as those involving the India balance-of-payments situation, Canada's dairy subsidies and quotas, and the EU's ban on hormone-treated beef, took considerably more time (between 24 to 27 months). For cases brought 32Terence P. Stewart and Amy Ann Karpel, Review of the Dispute Settlement Understanding: against the United States, the timing was closer to the timetables, with rulings in 19 months on average.**
- **The time provided for WTO members to implement final WTO dispute settlement rulings in most cases has fallen well within WTO guidelines of 15 months. It ranged from as little as 3 months in the Australia leather case (case 24), to 8 months for a case involving Argentina's restrictions on imports of textiles, apparel, and footwear (case 23) and for the Korea semiconductors case (case 36), to 65 months for a case (case 4) involving Japan liquor taxes (the United States secured concessions for agreeing to this extended implementation period). For the cases we examined, an implementation period of between 9 to 15 months was typical. Only 2 of the 15 cases involved implementation periods in excess of 15 months (Japan liquor taxes and**

India balance-of-payments). In rulings against the United States, the implementation period was 6 months on average, with none longer than 15 months.

USTR officials said that several factors affect the dispute settlement system's timeliness. For example, cases are slowed down by the unavailability of panelists and the need for translation of documents. In addition, on occasion the complainants themselves seek additional time to prepare their cases.

Transparency of WTO Proceedings.

WTO dispute settlement decisions can have far-reaching effects, but information about and input into WTO proceedings is limited. The WTO dispute settlement system was established as a forum to resolve disputes between WTO member governments. Governmental parties to the dispute have certain rights, including the right to be heard, to receive and submit documents at prescribed intervals, to comment on draft panel reports, and to appeal panel decisions. However, unless they are recognized third parties in the case, other WTO members have no rights to participate in proceedings or to submit or receive documents, nor do other international organizations, nongovernmental organizations, local governments, and private persons. Members generally do not make their submissions to panels and the Appellate Body public, outside parties cannot observe or participate in proceedings, and transcripts are not prepared or made publicly available. Numerous U.S. officials, legal experts, business representatives, and interest groups say the secrecy that attends WTO dispute settlement proceedings undermines its legitimacy.

Some progress has been made in opening the system. As a result of a 1996 WTO decision, panel and Appellate Body reports are now released to the public immediately upon release to all WTO members. In several recent cases, key submissions of arguments by each party have been released to the public by mutual agreement among the parties to the dispute. Outside counsel are now permitted to attend WTO proceedings if they are made part of a disputing parties' delegation by that government. Moreover, in the shrimp-turtle case, the WTO Appellate Body decided that dispute settlement panels had the authority to consider the submission of amicus curiae or "friend of the court" legal briefs even if the briefs were not requested by the panel. In the recent WTO decision involving lead bar from the United Kingdom, the Appellate Body stated that individuals and organizations have no legal right to make submissions or to be heard by the Appellate Body but found that the Appellate Body has the legal authority to accept and consider amicus curiae briefs.

The United States has proposed additional steps at the WTO to improve transparency and has done some things on its own to give affected U.S. interests indirect access to the dispute settlement process. The Uruguay Round Agreements Act set forth procedural requirements to foster transparency and consultation with domestic stakeholders during WTO dispute settlement proceedings, including statutory trade advisory committees.33 Recently, USTR instituted the practice of publishing a Federal Register notice whenever it initiates or is subject to WTO consultations, providing an opportunity for public input at an earlier stage. The commercial and public interest groups we consulted felt that full and timely consultation with domestic stakeholders was critical to effective U.S. participation in WTO dispute settlement. The U.S. government was praised for taking steps to improve public participation and domestic consultations, but some said formal and informal mechanisms still need improvement. For example, several nongovernmental organizations said the statutory trade advisory mechanism as currently structured does not fully represent all the U.S. interests that could be affected by WTO decisions and that wider consultation prior to initiating cases was desirable. Within the WTO, the United States has proposed opening up panel proceedings to observation by outside parties, making legal briefs and other panel submissions public, permitting submission of amicus curiae briefs, and

obtaining earlier public release of panel reports. USTR is also seeking more timely compliance with a WTO requirement for parties to provide nonconfidential summaries of submissions upon request.

However, the United States faces outright opposition or limited support from most other WTO members to opening the WTO dispute settlement process further. At the root of this resistance is disagreement among WTO members over whether the dispute settlement process is an adjudicative one, where court-like transparency protections may be appropriate, or an intergovernmental conciliation mechanism, where confidential discussions are more typical. WTO members also disagree on the merits of greater openness in fostering full and impartial consideration of relevant issues. Many members say the WTO should retain its character as a strictly government-to-government forum and warn that there is a danger of overloading the system and subjecting it to interest group pressures more appropriately channeled through members' own domestic political mechanisms. There is also some concern that allowing outside participants may give developed countries an advantage over less developed countries,given their greater resources.

Summaries of 42 World Trade Organization -- Dispute Settlement Cases.

United States has been involved in 42 dispute settlement cases that have reached a conclusion from the World Trade Organization's (WTO) inception in 1995 through March 16, 2000, according to the U.S. Trade Representative (USTR). All the cases began with a request by a WTO member for consultations about an alleged violation of WTO obligations as set forth in the WTO agreements or accession documents. The cases then followed different paths through the dispute settlement system. Some were resolved before formal consultations took place. About half of the cases went to a WTO panel for adjudication. Table 1 lists the cases in chronological order. It is followed by a brief summary of each case that includes information on the case's outcome, major issues, resolution, and actions taken to comply with panel rulings.

Case 1: U.S. Regulations Affecting Gasoline Imports.
Case 2: Korea's Agricultural Shelf-Life Standards.
Case 3: U.S. Import Duties on Automobiles From Japan.
Case 4: Japan's Taxes on Distilled Spirits
Case 5: European Union Grain Tariffs.
Case 6: European Union Banana Import Regime.
Case 7: U.S. Underwear Import Restraint.
Case 8: European Union Ban on Meat From Hormone-Treated Animals.
Case 9: Japan Sound Recordings.
Case 10: Canada's Measures on Magazines.
Case 11: U.S. Wool Coat Import Restraint.
Case 12: U.S. Wool Shirt Import Restraint.
Case 13: Hungary's Agricultural Export Subsidies
Case 14: Pakistan Patent Mailbox Provision.
Case 15: Portugal Patent Protection.
Case 16: U.S. Helms-Burton Act.
Case 17: Tariff Retaliation on European Union Products.
Case 18: Turkey's Taxation of Foreign Films.
Case 19: Japan's Import Measures Affecting Film.
Case 20: U.S. Antidumping Investigation on Mexican Tomatoes.
Case 21: India Patent Mailbox Provision.
Case 22: Brazil's Automobile Regime.
Case 23: Argentina Duties on Textiles, Apparel, and Footwear.

Case 24: Australia Automotive Leather Export Subsidies.
Case 25: U.S. Ban on Shrimp Imports to Protect Turtles.
Case 26: Indonesia Automobile and Auto Parts Measures.
Case 27: European Union Customs Classification of Computer Equipment.
Case 28: U.S. Antidumping Order on Urea.
Case 29: Philippines Pork and Poultry Tariff-Rate Quotas.
Case 30: Japan's Measures Affecting Fruit Imports.
Case 31: U.S. Textile and Apparel Rules of Origin.
Case 32: Korea's Taxes on Distilled Spirits.
Case 33: Sweden's Civil Procedures for Intellectual Property.
Case 34: U.S. Antidumping Order on Color Television Receivers.
Case 35: India's Quantitative Import Restrictions.
Case 36: U.S. Antidumping Order on Korean Semiconductors.
Case 37: U.S. Ban on Imports of European Poultry.
Case 38: Mexico's AD Determination on High Fructose Corn Syrup.
Case 39: Canada Dairy Subsidies and Quotas.
Case 40: U.S. Tax Treatment for U.S. Foreign Sales Corporations.
Case 41: Imports of Canadian Cattle, Swine, and Grain.
Case 42: Provisions of the U.S. Trade Act of 1974.

Commercial Significance of 42 U.S. WTO Dispute Settlement Cases.

We examined the commercial stakes and outcomes of each of the 42 completed dispute settlement cases involving the United States (see app. III for more information on our methodology). Table 2 presents a summary of the commercial outcome of the cases, while table 3 presents a short description of each of these cases, giving information—when available—on the particular barriers or measures contested, the market size, the relevant trade or investment involved, and other indicators of the commercial relevancy of the cases to the United States.

GAO/NSIAD/OGC-00-196BR (June 2000)

WORLD TRADE ORGANIZATION.
U.S. Experience to Date in Dispute Settlement System.

http://www.gao.gov/archive/2000/ns00210.pdf

Results in Brief WTO member countries have actively used the WTO dispute settlement system during its first 5 years, filing 187 complaints as of April 2000.1 The United States and the European Union were the most active participants, both as plaintiffs and defendants. In the 42 cases involving the United States that had either reached a final WTO decision or were resolved without a ruling, we found that the United States has served as plaintiff in 25 cases and defendant in 17 cases. As a plaintiff, the United States prevailed in a final WTO dispute settlement ruling in 13 cases, resolved the dispute without a ruling in 10 cases, and did not prevail in 2 cases. As a defendant, the United States prevailed in 1 case, resolved the dispute without a ruling in 10 cases, and lost in 6 cases. Overall, our analysis shows that the United States has gained more than it has lost in the WTO dispute settlement system to date. WTO cases have resulted in a substantial number of changes in foreign trade practices, while their effect on U.S. laws and regulations has been minimal. In about three-quarters of the 25 cases filed by the United States, other WTO members agreed to change their practices, in some instances offering commercial benefits to the United States. For example, in response to a 1998 WTO ruling on Japanese distilled liquor taxes, Japan accelerated its tariff elimination and reduced discriminatory taxes on competing alcohol imports. The year following the resolution of the case, U.S. exports of whiskey to Japan, one of the largest U.S. markets for distilled spirits, increased by 18 percent, or $10 million. As for the United States, in 5 of the 17 cases in which it was a defendant, two U.S. laws, two U.S. regulations, and one set of U.S. guidelines were changed or subject to change.2 These changes have been relatively minor to date and the majority of them had limited or no commercial consequences for the United States.3 For example, in one case challenging increased U.S. duties on Korean semiconductor imports, the United States took action to comply with the WTO ruling while still maintaining the duties.

WTO Members' Use of Dispute Settlement System.
WTO Members' Share of 187 Complaints Filed, 1995-2000.

U.S 30% EU 26% .All others 44%.

The United States has filed 56 complaints, or almost a third of the 187 complaints filed as of April 2000. The European Union (EU) was the next most frequent filer, with 49 complaints or 26 percent of the total. Over a third of the U.S. and EU cases were against each other.

Agreed-to Changes in Foreign Practices.

• Other WTO members agreed to change their practices in about three-quarters of 25 cases United States filed against them.
• The following types of changes in foreign practices were agreed to:

- **Equalization of taxes on foreign and domestic goods**
- **Removal of import barriers**
- **Increases in intellectual property protection**
- **Removal of trade-related investment measures**

The 25 cases that the United States filed with the WTO resulted in several types of changes in foreign laws, regulations, or practices. For example, in one case involving a tax on imported liquor, Japan began lowering taxes and tariffs on distilled spirits in 1998 after a WTO ruling found that Japan had discriminated against imports. In another case, Japan lifted a varietal testing requirement for imports of apples, cherries, and other fruits at the end of 1999 after a WTO ruling found that the requirement was maintained without sufficient scientific evidence. As a result, U.S. exports of these fruits recently entered the Japanese market, with shipments in December 1999 and March 2000.

In a case the United States filed with the WTO challenging inadequate intellectual property protection for pharmaceuticals and agricultural chemicals, India passed legislation in March 1999 to establish a filing system for patent applications on these products and to grant exclusive marketing rights to the patent applicant. The WTO ruled that these changes were called for under the Uruguay Round agreement on intellectual property rights. Pakistan agreed to make similar changes to settle another WTO case filed by the United States. In a case involving investment measures that may limit or distort trade in the auto sector, Indonesia eliminated local content requirements and other trade-restricting measures in 1999 after a WTO ruling found Indonesia had discriminated against foreign investors.

Commercial Effects of Foreign Changes.

- **The United States challenged other WTO members' practices in 25 cases:**
- **14 cases provided U.S. commercial benefits through**
- **greater market access**
- **stronger protection of intellectual property rights.**

Of the 25 cases that the United States filed, 14 resulted in commercial benefits to the United States, either through greater market access or stronger intellectual property protection. For example, in a case involving Korean standards for food imports, Korea made changes in its food code in 1995 and

1996 after a WTO case was filed. Korea's standard had previously kept out approximately $87 million of U.S. chilled beef exports and $79 million of U.S. pork exports, according to Department of Agriculture estimates. Also, in a case challenging Japan's inadequate time period for protecting copyrights on sound recordings, Japan changed its copyright law in 1996 after a WTO ruling. As a result of this change, U.S. sound recordings will be protected for a 50-year period, including retroactively. The U.S. recording industry estimated that these protections are worth about $500 million annually, based on lost sales in 1995.

In the 11 other cases that the United States filed with the WTO dispute settlement body, 9 had limited commercial benefits, either because (1) other barriers existed; (2) implementation of the WTO ruling was incomplete or disputed; or (3) the case was brought mainly to uphold trade principles. Regarding cases where other foreign barriers existed, the United States challenged Canadian subsidies and import barriers.

Commercial Effects of Foreign Changes (cont.)

- **In 25 cases U.S. filed (continued):**
- **9 cases had limited commercial benefits**
- **Other barriers existed**
- **Compliance with ruling incomplete or disputed**
- **United States brought cases to uphold trade principles**
- **2 cases where United States did not prevail**
- **1 failed to gain greater market access**
- **1 was mitigated by separate agreement**

dairy market. Among other modifications, Canada changed its tariff-rate quota system,1 which the U.S. dairy industry estimated could increase U.S. exports by $45 million. However, the U.S. dairy industry cannot take advantage of these changes until the United States and Canada conclude separate, ongoing negotiations on fluid milk standards. Currently, neither country can export fluid milk to the other (except in retail size containers) due to differences in the two countries' standards. Regarding WTO rulings whose implementation is incomplete or disputed, in two high-profile cases the EU decided not to fully comply with WTO rulings involving imports of bananas and hormone-treated beef. In addition, as of early June, Australia had not complied with a 1999 WTO ruling that maintained that Australia had provided an improper export subsidy grant to a leather manufacturer; the WTO had recommended that the grant be repaid. The United States and Australia have been negotiating a compliance plan. Also, in a case primarily involving trade principles rather than commercial interests, the United States filed a case against Hungary involving agricultural export subsidies, although U.S. products do not directly compete with the affected Hungarian exports. According to the Office of the U.S. Trade Representative, the case was brought to protect the integrity of the Uruguay Round Agreement on Agriculture. The Office maintained that Hungary was in violation of the agreement's provisions limiting these subsidies.

The United States initiated two WTO cases with high commercial stakes that it lost. In the first case, involving alleged trade restrictions in Japan's film and photographic supplies market, the United States failed to gain greater access to this market as a result of the loss. In the other case, the United States challenged an EU change in customs classification of local area network equipment that resulted in higher tariffs for U.S. exports. Although the United States lost the case, the effects of the loss were mitigated by the WTO's 1997 Information Technology Agreement, which made U.S. exports of this equipment duty free.

Out of the 17 WTO cases in which U.S. practices were challenged, only one resulted in a change in U.S. law, and that change was relatively minor. In another case, the United States pledged to seek from Congress presidential authority to waive certain provisions of a law. However, Congress has yet to grant the President this authority.

Agreed-to Changes in U.S. Laws.

In 5 of the 17 cases where the United States was defendant, two U.S. laws, two U.S. regulations, and one set of U.S. guidelines were subject to change. Changes to date have been minor.

The two laws included:

- **Textile and apparel rule of origin law**
- **Visa provisions of Helms-Burton Act**

Regarding the one change in U.S. law, the United States amended a 1996 rule of origin law for determining the country of origin of U.S. textile and apparel imports. The United States made this change in May 2000 in response to a WTO case filed by the EU. The amendment changed the country of origin of certain fabrics including silk, and of certain goods such as scarves, from where the raw fabric was made, to where the product was both dyed and printed with two additional finishing operations.2 The EU maintained that the 1996 law's criteria for determining country of origin affected its quota-free access to the United States. This is because raw fabric is often produced in countries subject to U.S. quotas, such as China. According to Department of Commerce data, the affected EU exports to the United States are relatively small. In another case, the EU challenged certain aspects of a U.S. law involving trade sanctions against Cuba. The United States and the EU reached an agreement in 1997 before a WTO dispute settlement panel ever met. Among other things, the EU agreed to drop the dispute settlement case in return for a U.S. pledge to seek from Congress presidential authority to waive title IV of the Helms-Burton Act,3 which authorizes denial of U.S. visas to persons involved in trafficking in confiscated Cuban property when certain conditions are met. Congress has yet to grant the President authority to waive title IV.

Two U.S. regulations have been subject to change as a result of WTO rulings. First, in a case brought by Venezuela and Brazil, the Environmental Protection Agency (EPA) changed a regulation implementing the 1990 Clean Air Act pertaining to the cleanliness of gasoline.4 EPA modified the regulation in 1997 to give foreign suppliers the option of using a baseline

Agreed-to Changes in U.S. Regulations and Guidelines.

- **As defendant in 17 completed cases, the United States agreed to change a regulation or guideline in 3 cases:**
- **Environmental Protection Agency gasoline regulation**
- **Antidumping regulation**
- **Endangered sea turtle guidelines**

Brazil and Norway, which account for 0.18 percent of U.S. gas supplies, are currently the only countries exporting to the United States under this option. Also, as a result of a case brought by Korea involving dynamic random access memory (DRAM) semiconductors, the Department of Commerce in 1999 changed its standard for lifting an antidumping order5 to conform to WTO antidumping

provisions.6 The United States had imposed duties on certain Korean imports of these semiconductors after it determined that they were being dumped in the U.S. market. The WTO found that the previous U.S. standard placed too high a burden of proof on the party contesting the continuation of an antidumping order. After the U.S. regulation was changed, Commerce conducted another review of Korean DRAM imports, and Commerce still found the likelihood of continued dumping and kept the antidumping order in place. At Korea's request, a panel is now examining U.S. compliance with the WTO ruling. Finally, as a result of a WTO case challenging a U.S. ban on imports of shrimp harvested in a manner harmful to endangered sea turtles, in July 1999 the State Department revised a set of certification guidelines.7 The revision provided more transparency (openness) and due process in making decisions to grant countries' certification to export shrimp to the United States. This change was very minor and, throughout the case, U.S. restrictions on shrimp imports remained in effect. However, one of the plaintiffs—Malaysia—has reserved its right to challenge U.S. compliance with the WTO ruling.

Commercial Effects of U.S. Changes.

- **WTO members challenged U.S. practices in 17 cases:**
  - **5 cases United States lost had limited economic consequences**
  - **gas and turtle cases - primarily environmental, not commercial, concerns**
  - **2 textile cases - U.S. restraints removed, but limited effect**
  - **DRAM case - U.S. antidumping duty maintained**
  - **1 case United States lost (tax treatment of U.S. foreign sales corporations) - has high commercial stakes, but yet to be implemented.**
- **11 cases were resolved or U.S. won.**
  - **5 with potentially high commercial stakes**
  - **all had limited or no commercial effect.**

In the 17 cases in which the United States was a defendant, the United States lost 6 cases, 5 of which had limited commercial consequences. The sixth case, challenging provisions of U.S. tax law regarding foreign sales corporations, has potentially very high commercial stakes. The United States provides tax exemptions to a wide variety of companies on exported products used abroad. In this case, a February 2000 WTO ruling found that these tax provisions constituted prohibited export subsidies. The United States has not fully determined how it will implement the WTO's decision. Of the 11 WTO cases filed against the United States that were resolved without a panel ruling or that the United States won, 5 had potentially high commercial stakes. However, the outcomes of all 11 cases had a limited or no commercial effect. For example, one of these high-stakes cases involved a challenge by Mexico to the initiation of a U.S. antidumping investigation on imports of certain fresh tomatoes. The U.S. International Trade Commission reported that imports of fresh tomatoes from Mexico were $452 million, or almost 36 percent, of the $1.27 billion U.S. market in 1995. The Commerce Department and the U.S. International Trade Commission made preliminary determinations that the Mexican imports were being sold at less than their fair value and were causing material injury to the U.S. industry. If the final investigations upheld these findings, the Commerce Department could have placed duties on these imports to raise their price up to the fair market value. Mexico requested WTO consultations with the United States about this issue. Commerce, however, resolved the matter with a formal commitment by Mexican growers not to sell their exports below a certain price. This agreement was reached to eliminate the injurious effects of the dumped imports on the U.S. industry. The remaining six cases resulted in some U.S. government action, with minimal commercial effect. For example, in a case challenging U.S. duties on imports of urea (primarily used as a fertilizer) from the EU, the United States removed the duties after it found that U.S. industry was not interested in maintaining them.

Conclusions.

- **To date, United States has gained more than it has lost in the WTO dispute settlement system.**
- **Impact on United States should not be judged by wins and losses or commercial value alone.**
- **Not enough cases to fully evaluate the system.**
- **Some high-profile cases for United States are in the pipeline.**

Our analysis shows that the United States has gained more than it has lost in the WTO dispute settlement system to date, for several reasons. First, the United States has been able to effect changes in several foreign laws, regulations, and/or practices that it considered to be restricting trade. Further, several of the cases in which the United States prevailed provided commercial benefits to U.S. exporters or investors. In addition, WTO rulings have upheld several trade principles that are important to the United States, such as the patent protection provisions of the Uruguay Round agreement on intellectual property rights and provisions in the Agreement on Agriculture to eliminate export subsidies. The dispute settlement system's impact on the United States should not be evaluated solely on the basis of U.S. wins and losses. First, some winning cases do not result in the desired outcomes. For example, the EU decided not to fully comply with two WTO decisions involving bananas and hormone-treated beef and instead face U.S. retaliation. Conversely, some losses are only partial, as in the case regarding Korean DRAM semiconductors where the U.S. antidumping order being challenged was maintained despite an adverse WTO ruling. In addition, some losing cases actually uphold WTO principles important to the United States, as in the case involving endangered sea turtles, which expressly upheld provisions that protect the conservation of natural resources, including sea turtles. Moreover, the United States derives systemic benefits from a well-functioning multilateral dispute settlement system, even if it does lose some cases. It is important to note, however, that there have not yet been a sufficient number of WTO dispute settlement cases to fully evaluate the system.

In addition, the outcomes of some important pending WTO cases could be problematic for the United States, including several cases that challenge various aspects of U.S. trade laws, such as U.S. antidumping laws.

Appendix I.

Commercial Consequences in 42 WTO Dispute Settlement Cases Involving the U.S.
Cases Filed by the United States.

In the 25 disputes the United States filed with the World Trade Organization (WTO), 14 cases resulted in commercial benefits to the United States, either by achieving greater market access or stronger intellectual property protection (see table 1). In nine cases, the United States gained limited commercial benefits, either because (1) other trade barriers existed; (2) implementation of the WTO ruling was incomplete or disputed; or (3) the case was mainly brought to uphold trade principles (see table 2). Finally, the United States lost two cases with high commercial stakes.

The two cases that the United States filed but in which it did not prevail were the Japanese film import barriers case in which the United States failed to gain greater market access and the EU computer equipment customs classification case, whose loss was mitigated by provisions of the 1997 Information Technology Agreement that made the affected equipment duty free.

Cases Filed Against the United States.

Other WTO members brought 17 cases against the United States. In 11 cases, the disputes were resolved without a WTO ruling, or the United States prevailed. Some of these cases had high commercial stakes, but all were resolved with limited or no commercial effect (see table 3). In the six cases where the United States did not prevail, five cases had limited commercial consequences, while one case where the ruling is yet to be implemented has potentially high commercial stakes (see table 4).

Objectives, Scope, and Methodology.

The Chairman of the House Ways and Means Committee requested that we review the WTO's dispute settlement system, focusing on WTO member countries' use of the system over the past 5 years. In conducting the work, we examined (1) how WTO members have used the new system, focusing primarily on cases involving the United States and (2) the impact of these cases on foreign trade practices and U.S. laws and regulations, and their overall commercial effects.

To examine how WTO members have used the system over the past 5 years, we analyzed ggregate WTO data on member participation. To evaluate the impact on U.S. laws and regulations and foreign practices, we examined 42 cases involving the United States that the Office of the U.S. Trade Representative identified as completed as of March 16, 2000.

Completed cases included those that had gone through WTO litigation with a panel and/or appellate body ruling and cases that were resolved without a WTO ruling. To determine the impact of the cases on U.S. laws and regulations, and on foreign practices, we identified those cases whose outcome resulted in a change in laws, regulations, or guidelines or any permanent change in administrative procedures. We reviewed WTO dispute settlement documents including requests for consultations, panel and appellate body decisions, and other documents recording how the resolution of the cases was to be implemented. We also reviewed U.S. Federal Register notices where appropriate, as well as pertinent U.S. laws and regulations. We interviewed senior officials from the Office of the United States Trade Representative, including the Assistant U.S. Trade Representative for Monitoring and Enforcement, on the major issues and outcomes of all 42 cases. Regarding particular cases, we also met with high-level officials from the Departments of Agriculture, Commerce, State, and the Treasury, as well as the Environmental Protection Agency. We also spoke with industry representatives, interest groups, trade attorneys, and academics knowledgeable about WTO cases. To determine the changes in foreign practices, we relied on WTO and foreign government documents, as well as interviews with high-level U.S. government officials from the agencies previously listed. We did not conduct an independent analysis of the foreign changes or confirm those changes with the individual foreign governments.

To evaluate the commercial effects of the 42 cases, we examined the available evidence for each case concerning the U.S. commercial interests involved and the commercial consequences for the United

States of the case's resolution. However, we did not formally assess the economic impact on the United States of each dispute's outcome. It is difficult and resource intensive to distinguish among trade flows and competing factors affecting a particular market in order to isolate the economic impact of a WTO decision. Therefore, to present indicators of the commercial interests involved in the disputes, we gathered information on the market size, the level of investment, and the level of trade in the cases. In categorizing cases as having potentially high commercial stakes, we examined whether the case involved a high share of a particularly large market, large duties or sanctions, or wider implications for U.S. trade and trade policy. We also examined the trade barriers involved and the extent to which they were or might be removed. In cases involving intellectual property protection, we evaluated whether such protection had increased as a result of the case. In addition, we examined changes in trade flows of particular products after the resolution of a case. To evaluate the commercial consequences of the cases, we also interviewed government officials and industry experts with the Office of the U.S. Trade Representative; the Departments of Agriculture, Commerce, Energy, State, and the Treasury; as well as officials from the U.S. International Trade Commission, the Patent and Trademark Office, and the National Marine Fisheries Service. We used trade, market, and other data from the Departments of Commerce, Energy, Agriculture, and the Treasury, as well as the U.S. International Trade Commission, and the National Marine Fisheries Service. When available, we examined government and industry group estimates of the economic impact of the cases; however, we did not verify their results. We conducted our work from March through June 2000 in accordance with generally accepted government auditing standards.

[CRS REPORTS TO CONGRESS]

CRS Report for Congress
(RL32810)

WTO: Antidumping Issues in the Doha Development Agenda.

Updated April 20, 2006
http://fpc.state.gov/documents/organization/65760.pdf

Summary.

At the November 2001 Ministerial meeting of the World Trade Organization (WTO) in Doha, Qatar, WTO member countries launched a new round of trade talks known as the Doha Development Agenda (DDA). One of the negotiating objectives called for "clarifying and improving disciplines" under the WTO Antidumping and Subsidies Agreements. Since antidumping is the most frequently used trade remedy action worldwide, most of the discussion focused on changing ways that WTO members administer antidumping (AD) actions.

WTO negotiations in the DDA directly involve Congress since any trade agreement made by the United States must be implemented by legislation. In addition, Congress has an important oversight role in trade negotiations as provided in legislation granting presidential Trade Promotion Authority in the Trade Act of 2002 (P.L. 107-210).

The frequent use of antidumping actions by the United States and other developed nations has come under criticism by other WTO members as being protectionist. Many Members of Congress defend the use of U.S. antidumping actions brought as necessary to protect U.S. firms and workers from unfair competition. However, because the United States is also a leading target of antidumping actions by other countries, some U.S. export-oriented firms may support changes to the Antidumping Agreement.

The positions of major players in trade remedy talks are well-documented by position papers circulated through the WTO Negotiating Group on Rules. At the December 2005 WTO Ministerial in Hong Kong, rules negotiators were called upon to further "intensify and accelerate the negotiating process."

Most of the proposals on trade remedies focus on changing the Antidumping Agreement, currently a somewhat ambiguous document that gives broad guidelines for conducting AD investigations, in order to provide more specific definitions and stricter procedures. The goal of many of the WTO members seems to be to lower the level of antidumping duties provided per investigation and/or to

provide more restrictions on the ability of officials to grant relief to domestic industries. The gap between the U.S. position, where there is strong support in Congress to preserve the rights of WTO members to provide AD relief to domestic industries, and the viewpoints of other countries appears to be wide and may be difficult to narrow, but some countries see revision of the Antidumping Agreement and other WTO disciplines on trade remedies as a "make or break" issue if the DDA is to succeed.

This report examines antidumping issues in DDA negotiations by analyzing the issue in three parts. The first provides background information and contextual analysis for understanding why the issue is so controversial. The second section focuses on how antidumping issues fit into the DDA, and the third section provides a more specific overview of major reform proposals that are being considered. This report will be updated as events warrant.

Introduction.

At the November 2001 Ministerial meeting of the World Trade Organization (WTO) in Doha, Qatar, WTO member countries launched a new round of trade talks known as the Doha Development Agenda (DDA). One of the negotiating objectives members agreed to address, in spite of opposition from U.S. negotiators, called for "clarifying and improving disciplines" on trade remedies. At the December 2005 WTO Ministerial in Hong Kong, the " high level of constructive engagement" in the trade remedy area was acknowledged, and negotiators were directed to "intensify and accelerate the negotiating process."

Trade remedies are laws used by countries to mitigate the adverse impact of various trade practices on domestic industries and workers. Antidumping (AD) laws provide relief to domestic industries that have suffered material injury or are threatened with material injury as a result of competing imports being sold at prices

shown to be less than their fair market value (LTFV). AD laws and actions are often controversial because many trade experts view them as protectionist. Others believe that they are an essential means of mitigating the adverse impact of unfair trade on domestic companies, workers, and the communities in which they are located.

Historically, multilateral negotiations on antidumping have been extremely contentious; in fact, some analysts claim that a failure to reach consensus on the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement) was largely responsible for delaying the completion of the Uruguay Round negotiations by as long as two years. In the DDA, a coalition of developed and developing nations known as the "Friends of Antidumping" are pushing for reforms that many in Congress oppose and U.S. negotiators are resisting. However, many WTO members regard trade remedy — especially antidumping — reform as a "make or break" issue in terms of their acceptance of any final DDA agreement. The gap between the U.S. position and that of other countries is wide and may be difficult to bridge.

Negotiations on antidumping in the DDA are taking place within the framework of the WTO Negotiating Group on Rules. In the initial phase of Rules negotiations, the major issues on antidumping and the positions of interested parties were established through position papers written by WTO members. At this point in the negotiations, WTO members are suggesting changes to the text of the Antidumping Agreement that will be incorporated into a draft revision of the document. The

chairman of the rules negotiations has requested that all of these changes be submitted by the end of April so that he has sufficient time to complete the draft by July.

This report analyzes the issue in three parts. Section one provides background information and contextual analysis for understanding why the issue is regarded as controversial. It briefly discusses the Antidumping Agreement, U.S. antidumping laws and how they have worked in practice. Some U.S. stakeholders, including many U.S. industries and workers, believe that U.S. laws are effective and should not be changed or weakened. Others, including many foreign exporters to the U.S. market, U.S. exporters to international markets, U.S. manufacturers dependent on lower-cost inputs for their products, and other domestic importers of goods subject to AD actions, want to change the allegedly arbitrary way in which they are implemented.

The second section focuses on how antidumping issues fit into the DDA. The mandate to negotiate is explained and negotiating activity to date summarized. The nature of the reforms being considered is described in general terms.

Section three provides a more specific overview of major reform proposals. Many proposals attempt to regulate the manner by which countries assess dumping margins. Other submissions call for tightening rules or providing more specific definitions for terminology used in the WTO Antidumping Agreement. These proposals, if implemented, could significantly reduce the number of permissible AD investigations and/or the amount of duty margins assessed, thus reducing significantly the protective impact of the remedies.

Background and Analysis.

"Dumping" is defined in U.S. law as the actual or likely sale of merchandise imported into the United States at "less than its fair value" (LTFV) when these sales cause or threaten material injury to a U.S. industry manufacturing similar goods, or materially retard the establishment of a U.S. industry. This practice is condemned in WTO rules as an unfair trade practice that can cause market disruption and injure producers of like products in the receiving market. Antidumping laws are used by the United States and many U.S. trading partners in an effort to lessen the adverse impact of unfairly traded imports on domestic industries, producers and workers.

Trade remedy actions, particularly AD actions, continue to be a subject of intense debate within Congress, the WTO, and the international business community. Stakeholders in favor of preserving and strengthening AD laws include many U.S. import-competing industries vulnerable to the effects of increased trade liberalization. The steel and chemical industries have used antidumping measures frequently, but smaller industries (such as honey, candles, and crawfish) have also initiated successful AD petitions. Many in Congress have expressed a compelling interest in ensuring that the firms and workers they represent are able to compete on a "level playing field" in the face of increased global competition from firms that use unfair trade practices to gain greater U.S. market share, and believe that AD laws and actions are essential tools to that end.

Stakeholders in favor of eliminating or scaling back these actions include domestic retailers and U.S. consuming industry sectors, such as the automobile or construction industries, that import raw materials or other inputs to include in their
downstream products. U.S. exporters have sometimes expressed support for relaxing AD laws because they face similar actions in other countries, and could bear the immediate effects of any trade retaliation if any U.S. laws are determined not to conform to WTO disciplines. Many multinational

corporations also favor AD reform because they might have greater freedom to ship products at various stages of development across national boundaries for further transformation. These stakeholders, concerned about selling or producing goods at the lowest cost so that their end-use goods are also competitive, often accuse users of AD action of being protectionist and administrative officials of making arbitrary and politically motivated decisions.

WTO Antidumping Agreement.

The General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Antidumping Agreement set forth general governing principles applicable between WTO members, including the "most-favored-nation" principle and guidelines for market access and treatment of imported goods. Article VI of GATT 1994 authorizes WTO members to impose AD duties in addition to other tariffs if domestic officials find that (1) imports of a specific product are sold at less than normal value, and (2) the imports cause or threaten injury to a domestic industry, or materially retard its establishment.

The Antidumping Agreement clarifies and expands Article VI by laying out guidelines for determining if dumping has occurred, identifying the "normal value" of the targeted product, and assessing the dumping margin. The Agreement also provides specific rules for administrative authorities responsible for conducting injury investigations. Detailed methodology is set out for initiating anti-dumping cases, conducting investigations, and ensuring that all interested parties are given an opportunity to present evidence. Specific criteria are set for investigations, including a requirement that investigations must be dropped if authorities determine that the volume of the dumped imports is negligible (less than 3% of total product imports from any one country, or less than 7% for investigations involving several countries).

Antidumping measures must expire five years after the date of imposition, unless an investigation shows that ending the measure would continue to result in injury. According to the Antidumping Agreement, all WTO Member countries must inform the Committee on Antidumping Practices about anti-dumping actions, promptly and in detail, and must also report on all ongoing investigations.

U.S. AD Laws.

Although U.S. laws generally conform to the current WTO Antidumping Agreement, some U.S. laws and investigations have been successfully challenged through the WTO dispute settlement process. Recently, in response to an adverse WTO ruling, Congress repealed the Antidumping Act of 1916, which provided for criminal and civil penalties for any person importing goods in the U.S. market with the intent of destroying a domestic industry in the United States.8 WTO dispute settlement panels and the WTO Appellate Body have also ruled against the Continued Dumping and Subsidy Offset Act (CDSOA), or "Byrd Amendment," which requires that all duties collected pursuant to antidumping and countervailing investigations must be redistributed to qualified petitioners and interested parties that have been injured by the subject imports. A U.S. administrative practice known as "zeroing" faces WTO challenges from a number of countries, and had been found in WTO dispute settlement proceedings to violate WTO obligations. This practice and the subsequent panel determinations are discussed in a later section.
In the United States, AD investigations generally begin with the filing of a petition by a domestic industry or representative (e.g. labor group, industry association) alleging that certain products are being imported into the country at less than fair value, thus causing material injury, or threat of material injury, to the petitioners. Investigations are carried out by two agencies: the International

Trade Administration (ITA) of the Department of Commerce, which investigates allegations of sales at less than fair value (LTFV); and the International Trade Commission (ITC), which investigates injury allegations. These agencies conduct preliminary and final investigations in a detailed administrative process with specific time lines.

If affirmative final determinations are made by both agencies, an "AD duty order" imposing a duty equivalent to the "dumping margin"12 is issued for the targeted product. This duty is intended to offset the effects of dumping by creating a "level playing field" for the domestic producer. According to current U.S. law, all duties collected as a result of AD duty orders are distributed to the petitioners and interested parties as provided by the CDSOA.

U.S. law also allows the ITA to suspend an investigation at any point in favor of an alternative agreement to: (1) eliminate completely sales at less than fair value or to cease exports of the subject merchandise; (2) eliminate the injurious effect of the subject merchandise or; (3) limit the volume of imports of the subject merchandise into the United States, provided the foreign exporters agree to certain specific conditions. In each case, the ITA must be satisfied that the agreement is in the public interest and that effective monitoring by the United States is practicable.

All AD duty orders and suspension agreements are subject to annual review if requested by any interested party to an investigation or deemed necessary by the ITA. "Changed circumstances" reviews may also be requested at any time, but the ITA must determine whether there is sufficient cause to conduct the review. During the review process, the ITA recalculates the dumping margin for each exporter, thus the AD duties assessed on the subject merchandise may be raised or lowered depending on the price of sales transactions during the period of review (POR). In a changed circumstances review, the ITC also reviews whether a revocation of the order is likely to lead to continuation or recurrence of material injury, or whether a suspension agreement continues to eliminate completely the injurious effects of the imports of subject merchandise.

"Sunset" reviews must be conducted on each AD order no later than once every five years. The ITA determines whether dumping would be likely to continue or resume if an order were to be revoked or a suspension agreement terminated, and the ITC conducts a similar review to determine whether injury to the domestic industry would be likely to continue or resume. If both determinations are affirmative, the duty or suspension agreement remains in place. If either determination is negative, the order is revoked, or the suspension agreement is terminated.20 In practice, sunset reviews of AD orders resulted in continuations about 53% of the time, according to ITA statistics, and several U.S. AD orders have been in effect since the mid-to-late 1970s.

International AD Activity.

Many WTO members are concerned about an apparent escalation of AD activity worldwide, especially since the implementation of the Antidumping Agreement in 1995. Another matter of concern is the apparent increase in these measures by developing countries — considered "nontraditional" users of AD measures. This is one of the reasons that led to the pressure for including WTO disciplines on antidumping in DDA negotiations.

Supporters of antidumping measures acknowledge that AD activity has increased (at least prior to 2003), but also point to a marked increase in the volume of international trade as a whole, suggesting that as overall trade increases the frequency of unfair trading practices, such as dumping, will also have a natural tendency to increase.

WTO statistics on worldwide AD activity may help illustrate the scope and magnitude of the problem. According to antidumping statistics for January 1981 through June 2005, the total number of AD initiations rose steadily from 1990 to 1993, decreased sharply in 1994 and 1995 and peaked again in 1999, before reaching an all-time high of 366 in 2001. However, AD activity has been declining since then. In fact, on November 1, 2004, the WTO Secretariat announced that from the period of January 1, 2004 to June 30, 2004 there were 52 final AD measures implemented (duties imposed as well as suspension agreements), as opposed to 114 during the same period in 2003.24 The rapid decline has led some more skeptical observers to speculate that countries are curbing their appetite for antidumping activity due to the ongoing DDA negotiations. Since international activity seems to vary widely from year to year, it is unclear if the trend toward fewer measures will continue.

Antidumping Negotiations in Doha.

When the trade ministers of WTO member nations convened at the November 2001 Ministerial of the World Trade Organization in Doha, Qatar, many countries placed launching a new round of trade negotiations high on the agenda. Some observers believed that a new trade round would give the world economy a much needed stimulus. U.S. officials wanted to negotiate expanded market access for U.S. exporters, especially in the agriculture and service sectors. As a result of mounting international concern on expanding trade remedy activity in general and about antidumping in particular, a coalition of developed and developing WTO member countries called the "Friends of Antidumping" — a group consisting of the European Union, Brazil, Chile, China, Colombia, Costa Rica, Hong Kong, India, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand, and Turkey — believed that any new framework for negotiations should include talks on improving WTO trade remedy rules.

The European Union may have joined the coalition of developing countries, in part, because it is a leading target of antidumping measures. EU trade officials expressed concern at Doha, primarily concerning major differences among countries in their interpretation and application of WTO rules in their domestic trade remedy procedures.29 Many of the developing nations in the "Friends of Antidumping" group argued that trade remedy action disproportionately affects their economies, and that the Antidumping Agreement should require that developed nations provide some form of "special and differential treatment" when investigating products originating in developing nations.

Then-U.S. Trade Representative (USTR) Robert B. Zoellick, aware of congressional interest in reserving the effectiveness of U.S. trade remedy laws, initially resisted efforts to open negotiations on the Antidumping Agreement. However, U.S. negotiators relented when it seemed evident that the new round of talks would not go forward without some concessions on antidumping. They were able, however, to include language in the Doha negotiating documents that limited radical change, and were also successful in injecting a certain amount of ambiguity in terms of the mandate. The final language of the Doha Ministerial Declaration regarding trade remedies read as follows:

> ***In light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase.***

Ambassador Zoellick later defended the decision to compromise on negotiations on trade remedies by stressing that the United States would push an "offensive agenda" on trade remedies in order to address the increasing "misuse" of trade remedy measures by other WTO Member countries against U.S. exporters. He also said that since WTO dispute panels had gone against the United States in several cases involving trade remedy cases, U.S. negotiators were especially interested in tightening dispute panel and Appellate Body "standard of review" provisions so that panels do not add to the obligations of, nor diminish the rights of, WTO Member nations. Many congressional supporters of trade remedy laws believe that Zoellick did not try hard enough to leave them off the table, and subsequently are concerned about the ability of the USTR to negotiate in this area in a manner that is favorable to their manufacturing constituents.

Recent Developments.

Hong Kong Ministerial, work on trade remedies has taken place in three overlapping phases. First, negotiators presented formal written papers indicating the general areas in which the participants would like to see changes in the agreements. A compilation of the 141 proposals was published by the Chairman in August 2003, just prior to the Cancun Ministerial.35 Second, after Cancun ministerial and through other ongoing negotiations, negotiators began discussing their positions in more detail, sometimes proposing legal drafts of suggested changes. This phase helped negotiators develop a clearer idea of what proponents of specific changes are seeking, and "a realistic view of what may and may not attract broader support in the group." The third phase consists of bilateral and plurilateral meetings for technical consultations, partly aimed at developing a possible standardized questionnaire which administering officials could use in AD investigations in order to reduce costs and increase transparency.

The Chairman's report emphasizes "we are not dealing with ... big picture issues, but with a very large number of highly specific issues" and the result of discussions will be based on the "precise details of the drafting." Therefore, he said, traditional means of arriving at consensus in WTO discussions such as "modalities" may not work in this context.

The Chairman of the Rules Committee further noted that any consensus on changing the ADA, SCM, or other trade remedy agreements is likely to involve internal trade-offs on trade remedies in exchange for external linkages — that is, perceived successes in other areas of DDA negotiations, such as improved agricultural market access or services trade.40 Others agree, speculating, therefore, that any agreement on changes to trade remedies is not likely to take place until the end of the round. However, some speculate that, given the opposition expressed by many in Congress to any changes in the WTO agreements that would lead to lessening the effectiveness of U.S. trade remedy laws, some Members may not be willing to yield on such modifications *even if* major concessions were reached in other areas deemed critical to U.S. interests.

Hong Kong Ministerial Text. In Appendix D of the Hong Kong Ministerial Declaration issued on December 18, 2005, WTO members reaffirmed that achievement of substantial results on all aspects of the Rules mandate" is important to the further development of the rules-based multilateral trading system. The document recognized that negotiations, especially on antidumping procedures, have intensified and deepened and that "participants are demonstrating a high level of constructive engagement." The Group was directed "to intensify and accelerate the negotiating process" and complete the process of analyzing proposals by Participants on the AD and SCM Agreements as soon as possible."

The Chairman was then directed to prepare consolidated texts of the Antidumping and Subsidies Agreements based on the previous negotiating papers which will become the "basis for the final stage of the negotiations." This assertion is controversial given the opposition of many in Congress to any concessions that may weaken U.S. trade remedy laws.

The draft document also suggests that WTO members are committed to "enhancing the mutual supportiveness of trade and the environment, note that there is broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector" through prohibiting subsidies that lead to over-fishing and overcapacity. In this context, the draft directs the Negotiating Group on Rules to intensify and accelerate the negotiating process.

Major Issues in Negotiations.

The Antidumping Agreement, perhaps by design, is somewhat ambiguous. Many countries, especially the "Friends of Antidumping," would like to see more specific definitions and guidelines in order to provide some type of harmony in nations' implementation of trade remedy laws. However, most of the proposals, if implemented, could also lessen the ability of petitioners to obtain relief. Because the Agreement, in essence, is designed to provide general rules for various administrative officials in WTO member countries to follow when calculating dumping margins, determining injury, and granting relief, many of the proposals involve highly technical changes that are beyond the scope of this report. However, there are some specific discussion threads in presentations to date that can be explained in a very general way. It is important to note that the DDA mandate specifies that negotiations on trade remedies are intended to "clarify and improve" the WTO Agreements rather than to eliminate them. With this in mind, many WTO members have identified key provisions they seek to address in future negotiations through proposals formally submitted to the WTO Negotiating Group on Rules.

Because the United States is a large user, but also a large target, of AD actions, there is a trade-off between the costs and benefits of modifications to the Antidumping Agreement. The United States could benefit from some of the suggested modifications, especially if they enhance the transparency of trade remedy procedures in other WTO Member countries. However, other proposals could raise the threshold for domestic petitioners' ability to obtain relief, lower calculated dumping margin levels, or mandatorily limit the duration of antidumping orders.

In addition, all WTO negotiations are conducted on a consensus basis. Any proposal submitted by the United States would require the agreement of all other members, perhaps in conjunction with U.S. acceptance of other members' proposals. Thus, the submission of any proposal on trade remedies likely is accompanied by certain calculations on the part of the USTR on whether any consensus can be reached on the issues, and to what negotiating concessions the United States may have to agree. This calculation may be especially significant considering the generally defensive nature of U.S. negotiating positions at the rules talks.
This discussion of DDA negotiations on antidumping focuses on suggested changes (1) for which there seems to be broad support among WTO members, and (2) which could potentially result in significant amendment to U.S. laws or administrative procedures. Several of these recommendations could affect methodologies used by authorities to determine injury and calculate dumping margins. Another proposal seeks mandatory termination of AD orders after a specified period.

Antidumping Duty Assessment.

Many WTO members believe that the methodology used by some countries to calculate dumping margins leads to highly inflated duties that are disproportionate to the amount needed to mitigate the injury to the domestic industry, as well as the level of dumping practiced by the exporters. Some Members have particularly criticized U.S. methodology, where ITA-calculated dumping margins typically average between 60 and 70 percent.48 Consequently, revisions in the Antidumping Agreement that could lower dumping margins have been major focus of submissions to the Rules Committee.

Some proposals that have drawn broad support include a ban on "zeroing," a mandatory "lesser duty" rule, and increased use of "price undertakings." These proposed changes would affect primarily ITA administrative rules for calculating dumping margins, but may also require some modification to U.S. law.

Ban on Zeroing.

In U.S. law, AD orders imposed on targeted merchandise must be equal to the dumping margin or "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." The ITA typically calculates the margin by first identifying, to the extent possible, all U.S. transactions, sale prices, and levels of trade for each model or type of targeted merchandise sold by each company in the exporting country. These model types are then aggregated into a subcategories, known as "averaging groups," which are used to calculate the "weighted average export price." The export prices for each subgroup are then compared to the corresponding agency-calculated "weighted average normal value." Finally, the results of all of these comparisons are added up to establish the overall dumping margin of the targeted product.

When authorities add up the dumping margins of each of the subgroups to establish an overall dumping margin for the subject merchandise, they sometimes encounter negative margins in a subgroup, an indicator that the items in that category are not being dumped. However, rather than including the negative margin in their calculations, which might result in a lower overall dumping margin, ITA officials factor in the results of that subgroup as a zero. Officials use a similar practice when re-calculating dumping margins in administrative reviews of AD orders or suspension agreements. One justification for the zeroing practice is that the dumping margin could be skewed if, when determining the weighted average dumping margin, the subgroup that has the negative dumping margin represents a substantial percentage of export sales.

The U.S. practice is currently being challenged in the WTO on a number of fronts. On February 6, 2004, the European Union formally requested the establishment of a dispute settlement panel on zeroing, citing 31 U.S. AD cases targeting products of the EU. The EU claims that in these cases the dumping margin would have been minimal, or even negative, if U.S. officials had not used zeroing. A panel was established on March 19, 2004. In a split decision, in late October 2005, the dispute settlement panel report found for the United States in its use of zeroing in the course of administrative reviews, but against U.S. practice when conducting initial investigations.

In part, the Panel determined that the denial of offsets when calculating the weighted average dumping margin using the "average-to-average" comparison methodology when conducting original investigation was inconsistent with U.S. obligations under Article 2.4.2 of the Antidumping Agreement — an aspect of the ruling that the United States did not appeal. In early March 2006 the

International Trade Administration began the process of amending its procedures by soliciting public comments on amended methodology.

On April 18, 2006, the WTO Appellate Body overturned the dispute panel's ruling that "zeroing" methodology was permissible in administrative reviews. While the European Union welcomed the decision, USTR responded that "the Appellate Body's analysis failed to address many of the important issues raised in the appeal, and appears difficult to reconcile with other areas of antidumping."

On November 24, 2004, Japan also requested consultations with the United States on zeroing, citing 15 cases that the practice was used when calculating dumping margins on Japanese merchandise. Mexico requested consultations on zeroing on January 10, 2005, as it related specifically to a dumping determination on stainless steel products. A dispute settlement panel has been established on one other complaint by Mexico, involving U.S. zeroing practices on oil country tubular goods from Mexico. On December 10, 2004, Thailand also requested WTO consultations on zeroing, challenging use of U.S. practice when establishing provisional duties on shrimp exports.

Since the European Union's practice of zeroing had already been found to violate the Antidumping Agreement in a dispute settlement case brought by India, many observers speculated that any dispute proceeding against the United States on the practice will produce a similar result.

The U.S. practice of zeroing is neither required, nor prohibited, by U.S. law; therefore it is not clear if congressional action would be required if the United States loses one of these disputes or if the DDA changes the rules.

Mandatory Lesser Duty Rule.

Article 9.1 of the Antidumping Agreement encourages the imposition of an AD duty lower than the full dumping margin if investigating authorities determine that the lesser amount is sufficient to offset the injury suffered or threatened to the domestic industry. Many WTO members favor amending the Antidumping Agreement to require a *mandatory*, rather than discretionary, "lesser duty rule." Developing countries are especially interested in seeing a mandatory rule applied to exports from their countries, and have proposed this measure as part of a "special and differential treatment" package of trade concessions offered by developed nations to developing countries. There is currently no "lesser duty rule" in U.S. law or practice, and enactment of a mandatory rule might require congressional action.

"Price Undertakings".

Article 8 of the Antidumping Agreement allows the use of "voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices" provided that investigating authorities are satisfied that the injurious effect of the dumping is eliminated. Many WTO members favor increased use of "price undertakings," because they believe that the practice is less damaging to exporters, while also mitigating the injury to domestic producers. Some developing countries favor mandatory use of price undertakings by developed country members in AD cases involving developing countries.

U.S. antidumping law allows for similar alternative arrangements, known in U.S. law as suspension agreements, but in practice, the ITA does not use them very often. At present, there are only six U.S. suspension agreements and one quantitative restriction agreement in place, in comparison to more than 260 active AD orders.

Proposed Changes in Injury Determinations.

Another major focus of proposals for amending the Antidumping Agreement is redefining and streamlining the methodology by which administrative authorities determine injury. Some WTO members believe that the guidelines and definitions in the Agreement are too subjective and that procedures lack transparency in many countries. Some proposals in this area involve designing new rules that provide more precise guidance or objective criteria when making injury determinations, while others favor more precise definitions for the terms in Agreement such as "material injury," "material retardation," or "threat of material injury." Some negotiators believe that factors other than dumping are often to blame for industry declines and consequently favor more objective criteria for establishing the existence of a clear and substantial link to dumping before determining injury.

Mandatory Sunset of AD Orders.

The current Antidumping Agreement specifies that each antidumping order must be terminated after five years *unless* authorities determine in a review that its expiration would be likely to lead to a recurrence of dumping and subsequent injury to the domestic producer.

Some WTO members are critical of the use of sunset and administrative reviews that determine if relief is still needed. In particular, many have complained that U.S. authorities base sunset review determinations inordinately on submissions by the domestic industry. They claim that, consequently, U.S. AD orders are likely to remain in place as long as the domestic industry opposes their removal. There seems to be strong support among WTO members for a mandatory termination of AD orders within five years. Other Members favor a more moderate approach that would list specific circumstances or definitive factors that authorities must consider before extending AD orders. Others criticize the length of time that sunset review procedures take to complete and favor a mandatory twelve-month time limit.

Treatment of Developing Countries.

Many developing countries complain that antidumping actions on their products, as well as illegal dumping in their countries, affects their economies disproportionately. Article 15 of the Antidumping Agreement recommends that developed countries show "special regard" for the economic situation of least developed and developing country members, and suggests that "constructive remedies" be used instead of assessing antidumping duties. However, it does not require or specify a particular course of action for antidumping proceedings.
The "Friends of Antidumping" and others have proposed that developing countries should include specific provisions that will provide these countries with "meaningful special and differential treatment" when facing antidumping actions. Some general recommendations for providing special regard have included requiring developed countries to negotiate/accept mandatory price undertakings (suspension agreements) when investigating products of developing countries, and raising the *de minimis* threshold (i.e. the margin at which the amount of dumping is found to be insignificant).

Many developing countries also maintain the cost of initiating an antidumping proceeding under the existing requirements of the Antidumping Agreement is prohibitive. One recommendation calls for standardizing certain investigative procedures in order to make AD action less costly for all countries. Some suggestions in this vein include requiring shorter periods for investigations, investigators know precisely what information is necessary to extract when investigating a case.

Possible Effects of Changes.

Most of the proposed changes in the Antidumping Agreement, if adopted, would further restrict the ability of all WTO members to grant relief to import-competing industries. Import-competing industries in the United States may find it more difficult to obtain relief, could have lower dumping margins assessed on targeted merchandise, or could be authorized to receive relief for a shorter time period. Other countries would face the same restrictions, however, which could benefit U.S. exporters. U.S. consuming industries, and ultimately consumers, might also benefit from lower prices for production inputs and finished goods.

More specifically, proposals to change dumping margin calculations likely would require changes in the way in which the ITA calculates the level of relief that domestic companies will gain from AD action. Most of these changes can be accomplished administratively, via regulations and procedural changes. However, legislation may be necessary to enact some of the proposals, at least for the sake of greater official transparency. Lower dumping margins would, in turn, reduce the amount of CDSOA disbursements that U.S. petitioners and interested parties receive as the result of AD action.

Suggestions for changes in procedures for determining injury could result in fewer changes to U.S. laws and administrative procedures (which already provide considerable quantitative guidance, narrow definitions, and specific timetables) than they would in other WTO member countries. U.S. exporters might benefit from enhanced transparency in AD investigations in receiving markets, while industries seeking AD action in the United States might be only minimally affected. However, since the overall objective of many WTO members seems to be to restrict the ability of domestic industries in the importing countries to receive relief, it is still possible that modifications in this area could lead to changes that could diminish the use and effectiveness of AD actions.

Proposals for modifying the duration of AD orders, such as requiring mandatory sunset after five years, could have a significant effect on U.S. domestic industries. The United States currently has about 190 AD orders that have been in effect longer than five years (the oldest, on polychloroprene rubber from Japan dates from 1973). Statistics on five-year reviews conducted from January 2000 to January 2005 indicate in the 116 reviews initiated during the period, the ITA and ITC decided to revoke AD orders, continued 52 orders, and an additional 27 investigations are still pending. These statistics indicate that a number of U.S. AD orders do continue in place beyond the five-year period. Therefore, adoption of a mandatory five-year revocation of AD orders could have a substantial impact on U.S. trade remedy policy, as well as on industries that have benefited from the protection of these orders.

Conclusion and Options for Congress

When Congress granted presidential Trade Promotion Authority (TPA) in 2002 (P.L. 107-210), it agreed to consider legislation to implement a trade agreement under special legislative procedures

that limit debate and allow no amendment. Therefore, any negotiated WTO agreement must be subject to an "up or down" vote with limited debate in both Houses.

However, Congress also gave itself considerable oversight authority over trade negotiations by requiring the President and other executive agencies (particularly the USTR) to consult with Congress, to provide congressional committees with regular, detailed briefings on the status of negotiations, and to coordinate closely with a Congressional Oversight Group consisting of chairmen, ranking members, and other representatives from the House Ways and Means and Senate Finance committees. Since many members were particularly concerned about modifications to the Antidumping Agreement, the TPA approval legislation required the President to report within 180 days prior to acceptance of a trade agreement if any of the proposals could require amendments to trade remedy laws. The law also provided specific language for a procedural resolution of disapproval to be introduced in either House if Congress determined that the proposed changes to the trade remedy laws in any agreement are inconsistent with U.S. negotiating objectives on trade remedies. Although the disapproval resolution would not be binding on the President or on the USTR, such a resolution, if passed, would send a clear message that Congress resists any modifications to the WTO Agreements that would weaken U.S. trade remedy laws.

It should be noted that TPA expired on June 1, 2005, and continues now under a two-year extension as requested by the President and approved by Congress. Although the President received the extension, some are concerned that DDA negotiations must be concluded before this grant of TPA terminates on June 1, 2007, if any substantive agreement is to be reached.

In addition, since United States was found to be in violation of its WTO obligations with regard to the CDSOA and the usage of zeroing when conducting initial investigations, some observers suggest that it might be advantageous for the United States to concede on these issues in DDA negotiations, especially if by doing so U.S. negotiators can avoid other changes to the Agreement that might adversely affect U.S. trade remedy laws.

Currently, the gap between the U.S. position on antidumping and that of our WTO trading partners appears to be very wide and may be difficult to narrow. However, trade negotiators from all countries must weigh concessions made against gains in other areas in the WTO negotiations.

Figure 2. Leading Targets of Worldwide AD Initiations, January 1995 - June 2005

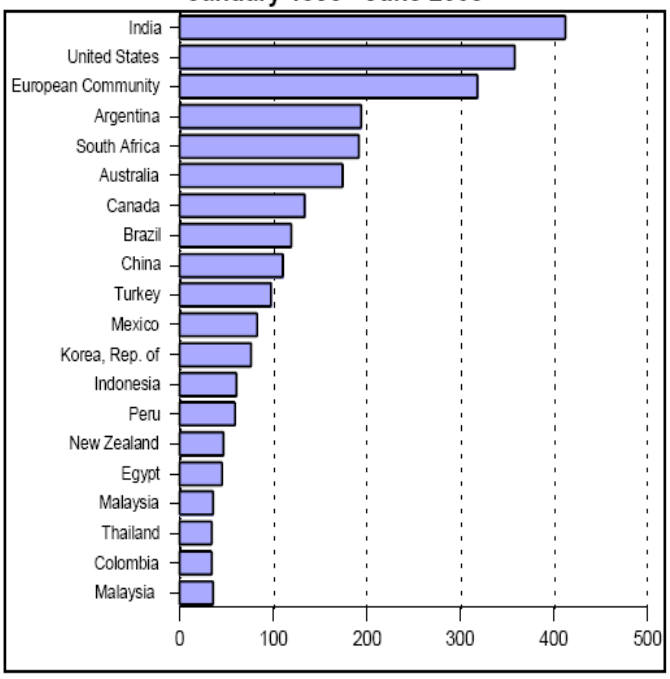


Figure 3. Antidumping Initiations by Selected WTO Members, January 1995 - June 2005

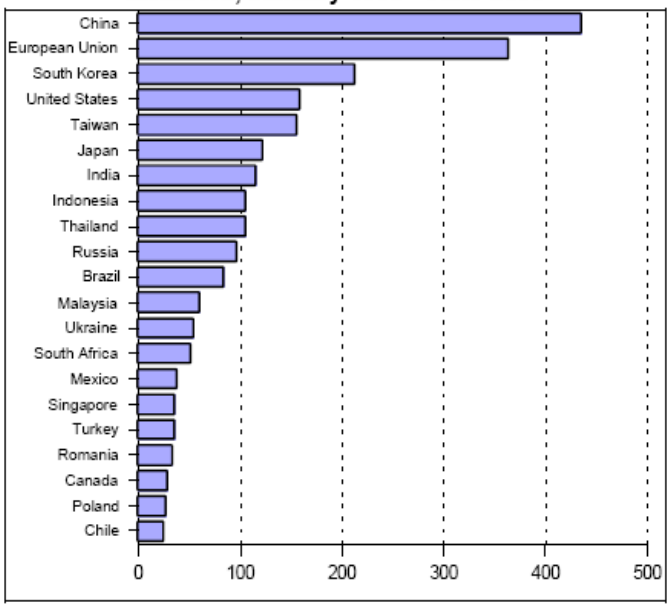
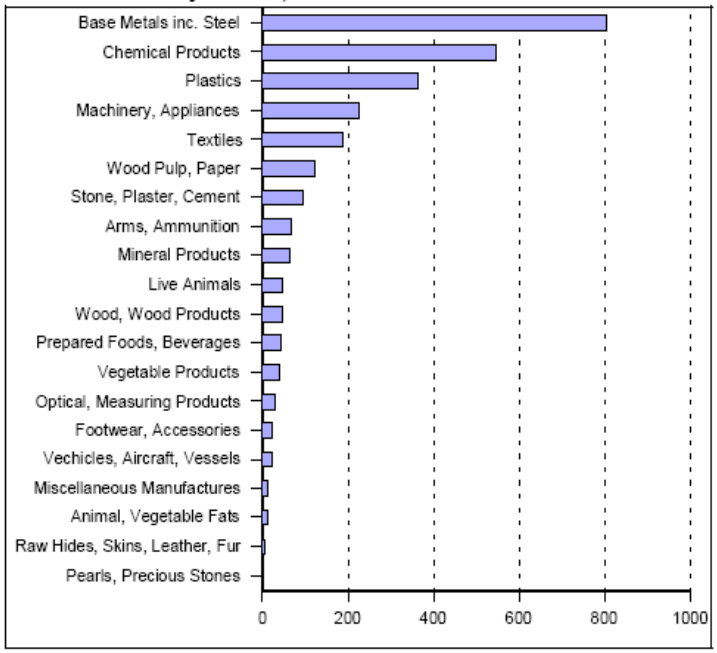


Figure 4. Worldwide Antidumping Initiations (WTO Members) by Sector, Jan. 1995 - June 1005



CRS Report to Congress

U.S.-European Union Trade Relations: Issues and Policy Challenges.

IB10087 (January 26, 2006)
http://fpc.state.gov/documents/organization/61435.pdf

SUMMARY.

The United States and European Union (EU) share a huge and mutually beneficial economic partnership. Not only is the U.S.-EU trade and investment relationship the largest in the world, it is arguably the most important. Agreement between the two economic superpowers has been critical to making the world trading system more open and efficient. Given a huge level of commercial interactions, trade tensions and disputes are not unexpected. In the past, U.S.-EU trade relations have witnessed periodic episodes of rising trade tensions and even threats of a trade war, only to be followed by successful efforts at dispute settlement.

Resolution of U.S.-EU trade disputes has become increasingly difficult in recent years. Part of the problem may be due to the fact that the U.S. and the EU are of roughly equal economic strength and neither side has the ability to impose concessions on the other. Another factor may be that many bilateral disputes now involve clashes in domestic values, priorities, and regulatory systems where the international rules of the road are inadequate to provide a sound basis for effective and timely dispute resolution.

The two sides face difficult challenges in keeping the relationship on an even keel in 2006. A number of bilateral trade disputes have been carried over from 2005 and are expected to be considered by the World Trade Organization (WTO). These include disputes on production subsidies for aircraft manufacturers, the EU's treatment of bio-engineered foods, compliance in the long-running battle over tax breaks for U.S. exporters, and the continuing ban on beef treated with growth hormones. In addition, critical U.S.-EU differences, particularly over agriculture, now complicate and threaten progress in the ongoing Doha Round of world trade negotiations. The biggest dispute in terms of the amount of trade involved relates to allegations that each side provides their civil aircraft producers, Airbus and Boeing, with illegal production subsidies. Both the EU and U.S. filed formal complaints with the WTO in May 2005 to this effect, and two separate WTO panels are scheduled to begin hearing the cases this year. However, panel rulings in these cases are not expected to be handed down until early 2007, thereby giving the United States and the EU ample opportunity to try to resolve the dispute bilaterally. On a second dispute, the EU may have to decide this spring whether to reimpose sanctions on U.S. exports in the ongoing Foreign Sales Corporation (FSC)-Extraterritorial (ETI)

export subsidy dispute. Congress thought it had brought U.S. law into conformity with U.S. WTO obligations when it repealed the FSC-ETI as a provision of the American Jobs Creation Act of 2004. But an EU challenge to several transitional provisions of the new law was upheld by the WTO, thereby setting the stage for a possible reimposition of sanctions this spring.

Major U.S.-EU trade challenges can be grouped into five categories: (1) complying with WTO rulings; (2) resolving longstanding trade disputes involving aerospace production subsidies and beef hormones; (3) dealing with different public concerns over new technologies and new industries (4) fostering cooperative competition policies; and (5) strengthening the multilateral trading system.

MOST RECENT DEVELOPMENTS.

European Trade Commissioner Peter Mandelson stated on January 16, 2006, that he is prepared to accept failure of the Doha Round rather than accept a deal that offers no benefits to Europe.

The European Commission on January 4, 2006, presented to member states a new regulation to amend its system for protecting products under geographical names in response to a WTO panel decision. The panel determined that two aspects of the current system for protecting products such as *Champagne or Roquefort* were not consistent with the EU's obligation to treat trading partners no less favorably than its own nationals.

House and Senate conferees on December 19, 2005, concluded a provision in the budget reconciliation conference agreement (S. 1932) to repeal the Byrd Amendment, despite an overwhelming Senate vote on December 15 to oppose such a move. The House has to vote on the reconciliation bill again because the Senate on December 19, 2005, struck two provisions from the conference approved bill. This vote is expected to take place during February 2006.

The U.S. and EU announced agreement on November 30, 2005, on a package of trade benefits designed to compensate the United States for tariff increases put in place by the EU following its enlargement to include 10 new member states in May 2004. The WTO on October 17, 2005, appointed panelists to consider cases brought by the United States and EU against each others' alleged subsidies to their commercial aircraft manufacturers. The United States and EU initialed on September 14, 2005, a "first-phase" agreement on wine labeling standards, but final approval by the EU may be in doubt due to opposition from Germany, Italy, and Spain.

The WTO issued an interim ruling on July 22, 2005, that a provision contained in a U.S. tax law, the American Jobs Creation Act, violates international subsidies rules. This U.S. law had been intended to end the long-running FSC-ETI tax and trade dispute with the EU.

BACKGROUND AND ANALYSIS.

Overview.

The United States and the European Union (EU) share a huge and mutually beneficial economic partnership. Not only is the U.S.-EU trade and investment relationship the largest in the world, but it is also arguably the most important. Agreement between the two partners in the past has been critical to making the world trading system more open and efficient. Given the high level of U.S.-EU commercial interactions, trade tensions and disputes are not unexpected. In the past, U.S.-EU trade relations have witnessed periodic episodes of rising trade tensions and conflicts, only to be followed by

successful efforts at dispute settlement. This ebb and flow of trade tensions occurred again last year with high-profile disputes involving tax breaks for U.S. exporters and production subsidies for the commercial aircraft sector.

The two sides still face difficult challenges in the months ahead in keeping the relationship on an even keel. A number of bilateral trade disputes have been carried over from 2005 and are expected to be considered by the WTO dispute settlement bodies. These include disputes on production subsidies for aircraft manufacturers, the EU's treatment of bio-engineered food, compliance in the long-running battle over tax breaks for U.S. exporters, and the continuing EU ban on beef treated with growth hormones. In addition, critical U.S.-EU differences , particularly over agriculture, now complicate and threaten progress in the ongoing Doha Round of WTO negotiations.

Closer Economic Ties.

The United States and the European Union share the largest bilateral trade and investment relationship in the world. Annual two-way flows of goods, services, and foreign investment transactions exceeded $1.3 trillion in 2004. Viewed in terms of goods and services, the United States and EU are each other's largest trading partners. Each purchases about one-fifth of the other's exports of goods in high-technology and sophisticated product areas where incomes and tastes are the primary determinants of market success.

Based on a population of some 455 million citizens and a gross domestic product of about $10.3 trillion (compared to a U.S. population of 289 million and a GDP of $10.6 trillion) in 2003, the twenty-five members of the EU provide the single largest market in the world. Given the reforms entailed in the introduction of the European single market in the early 1990s, along with the introduction of a single currency, the euro, for twelve members, the EU market is also increasingly open and standardized.

The fact that each side has a huge investment position in the other's market may be the most significant aspect of the relationship. By year-end 2002, the total stock of two-way direct investment reached $1.67 trillion (composed of $964 billion in EU investment in the United States and $708 billion in U.S. investment in the EU), making U.S. and European companies the largest investors in each other's market. This massive amount of ownership of companies in each other's market translates into an estimated 5-6 million Americans who are employed by European companies and almost an equal number of EU citizens who work for American companies in Europe.

Growing Strains.

Given the huge volume of commercial interactions, it is commonly pointed out that trade disputes are quite natural and perhaps inevitable. While the vast majority of two-way trade and investment is unaffected by disputes, a small fraction (often estimated at 1%-2%) of the total often gives rise to controversy and litigation. Historically, with the possible exception of agriculture, the disputes have been handled without excessive political rancor.

Over the last 5-6 years, however, trade relations are being strained by the nature and significance of the disputes. Former EU Commissioner for Trade, Pascal Lamy, stated on November 20, 2000 that the "problems seem to get worse, not better." Richard Morningstar, then U.S. Ambassador to the EU, said in a January 23, 2001 speech that the inability of our two sides "to resolve our list of disputes, which are growing in both number and severity, is beginning to overshadow the rest of the

relationship." Moreover, some of the efforts at dispute resolution have led to escalation and "tit-for-tat" retaliation with the potential to harm the multilateral trading system.

In 1999 the United States imposed punitive tariffs on $308 million of EU exports of mostly higher value-added agricultural products such as Danish ham and Roquefort cheese. This action was a response to a refusal by the EU to change its import regimes for bananas and hormone-treated beef which the World Trade Organization (WTO) determined to be in violation of world trade rules. (The U.S. retaliation for bananas was lifted in 2001 but $116 million in punitive duties remains in effect due to the beef dispute.) EU pique over U.S. pressures on bananas and beef, in turn, led the EU to threaten retaliation against $4 billion dollars in U.S. exports that the WTO found in violation of an export subsidy agreement. In addition, the EU has filed numerous WTO dispute resolution petitions alleging that a variety of U.S. trade laws violate international obligations in some technical fashion, contributing to an impression that these challenges are part of a concerted EU strategy to weaken or gut U.S. trade laws.

The underlying causes of the trade disputes are varied. Some conflicts stem primarily from traditional demands from producer or vested interests for protection or state aids. Other conflicts arise when the United States or the EU initiate actions or measures to protect or promote their political and economic interests, often in the absence of significant private sector pressures. Still other conflicts are rooted in an array of regulations that deal mostly with issues that are considered domestic policy. Resolution of these disputes has proven difficult in recent years. Part of the problem may rest in the fact that the EU and United States are of roughly equal economic strength and neither side has the ability to impose concessions on the other. Another factor may be that numerous new disputes involve clashes in domestic values and priorities where the international rules of the road are inadequate to provide a basis for effective and timely dispute resolution.(For further discussion, see CRS Report RL30732, *Trade Conflict and the U.S.-European Union Economic Relationship*, by Raymond J. Ahearn.)

The United States and European Union currently have a full plate of high profile bilateral disputes this year. Several of the disputes may need to be resolved and new potential disputes avoided if the bilateral trade strains are to be contained and a smoother trade relationship is to develop. Resolution of disputes involving alleged government subsidies for Boeing and Airbus, the Byrd Amendment, and the EU ban on imports of genetically modified organisms (GMOs) are at the top of the list of bilateral challenges.

Major Issues and Policy Challenges.

Major EU -U.S. trade and investment issues and policy challenges can be grouped into six different categories: (1) complying with WTO rulings; (2) resolving longstanding trade disputes; (3) dealing with disputes involving new technologies or industries; (4) fostering cooperative competition policies; and (5) strengthening the multilateral trading system. A summary and status update of each challenge follows.

Complying With WTO Rulings.

Some of the more serious trade disputes that currently cloud the bilateral relationship deal with WTO dispute compliance. While the United States has complied with adverse rulings in most WTO disputes, there are a number of outstanding disputes where this has not been the case. The same can be said of the EU compliance record (see treatment of the beef hormone dispute below). U.S. tax

benefits for exporting and the Byrd amendment are two key compliance disputes that involve retaliation or threats of retaliation.

U.S. Tax Benefits for Exports. The EU on March 1, 2004 began imposing retaliatory duties of 5% on selected U.S. exports in the dispute over U.S. compliance with a WTO ruling involving the Foreign Sales Corporation (FSC) and its successor Extraterritorial Income Exclusion (ETI) export tax regime. Although Congress passed legislation (H.R. 4520) on October 11, 2004 that repeals the export tax regime, the EU did not lift the trade sanctions it was imposing on U.S. exports until January 21, 2005. On that date, a regulation adopted by the member lifted retaliatory duties retroactively to January 1, 2005. The regulation, however, also calls for a possible reimposition of punitive tariffs on $2.4 billion of U.S. goods if a WTO dispute panel rules against several provisions of the law (the American Jobs Creation Act -P.L. 108-357) passed by Congress to bring the United States into compliance with the WTO ruling on the FSC-ETI case. The Commission had proposed automatic imposition of sanctions if the WTO finds in Brussels' favor, but member states agreed only to give the Commission discretion — in close consultation with the member states — to retaliate on U.S. exports again if the WTO rules against the U.S. tax law.

The two provisions of the American Jobs Creation Act being objected to by the EU are a two-year transition period lasting until 2006 and the grandfathering of the FSC benefits for certain contracts that were in place on September 17, 2003. The EU claims the latter provisions will benefit companies such as Boeing, Microsoft, and Catepillar.

U.S. reaction to the EU's challenge of the new tax law and threat to reimpose sanctions if it wins its new WTO case has been almost uniformly negative. An official for the Office of the U.S. Trade Representative stated that "it is harmful for the EU to needlessly prolong this matter in the face of Congress's good faith action." Senate Finance Committee Chairman Charles Grassley stated that he remains frustrated and troubled by the actions of the EU. (For further discussion, see CRS Report RS20746, *Export Tax Benefits and the WTO: The Extraterritorial Income Exclusion and Foreign Sales Corporations*, by David L. Brumbaugh.)

The dispute entered a new stage on July 22, 2005, when the WTO issued an interim ruling indicating that provisions of the American Jobs Creation Act still violate international subsidy rules which state that signatories should remove without delay any subsidies found to be prohibited by the WTO. The United States, in turn, appealed the adverse WTO panel decision in November 2005. The WTO Appellate Body is expected to rule on the U.S. appeal by February 13, 2006.

If the U.S. appeal is denied, the EU can reimpose sanctions against U.S. exports that it had suspended in January 2005. As noted above, the EU directive calls for retaliation to be reimposed 60 days after the Appellate Body rules.

Byrd Amendment. The Continued Dumping and Subsidy Offset Act (CDSO), or Byrd Amendment, enacted in October 2000, requires the annual disbursement of antidumping and countervailing duties to qualified petitioners in the underlying proceedings. Soon after enactment, the EU and seven other parties successfully challenged the statute in the WTO on the grounds that the Byrd Amendment constitutes a "nonpermissible specific action against dumping or a subsidy" contrary to various WTO agreements. Because the United States did not comply with the ruling by the arbitrated deadline of December 27, 2003, the eight complaining members requested authorization from the WTO in January 2004 to impose retaliatory measures. A decision by a WTO arbitrator on the amount of retaliation U.S. trading partners can impose was handed down on August 31, 2004. The arbitrator

determined that each of the eight complainants could impose countermeasures on an annual basis in an amount equal to 72% of the CDSO disbursements for the most recent year in which U.S. data are available.

Canada and the EU began retaliating on May 2, 2005, by placing a 15% additional duty on selected U.S. exports. Mexico imposed higher tariffs on U.S. milk products, wine, and chewing gum as of August 18, 2005, and Japan placed an additional tariff of 15% on 15 steeland industrial products as of September 1.

Despite strong congressional support for the measure in both chambers, a provision seeking to repeal the CDSOA was included in the conference report to S. 1932, the Deficit Reduction Act of 2005. The language in the provision, however, would allow CDSOA payments on all goods that enter the United States to continue through October 1, 2007.

As of this writing, the Byrd repeal has not been signed into law yet. A final House vote on the reconciliation bill is expected to take place in February. If the Byrd amendment is repealed, it is not clear whether the EU, Mexico, Japan, and Canada will lift the sanctions or not.

Resolving Longstanding Disputes.

The United States and EU are engaged in long-running disputes involving aerospace production subsidies and trade in beef that has been treated with hormones. President Bush in an August 13, 2004 speech raised the stakes of the Airbus-Boeing dispute by stating that Airbus production subsidies are unfair. In October 2004, this long simmering dispute reignited when both sides took their complaints to the WTO. Tensions were somewhat diffused by a January 11, 2005 agreement to try to reconcile differences through a three-month period of bilateral negotiations. But negotiations stalled in April and the two sides filed complaints in the WTO over their respective government's alleged subsidies, thus creating the largest trade dispute in value terms ever considered by the WTO. The beef hormone dispute also heated up when the EU in November 2004 took the first steps to challenge in the WTO the sanctions the United States and Canada are imposing on EU exports.

<u>Airbus-Boeing Subsidy Tensions.</u> The United States and the EC have now each filed complaints with the World Trade Organization (WTO), thus creating a major trade confrontation between these two trade superpowers. At the same time, U.S. and EU trade officials stated on June 17, 2004, that they would still search for a negotiated settlement of this aircraft subsidy dispute between Boeing and Airbus. However, on July 20, 2005, the WTO agreed to establish two dispute settlement panels to begin investigating the competing U.S. and EU complaints. Two panels were established on October 17, 2005 (one handling the U.S. charges against Airbus and the other handling the EU's counterclaims against Boeing), and both panels are scheduled to begin hearing the cases this year. Beginning this March, the two sides will begin filing and rebuttal submissions, providing the first public glimpse into the arguments that will be made and evidence that will be presented. However, panel rulings are not expected to be handed down until early 2007. Whether the WTO litigation provides an incentive for the United States and the EU to resolve the dispute bilaterally remains to be seen.

This dispute had its beginnings on October 6, 2004, when the United States requested consultations with relevant parties pursuant to the World Trade Organization's (WTO) Understanding on Rules and Procedures Governing the Settlement of Disputes. At the same time the United States terminated a 1992 agreement between itself and the European Communities (EC) on Government Support for

Civil Aircraft. Later in the same day, the EC, acting on behalf of itself, and the member states filed a separate request for consultations under the WTO dispute resolution process. Separately, the EC rejected the U.S. termination of the 1992 agreement.

In the 13 years since the 1992 Agreement was signed, the long-standing competitive relationship between the two major producers of large commercial aircraft has changed. Airbus, which was the number two producer for most of the 1990s, now leads Boeing in both new annual aircraft deliveries and orders. Boeing, although a strong competitor in this market, has experienced a number of high profile problems, most recently with its now on hold plan to sell/lease tankers to the Air Force.

Much of the ongoing discussion about the Airbus/Boeing relationship stems from Airbus's December 2000 launch of a program to construct the world's largest commercial passenger aircraft, the Airbus A380. Many observers believed then, that the A380 action could reopen a long-standing trade controversy between the United States and Europe about alleged subsidization of commercial aircraft projects that compete directly with nonsubsidized U.S. products. It now appears that these concerns have come to fruition.

The market for large commercial aircraft (jet aircraft with 100 or more seats) is essentially a duopoly consisting of an American manufacturer, Boeing, and a European manufacturer, Airbus. Until recently Airbus was a consortium of national aviation firms, some with close government ties, who cooperated to produce commercial aircraft. As a result of recent European aerospace industry consolidation, the firm is now owned by just two firms, EADS and BAE Systems. Airbus itself is now a public firm operating under the Airbus name (also know as Airbus SAS).

The dispute between the United States and the European governments participating in the Airbus consortium is of long standing. The basic premise of the dispute is whether, as the U.S. trade policymakers contend, Airbus is a successful participant in the market for large commercial jet aircraft not because it makes good products, which by all standards it does, but because it has received significant amounts of governmental subsidy and other assistance, without which it is unlikely to have been able to enter and participate in the market.

The source of most recent controversy over subsidies, the Airbus A380, is being offered in several passenger versions seating between 500 and 800 passengers, and as a freighter. The project is believed to have cost about $13 billion, which includes some significant cost overruns identified by Airbus earlier this year. Airbus expects that its member firms will provide 60% of this sum, with the remaining 40% coming from subcontractors. State-aid from European governments are also a source of funding for Airbus member firms. State-aid is limited to one-third of the project's total cost by a 1992 Agreement on Government Support for Civil Aircraft between the United States and the European Union (EU).
At issue in the A380 development is at least $3.2 billion in already identified direct loans to be provided to Airbus member firms by the governments of France, Germany, Spain, and the United Kingdom. Additional funds have likely been provided to subcontractors by other European nations. Also at issue are large dollar infrastructure improvements provided by state and local governments that directly benefitted the A380 project.

Shortly after the A380 project was announced, Boeing dropped its support of a competing new large aircraft. Boeing believes that the market for A380 size aircraft is limited. It has, therefore, settled on

the concept of producing a new technology 250-seat aircraft, the 787, which is viewed as a replacement for 767 size aircraft. Boeing formally launched the program in 2004.

To construct this aircraft Boeing is proposing to greatly expand its use of non-U.S. subcontractors and non-traditional funding. For example, a Japanese group will provide approximately 35% of the funding for the project ($1.6 billion). In return this group will produce a large portion of the aircraft's structure and the wings. Alenia of Italy is expected to provide $600 million and produce the rear fuselage of the aircraft. In each of these instances, the subcontractor is expected to receive some form of financial assistance from their respective governments. The project is also expected to benefit from state and local tax and other incentives. Most notable among these is $3.2 billion of such incentives from the state of Washington.

The Boeing View. Boeing has long contended that Airbus has benefitted greatly from direct assistance from the member states. It is Boeing's view that several of Airbus's aircraft projects, especially the A380, would not have been able to obtain financing in commercial markets because of their large risks. The view is that Airbus's corporate decision-making is largely influenced by the knowledge that the firm ultimately cannot fail financially and because a large portion of the risk is borne by European partner governments.

Since early 2004, Boeing's management has continuously raised the subsidy issue with the Bush Administration and with Congress. As it has become apparent that Airbus might launch a new aircraft project, the A350, in response to the 787, with launch aid from the member states, Boeing's concerns have increased.

The Airbus View. Airbus does not accept the U.S. view of the reasons for its success. Although admitting to, but not completely disclosing, prior levels of direct subsidies from supporting governments, Airbus contends that it is in the market for long-term profit. Airbus points to the loan repayments it has provided to its governmental sponsors over the last several years as proof of its long-term intent to operate in a market environment. Airbus also contends that its loans are, contrary to Boeing claims, at commercial rates. Airbus counters the U.S. argument that subsidies are the principal reason for Airbus's success, with claims that U.S. manufacturers have benefitted from huge indirect governmental subsidies in the form of military and space contracts and government-sponsored aerospace research and development.

Europeans are also likely to contend that the 787 will receive a level of subsidy that they believe might proportionately exceed the subsidy levels received by the A380. To support this claim, they point to the aforementioned publically announced subsidies from Washington state, and the large amount of government assistance by Japan and Italy to firms that will serve as major subcontractors on the aircraft.

On April 11, 2005, the Senate passed a concurrent resolution calling for the Bush Administration to move the Airbus-Boeing dispute to the WTO if the EC and/or its Member States provide launch aid for the Airbus A350 aircraft (S.Con.Res. 25). Although the resolution has no force in law, the 96-0 vote in favor of the resolution demonstrates a clear Senate consensus that the issue is important to national policy.

Beef Hormones. The dispute over the EU ban, implemented in 1989, on the production and importation of meat treated with growth-promoting hormones is one of the most bitter disputes between the United States and Europe. It is also a dispute, that on its surface, involves a relatively

small amount of trade. The ban affected an estimated $100- $200 million in lost U.S. exports — less than one-tenth of one percent of U.S. exports to the EU in 1999.

The EU justified the ban to protect the health and safety of consumers, but several WTO dispute settlement panels subsequently ruled that the ban was inconsistent with the Uruguay Round Sanitary and Phytosanitary (SPS) Agreement. The SPS Agreement provides criteria that have to be met when a country imposes food safety import regulations more stringent than those agreed upon in international standards. These include a scientific assessment that the hormones pose a health risk, along with a risk assessment. Although the WTO panels concluded that the EU ban lacked a scientific justification, the EU refused to remove the ban primarily out of concern that European consumers were opposed to having this kind of meat in the marketplace.

In lieu of lifting the ban, the EU in 1999 offered the United States compensation in the form of an expanded quota for hormone-free beef. The U.S. government, backed by most of the U.S. beef industry, opposed compensation on the grounds that exports of hormone-free meat would not be large enough to compensate for losses of hormone-treated exports. This led the way for the United States to impose 100% retaliatory tariffs on $116 million of EU agricultural products from mostly France, Germany, Italy, and Denmark, countries deemed the biggest supporters of the ban. Canada imposed $9.4 million in sanctions.

The U.S. hard line is buttressed by concerns that other countries might adopt similar measures based on health concerns that lack a legitimate scientific basis according to U.S. standards. Other U.S. interest groups are concerned that non-compliance by the EU undermines the future ability of the WTO to resolve disputes involving the use of SPS measures.

Occurrences of "mad cow disease" in several EU countries and the outbreak of footand-mouth disease (FMD) in the United Kingdom and three other EU countries have contributed to an environment that is not conducive to resolving the meat hormone dispute. The EU has recently indicated its intention to make the ban on hormone-treated meat permanent, while at the same time expressing some openness to renewing discussions about a compensation arrangement which would increase the EU's market access for non-hormone treated beef from the United States. In discussions held June 11, 2001, a U.S. industry proposal for expanded access to the EU market for hormone-free beef for a period of 12 years was rejected by the EU. In response, the EU countered with a 4-5 year period for compensation. The compensation talks have since languished.

In pursuing compensation talks, the Bush Administration was faced with a divided industry position. The American Meat Institute and the American Farm Bureau preferred carousel retaliation to settle the dispute while the American Cattlemen's Beef Association supported efforts to gain increased access for non-hormone treated beef in exchange for dropping the retaliatory tariff on EU exports.
The Bush Administration has maintained that it would not use so-called "carousel" retaliation (rotating the products subject to retaliation) while the negotiations for compensation are on-going. Some observers speculate that both the EU and the U.S. have made a political decision to handle the dispute by insisting that they are making progress towards a resolution. This arguably could shield USTR from congressional and private sector pressures to apply the carousel provision against the EU.

On August 2, 2002, eleven senators, including Senate Minority Leader Trent Lott and Senate Finance Committee Chairman Max Baucus, called on the Bush Administration to increase the level of retaliation for the EU's ban on beef imports to adjust for the additional trade that will be lost when

new countries join the EU. The Senators also suggested that the U.S. should implement the carousel provision of U.S. trade law.

In October 2003, the European Commission notified the WTO that it has changed its hormone ban legislation in a way that it believes complies with international trade rules. The legislation makes provisional a previous permanent ban for five growth hormones used to raise beef and keeps in place a permanent ban on the use of oestradiaol 17 on the basis that it is carcinogen. As a result, the EU argued that it should no longer be subject to punitive trade sanctions by the United States (as well as by Canada).

On November 8, 2004, the EU took an initial step in the WTO to challenge the U.S. and Canadian sanctions still in effect. According to the EU, its October 2003 actions making the ban provisional for five growth hormones complies with WTO rules, which means the U.S. and Canada are no longer entitled to retaliate against its exports. The U.S. and meat industry, however, argue that making a ban provisional for the long term does not meet WTO obligations. Nevertheless, in February 2005, the EU secured the establishment of a panel to determine whether the United States and Canada are in violation of WTO rules by maintaining punitive tariffs on a number of EU products in the dispute. A WTO dispute panel hearing on this issue was held on August 1, 2005, and a second hearing is scheduled to be held in March 2006. (For further discussion, see CRS Report RS20142, *The European Union's Ban on Hormone-Treated Meat*, by Charles E. Hanrahan.)

Dealing with Different Public Concerns Over New Technologies and New Industries.

The emergence of new technologies and new industries is at the heart of a growing number of disputes. Biotechnology as a new technology and e-commerce (and related data privacy concerns) as a new industry are emerging issues that have great potential for generating increases in transatlantic welfare, as well as conflict. These issues tend to be quite politically sensitive because they affect consumer attitudes, as well as regulatory regimes.

Bio-technology. Another dispute that is likely to reappear this year involves the EU's de facto moratorium on the approval of bio-engineered foods, also commonly referred to as products containing genetically modified organisms (GMOs). This long-running dispute goes back to October 1998 when the United States, Argentina, and Canada alleged that the EU was applying a moratorium of the approval of bio-engineered or GMO products without any scientific justification, blocking a number of marketing applications already in the pipeline. The three also accused Austria, France, Greece, and Italy of prohibiting the importation and marketing of GMO products, even though these products had already been approved for sale within the EU.

The WTO panel, which was established in August 2003, is expected to release a preliminary and confidential ruling on February 1, 2006. A final report is expected to be released in March 2006. This dispute is one of the longest in the history of the WTO. Some of the delay has resulted from the EU's insistence on the appointment of scientific experts to help the panel deal with technical issues.

In November 2005 the European Commission gave market approval for the use of a corn crop known as 1507 as animal feed, the fourth occasion the Commission has authorized the sale of a GMO produced in the EU since Brussels formally lifted its moratorium on GMO approvals in 2004. The moratorium was formally lifted after the EU adopted new labeling and traceability rules for bio-

engineered foods, but 11 member states including France, Germany, Austria, and Belgium have continued to impose their own moratoriums on the approval of new GMOs. The European Commission has brought a case against the member states at the European Court of Justice over implementing the directives.

But the U.S. government has argued that the EU has continued to impose a moratorium on approval of GMOs in violation of the WTO Agreement on Sanitary and Phytosanitary (SPS) measures. The EU has argued that the SPS agreement only addresses measures to protect human, animal, or plant life or health, which does not cover all issues the EU says are raised by GMO applications. Some questions on GMO applications, the EU argues, deal with non-living components of the environment and cannot be found in violation of the SPS agreement.

E-Commerce and Data Privacy. On July 1, 2003, the EU began requiring U.S. and other non-EU firms to pay value added tax (VAT) on the sale of goods and services digitally delivered to individual consumers in the EU. The new tax rules apply to the supply over electronic networks (digital delivery) of software and computer services generally, plus a wide array of information services. U.S. and other non-EU firms are required to register in one country but pay the VAT at the rate applicable to each customer's country. In contrast, EU firms pay tax at the single rate of the country in which they are located.

EU taxation of digital transactions raises several policy issues for the United States.

These include the taxation of digital commerce, unequal taxation of EU versus non-EU firms, high tax compliance costs, EU competition with the Organization for Economic Cooperation and Development's (OECD's) multilateral discussions of the taxation of ecommerce, and the possibility of a complaint to the WTO. The issue of requiring a foreign firm to collect tax on sales at multiple rates depending on the customer's country of residence is similar to the domestic issue, raised in connection with the Internet tax moratorium, of possibly requiring U.S. sellers to collect tax on interstate sales based on the tax in the customer's state of residence. (For further discussion, see CRS Report RS21596, *EU Tax on Digitally Delivered E-Commerce*, by Martin A. Weiss and Nonna A. Noto.)

The related issue of data privacy rights has also been a source of some friction. While the EU supports strict legal regulations on gathering consumer's personal data, the United States has advocated a self-regulated approach. Controversy emerged when the EU in 1995 adopted a directive forbidding the export of personal information outside EU member states unless the privacy laws in the country to which the information is to be received are deemed "adequate" by the EU. The fact that this list of countries did not include the United States, combined with the need for U.S. companies to be able to move date from Europe to the United States, prompted the creation of the "Safe Harbor" agreement of 2000. This mechanism allows U.S. companies within the jurisdiction of the Federal Trade Commission to comply with the EU Directive if they enroll with the Commerce Department, publicize that they will comply with the safe harbor rules, and recertify their compliance annually. As of December 2005, 837 U.S. companies were certified to the safe harbor program. (For further discussion, see CRS Report RS20823, *The EU-US "Safe Harbor" Agreement on Personal Data Privacy*, by Martin A. Weiss.)

Strengthening the Multilateral Trading System.

After three years of efforts, including the ill-fated ministerial held in Seattle in 1999, trade ministers from the 142 member countries of the WTO agreed to launch a new round of trade negotiations last November in Doha, Qatar. At Doha the WTO members also agreed to give priority attention to a number of developing country concerns.

By most accounts, U.S.-EU cooperation played a major role in producing agreement at Doha. Then-USTR Zoellick and then-EU Trade Commissioner Lamy reportedly worked closely together, agreeing that making concessions to developing countries on issues of priority concern was necessary to move the trading system forward. Their cooperation began early in 2001 with the settlement of the long-running banana dispute and tacit agreement to settle other disputes without resort to retaliation. Each also recognized that both trading superpowers would have to make concessions at Doha to achieve their overall objectives.

At Doha, both the U.S. and EU shared the goal of liberalizing markets in which each enjoyed competitive advantages and to preserve as many protected and less advanced sectors as possible. To gain support from other WTO members, the United States agreed to allow negotiations on its trade remedy laws and on patent protection while the EU agreed to greater liberalization of the agricultural sector than some Member States wanted. Both also agreed to support a number of capacity building initiatives designed to help developing countries better take advantage of world trade opportunities.

Subsequent negotiations proceeded at a slow pace and eventually broke down at the Cancun Ministerial Conference held September 10-14, 2003. At this meeting, trade negotiators were unable to reach agreement on the course of the multilateral trade negotiations. The immediate cause of the collapse was disagreement over launching negotiations on investment and competition, but agriculture and industrial market access were also sources of contention.

After the collapse of the Ministerial Conference, Brussels and Washington explored different ways in getting the Doha Round restarted. On December 2, 2003, the European Commission approved a white paper on reviving the Doha talks. Then-USTR Robert B. Zoellick outlined his proposals for moving the round forward in a letter to trade ministers dated January 11, 2004. On April 16, 2004, the EU withdrew its previous demand that member countries of the WTO agree to negotiate new rules on the so-called Singapore issues of investment, government procurement, competition policy, and trade facilitation. And on May 16, 2004, the EU announced that it is prepared to negotiate the elimination of all export subsidies as part of an effort to inject new momentum in talks.

The EU concessions, in turn, helped trade ministers conclude on August 1, 2004, an agreement setting the broad policy framework for the Doha negotiations. The framework agreement also pledges to substantially reduce domestic supports and significantly expand market access for farm products. Members also agreed to hold the next ministerial meeting of the WTO in Hong Kong in December 2005.

At the Hong Kong meeting, Peter Mandelson, who replaced Lamy as EU Trade Commissioner in November 2004, and former Congressman Robert Portman, who replaced Zoellick as U.S. Trade Representative, had difficulty in finding common ground. The fact that U.S. and EU negotiating priorities in some key areas, particularly agriculture, differ in significant ways has made progress

difficult. In agriculture, the EU has called on the U.S. to make concessions on cutting domestic agriculture subsidies in return for flexibility on its part in market access. But the U.S. has made it clear that it will not make additional concessions on domestic subsidies without EU concessions on market access. Unless this gap can be narrowed, it may be difficult to move the Doha talks forward. The next ministerial meeting is scheduled for April 30, 2006.

CRS Report for Congress

The World Trade Organization: The Hong Kong Ministerial.

RL33176 (Updated January 20, 2006)
http://fpc.state.gov/documents/organization/61517.pdf

Introduction.

The 6th Ministerial of the World Trade Organization (WTO) was held from December 13-18, 2005, in Hong Kong. WTO Ministerials are held every two years to bring together trade ministers from member states, often to make political decisions for the body. In the ongoing Doha Development Agenda (DDA) round of WTO trade negotiations, it was hoped that at the Hong Kong Ministerial trade ministers would be able to agree on a package of modalities (methodologies or formulas that are used to negotiate trade concessions) by which the round is negotiated. As it became clear in the fall of 2005 that such modalities would not be finalized in Hong Kong, the ministerial became an opportunity to take stock of the round, and to achieve some modest, incremental steps on which to build a full agreement.

Agriculture has become the most significant challenge for the members in the negotiations. At the Ministerial, members agreed to an elimination of export subsidies by 2013. Members also agreed to a three band approach to cutting domestic support and committed to achieving specific modalities areas of tariffs and domestic support by April 30, 2006. Trade ministers agreed to use a Swiss tariff reduction formula in the non-agricultural market access talks with specific modalities to be agreed by April 30, 2006. Members also reaffirmed a commitment to completing the services negotiations. With regard to the Trade Related Aspects of Intellectual Property Agreement (TRIPS), the WTO members acted before the Ministerial to approve the final amendment of the TRIPS agreement to incorporate the 2003 Decision on access to medicines. Members also made a commitment to extend duty-free and quota-free access to all LDC products. The outcome of the Ministerial potentially has significant implications for Congress. Any agreement resulting from the round must be approved by Congress, and there is pressure to come to an agreement well before the expiration of U.S. trade promotion authority on July 1, 2007. In addition, any agreement on agriculture may affect the drafting or necessitate the revision of the next farm bill that may be considered by Congress in 2007. Congress has also expressed an interest in shielding U.S. trade remedy laws from negotiations. This report will be updated to reflect the outcome of the Ministerial.

Outcome of the Ministerial.

The WTO Secretary General Pascal Lamy released a draft ministerial text on November 26, 2005.2 This "no-surprises" draft followed his recognition that the members were too far from convergence on major issues to use the Hong Kong Ministerial as a venue to agree on specific modalities for the negotiations. A new draft incorporating some additional areas of convergences was released on December 1, 2005, and was considered at the December 1-2 WTO General Council meeting in Geneva. For the most part, these items reflect areas of agreement reported by the sectoral negotiating chairs in their reports to the General Council. Generally, these convergences reflect a step beyond the July Framework Agreement, but fall short of full negotiating modalities. A summary of sector-by-sector results of the Ministerial follow in bullets below:

*** Agriculture. Members agreed to eliminate export subsidies, and "export measures with equivalent effect" by 2013, a date favored by the European Union (EU). Members agreed to cut domestic support programs with a three band methodology. As the largest user of domestic agricultural subsidies, the EU was placed in the highest band. The United States and Japan were placed in the second band and lesser subsidizing countries were placed in the third band. However, the actual percentage cuts that these bands represent remain subject to negotiation. Members also renewed a commitment to achieve a tariff cutting formula by April 30, 2006.**

*** Cotton. Members agreed to eliminate export subsidies for cotton and to provide duty-free and quota-free access for LDC cotton producers by year-end 2006. Members also agreed to reduce domestic support for cotton in a more ambitious manner than for other agricultural commodities as an "objective" in the ongoing agricultural negotiations.**

*** Least-Developed Countries (LDC). Members agreed to rovide duty-free and quota-free access for LDC exports by 2008. However, this agreement provides the caveat that 3% of tariff lines can be exempted as sensitive products such as textiles, apparel, and footwear.**

*** Non-Agricultural Market Access (NAMA). In the NAMA talks, members agreed to adopt a Swiss formula approach, one in which higher tariffs are decreased more than lower tariffs. However, the exact formula is yet to be determined, although members agreed to a April 30, 2006 deadline to achieve a formula. The exact nature and scope of special and differential treatment for developing countries in tariff reduction also remains to be resolved.**

*** Services. No substantive breakthrough was achieved in the services negotiations. Draft ministerial language that would have clarified specific sectors and modes of supply as subject to negotiations were watered-down at the insistence of some developing countries. Language that allowed for plurilateral negotiations was also restricted by tying members' obligations under the process to their development status.**

*** Intellectual Property Rights. Members agreed to a permanent amendment of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS). The amendment would enable developing and least developed countries without domestic manufacturing capability to issue a compulsory license to a third country producer to manufacture generic drugs to access medicines to fight public health epidemics such as HIV/AIDS, tuberculosis, malaria, and other infectious diseases. This agreement will become effective when it is ratified by two-thirds of the membership.**

*** Trade Remedies. While the Ministerial text and the rules annex did not report consensus on any negotiating issue, it called for the preparation of a text-based negotiating instrument.**

*** Trade Facilitation. No major breakthroughs in trade facilitation were announced in Hong Kong and the Ministerial declaration did not agree on a date for beginning text-based negotiations. The ministerial served as a review of progress and a discussion of plans for future work. *Dispute Settlement. The Ministerial takes note of the work of dispute settlement negotiations, but does not recommend any specific course of action.**

*** Trade and Environment. The Ministerial reaffirmed its commitment to Doha language "aimed at enhancing the mutual supportiveness of trade and environment." It also noted the cooperation between negotiating groups to identify environmental goods in which tariffs and non-tariff barriers.**

Trade Remedies and Related Matters.

The United States and many of its trading partners use antidumping (AD) and countervailing duty (CVD) laws to remedy the adverse impact of alleged unfair trade practices on domestic producers. These statutes are permitted by the WTO as long as they conform to the Agreement on Implementation of Article VI (Antidumping Agreement, ADA) and the Agreement on Subsidies and Countervailing Measures (SCM), as adopted in the Uruguay Round of trade negotiations. Under pressure from trading partners (including Japan, Korea, Brazil, Chile, Colombia, Costa Rica, Thailand, Switzerland, and Turkey) which had become concerned with a perceived general increase in the use of trade remedy measures, U.S. negotiators agreed to a Doha round negotiating objective which called for "clarifying and improving the disciplines" under the ADA and SCM. This objective has been criticized by many in Congress who are concerned that future U.S. concessions on trade remedies could lead to a weakening of U.S. laws that are seen to ameliorate the adverse impact of unfair trade practices on domestic producers and workers. Other Members, who have expressed concern about the economic inefficiencies caused by AD and CVD actions, especially as they relate to higher prices to U.S. consumers and consuming industries, have expressed some openness to considering changes to the WTO agreements.

U.S. Legislation.

Support for U.S. trade remedy laws is especially strong in the Senate, where, following an adverse WTO panel decision on a controversial trade remedy law, 70 senators wrote a letter to President Bush arguing strongly for retaining the law. S.Con Res. 55 (Craig, introduced September 29, 2005) seeks to express the sense of Congress that the United States should not be a signatory to any Doha Round agreement that would "lessen the effectiveness of domestic and international disciplines" or "lessen in any manner the ability of the United States to enforce rigorously our trade laws." On the other side of the debate, legislation has also been introduced that would give consuming industries standing in trade remedy cases (H.R. 4217, Knollenberg, introduced November 3, 2005), or to comply with certain WTO rulings on trade remedies.

Intellectual Property Issues.

The Doha Ministerial Declaration called for discussions on implementation of certain aspects of the TRIPS agreement, including the relationship between TRIPS and public health (access to medicines), on the creation of a multilateral registration system for geographical indications of wines and spirits,

and on the relationship of TRIPS to the Convention on Biological Diversity50 and to traditional knowledge and folklore. The Ministerial Declaration for Hong Kong notes the progress made in these discussions, but announces no new decisions on them. However, just prior to the Ministerial, the WTO members announced an agreement on the TRIPS and public health issue. For a discussion of geographical indications, including the issue of extending the protection accorded to wines and spirits to other agricultural products, see the agriculture section (p.9, above).

Dispute Settlement.

The WTO Understanding on Rules and Procedures for the Settlement of Disputes (Dispute Settlement Understanding or DSU), which entered into force January 1, 1995, with the Uruguay Round package of agreements, provides the legal basis for dispute resolution under virtually all WTO agreements and is the primary means of enforcing WTO obligations. The DSU introduced significant new elements into existing GATT dispute settlement practice intended to strengthen the system and facilitate compliance with dispute settlement results. In particular, the DSU makes the establishment of a panel, the adoption of panel and appellate reports, and the authorization of requests to retaliate virtually automatic, and adds a right to appellate review of panel reports on issues of law and legal interpretation. Its system of deadlines and timelines expedites proceedings at various stages of the process, seeks to ensure that compliance with adverse panel reports is achieved, if not immediately, within "a reasonable period of time," and allows disputing parties to exercise their rights under the DSU by defined dates. Certain unilateral actions in trade disputes involving WTO agreements, such as suspending WTO concessions or other obligations without multilateral authorization, are prohibited. The system has been heavily used, the WTO Secretariat reporting 335 complaints filed between January 1, 1995 and November 21, 2005; roughly half involve the United States either as a complainant or defendant.

Current dispute settlement negotiations, which are taking place in the Special Session of the WTO Dispute Settlement Body (DSB/SS), are an extension of talks begun under a Uruguay Round Ministerial Declaration that called on WTO Members to complete a full review of dispute settlement rules and procedures within four years after the WTO Agreement entered into force, and to decide at the first WTO ministerial meeting held after completion (in effect, the 3rd Ministerial Conference held in Seattle in late 1998) whether to continue, modify or terminate them. While there was much discussion of possible revisions and a draft text containing amendments to the DSU was circulated at the Seattle Ministerial, consensus could not be reached at that time. No decisions on reforms were taken by WTO Members subsequent to the Seattle meeting and the future of the review remained unclear until WTO Members agreed at the Doha Ministerial Meeting in November 2001 to continue negotiations on "improvements and clarifications" of the DSU, with the aim of reaching agreement by the end of May 2003 and bringing the results into force "as soon as possible thereafter." Further, dispute settlement negotiations would not be conducted, concluded, or their results brought into force as part of the single undertaking planned for Doha negotiations as a whole.

In the absence of probable consensus by the May 2003 deadline, the outgoing Chairman of the SS/DSB, Peter Balás (Hungary), drafted a Chairman's Text of proposed amendments to the DSU dated May 28, 2003, in which he incorporated numerous proposals, including those involving consultation procedures, third-party rights, procedures for terminating panels before they complete their work, remand authority for the Appellate Body, sequencing of requests for authorization to retaliate with requests for compliance panels, procedures for terminating retaliatory measures, awards for litigation costs, and special provisions for developing countries. No action was taken on the document and in July 2003, the WTO General Council extended the talks until May 31, 2004. With additional proposals submitted but little progress by the new date, the WTO General Council agreed

in the August 2004 Doha Work Program that work in the dispute settlement negotiations would continue on the basis set out by the new DSB/SS Chairman David Spencer (Australia), in his June 2004 report to the WTO Trade Negotiations Committee. The report stated that there was "agreement among Members that the Special Session needs more time to complete its work, on the understanding that all existing proposals would remain under consideration and bearing in mind that these negotiations are outside the single undertaking."

In addition, the Chairman did not recommend a specific target date for completion, noting, however, that one might be considered later. Among specific concerns under the DSU is the issue of "sequencing," originally identified during the implementation phase of the U.S.-European Communities (EC) banana dispute. The problem results from the gap caused by the failure of the DSU to integrate Article 21.5, which provides that disagreements over the existence or adequacy of compliance measures are to be decided by recourse to DSU procedures, with the processes and deadlines of Article 22, which permits the prevailing party in a dispute to request authorization to retaliate within 30 days after the compliance period ends if the defending party has not complied with its obligations by that time. The EC argued that a full compliance proceeding (including consultations) was called for; the United States argued that, given the 30-day deadline for retaliation requests, it would lose its right to request authorization to retaliate if it waited for a compliance panel to complete its work. While sequencing remains an issue in the negotiations, parties to disputes have resolved existing difficulties by entering into *ad hoc* bilateral agreements in specific disputes under which, for example, the complaining party requests both the establishment of a compliance panel and authorization to retaliate, the defending party objects to the level of retaliation proposed — an action that automatically sends the request to arbitration — and the arbitration is suspended pending completion of the compliance panel process (including any appeal).

Another case-based problem arose with the enactment of U.S. "carousel" legislation in May 2000, under which the USTR is required periodically to rotate lists of items subject to authorized trade retaliation unless certain exceptions apply, the legislation in large part a reaction to the EC's failure to comply with the WTO decision faulting the EC's prohibition on hormone-treated beef. The EC argued that changing a list would be a unilateral action not authorized under the DSU. Along with the issues just described, the negotiations have taken up a broad range of other topics, with over 50 working documents publicly circulated by Members and other informal proposals and compilations made during the course of the talks.

The United States has generally sought increased transparency and access to the process through open meetings, timely access to submissions and final reports, and guidelines for *amicus* briefs. It has also proposed shorter time frames (in tandem with clarifying the sequencing issue), and has called for steps that would give Members more control over the process, such as requiring the WTO Appellate Body to issue interim reports for comment by disputing parties; allowing the deletion from an appellate report, upon agreement by the disputing parties, of findings that they view as not necessary or helpful to resolving the dispute; and giving parties the right to mutually suspend panel and appellate proceedings to allow them to work on a solution to the case. In October 2005, the United States also suggested draft parameters concerning both the use of public international law in WTO dispute settlement and the proper interpretive approach for use in disputes. Its proposed interpretive guidelines are aimed at ensuring that WTO adjudicative bodies neither supplement nor reduce the rights and obligations of WTO Members under WTO agreements and, among other things, describe types of "gap-filling" that should only be addressed through negotiations, including a panel's reading a right or obligation into the text of an agreement by, for example, extrapolating from a different agreement provision.

The EC has proposed, among other things, permanent panelists, remand authority for the Appellate Body, a prohibition on carousel retaliation, enhancing the availability of compensation before resort to retaliation, and a formalized way to terminate multilateral authorization to retaliate. Japan has sought, *inter alia*, greater enforcement options and a larger Appellate Body membership. Canada has proposed procedures to protect business confidential information and the creation of a panel roster. The EC, Japan, and Canada have also proposed varying degrees of transparency in dispute proceedings. Proposals by developing country Members generally reflect Members' lower level of capacity and a desire to have developing country interests reflected to a greater degree in panel and appellate reports and dispute proceedings as a whole. These Members have proposed, among other things, extended timelines in cases in which they are involved, including extensions for consultations, brief filing, and the implementation of adverse results; provisions to ensure that a developing country panelist is included in all panels in which a developing country is a disputant; and the possible authorization of collective WTO retaliation where a developing or less-developed country (LDC) Member is a successful complainant.

They have also proposed ways of dealing with financial and human resource limitations in disputes, including increased technical resources for developing countries and the awarding of litigation costs to a developing country Member that has prevailed in a case.

CRS Report for Congress
RS22187
(Updated January 18, 2006)

U.S. Agricultural Policy Response to WTO Cotton Decision.

http://fpc.state.gov/documents/organization/61058.pdf

Summary.

In March 2005, a World Trade Organization (WTO) appellate panel ruled against the United States in a dispute settlement case (DS267) brought by Brazil against certain aspects of the U.S. cotton program.1 To comply with the "prohibited subsidy" portion of the WTO ruling, U.S. Secretary of Agriculture Mike Johanns announced (July 5, 2005) that the Administration was sending proposed statutory changes to Congress including elimination of the Step 2 cotton program, removal of a 1% cap on fees charged under the GSM-102 export credit guarantee program, and termination of the GSM-103 export credit guarantee program. In light of USDA's proposed changes, and with the expectation that they will be fully implemented in an expeditious manner, Brazil has temporarily suspended its pursuit of WTO-sanctioned retaliatory trade measures against U.S. agricultural products. The U.S. National Cotton Council (NCC) has announced its opposition to the removal of the Step 2 cotton program whose elimination is contained in the pending budget reconciliation bill, S. 1932, the Deficit Reduction Act of 2005. Additional permanent modifications to U.S. farm programs may still be needed to fully comply with the "actionable subsidies" portion of the WTO ruling. Such changes ultimately would be decided by Congress. This report will be updated as events warrant.

Background.

In late 2002, Brazil initiated a WTO dispute settlement case against specific provisions of the U.S. cotton program. On September 8, 2004, a WTO dispute settlement panel released its ruling on the case, finding against the United States on several key issues. On March 3, 2005, the WTO panel's ruling was upheld on appeal. On March 21, 2005, the panel reports were adopted by the WTO membership, initiating a sequence of events, under WTO dispute settlement rules, whereby the United States is expected to bring its policies into line with the panel's recommendations or negotiate a mutually acceptable settlement with Brazil. U.S. failure to comply could result in WTO-sanctioned trade retaliation by Brazil against certain U.S. agricultural exports.

The U.S. response to the WTO cotton ruling is being watched closely by developing countries, particularly by a consortium of four African cotton-producing countries which has submitted its own proposal to the WTO calling for a global agreement to end all production-related support for cotton

growers of all WTO-member countries.2 In addition, other WTO members are likely to evaluate the U.S. response as an indicator of whether the United States is prepared to make substantial cuts in market-distorting agricultural subsidies as part of the Doha Round of WTO trade negotiations.

WTO Panel's Recommendation.

The WTO panel recommended that the United States withdraw those support programs identified as "prohibited" subsidies by July 1, 2005, and to remove the prejudicial effects of those programs identified as "actionable" subsidies by September 21, 2005 (six months after the appellate report's adoption). Each of these subsidy types — prohibited and actionable — involves a different type of response and a different timetable for implementing that response.

Prohibited Subsidies. Two types of prohibited subsidies were identified by the WTO panel: unscheduled export subsidies (i.e., subsidies applied to commodities not listed on a country's WTO schedule or made in excess of the value listed on the schedule);3 and import substitution subsidies which refer to subsidies paid to domestic users to encourage the use of domestic products over imported products. Both Step 2 export payments and export credit guarantees were found to operate as prohibited export subsidies. Step 2 domestic user payments were found to operate as prohibited import substitution subsidies. Under the WTO's Agreement on Agriculture, prohibited subsidies are treated with greater urgency than actionable subsidies — in particular, they are given a shorter time frame for compliance.4

Step 2 Program. **Step 2 payments are part of special cotton marketing provisions authorized under U.S. farm program legislation to keep U.S. upland cotton competitive on the world market.5 Step 2 payments are made to exporters and domestic mill users to compensate them for their purchase of U.S. upland cotton which tends to be priced higher than the world market price.**

Export Credit Guarantee Programs. **USDA's export credit guarantee programs (GSM-102, GSM 103, and SCGP) underwrite credit extended by private U.S. banks to approved foreign banks for purchases of U.S. food and agricultural products by foreign buyers.6 GSM-102 covers credit terms up to three years, while GSM-103 covers longer credit terms up to 10 years. The Supplier Credit Guarantee Program (SCGP) insures short-term, open account financing designed to make it easier for exporters to sell U.S. food products overseas.**

The WTO panel found that all three export credit programs effectively functioned as export subsidies because the financial benefits returned to the government by these programs failed to cover their long-run operating cost. Furthermore, the panel found that this export-subsidy aspect of export credit guarantees applies, not just to cotton, but to all recipient commodities that benefit from U.S. commodity support programs. If a commodity that benefits from program payments is unscheduled (i.e., not listed on a country's WTO schedule) then, according to the WTO panel, it is not eligible for U.S. export credit guarantees so long as the credit guarantees continue to function as an implicit export subsidy. In contrast, the panel ruled that the subsidized export of scheduled agricultural products that remain within their export subsidy schedules do not circumvent U.S. export commitments and are not subject to trade remedy actions.

Actionable Subsidies. Any subsidy may be challenged in the WTO, i.e., it is "actionable," if it fulfills the WTO definition of a subsidy7 and is alleged to cause adverse effects including serious prejudice to the interests of other WTO members. Actionable U.S. subsidies were identified as contributing to serious prejudice to the interests of Brazil by depressing prices for cotton on the world market during

the marketing years 1999-2002. Specifically, this involved those U.S. subsidy measures singled out as price contingent (i.e., dependent on changes in current market prices), e.g., marketing loan provisions, Step 2 payments, market loss payments, and counter-cyclical payments (CCPs).8 The panel recommended that, upon adoption of its final report, the United States take appropriate steps to remove the adverse effects or to withdraw the subsidies.9

U.S. Response.

With respect to implementing changes to the "prohibited subsidies," the Administration is limited to how much response can be accomplished through altering the program's operation administratively, and how much response requires new legislation. The Step 2 cotton program was authorized by the 2002 farm act (P.L. 107-171; Sect. 1207) and would necessitate new legislation to remove or alter its implementation. The Administration has more discretion over the implementation of the export credit uarantee program, since it may choose simply not to operate the program or to provide credit only for WTO scheduled commodities. However, if the Administration intends to use export credit guarantees for the current list of supported commodities in otherwise unrestricted amounts, then some statutory changes will be needed to eliminate the alleged "subsidy" component of export credit guarantees. This is because user fees for GSM-102, the primary export credit program, are capped at 1% of the value of the export product.

Higher fees are needed to ensure that the financial benefits returned by these programs fully cover their long-run operating costs; thereby eliminating their subsidy component. On June 30, 2005, USDA announced that beginning July 1, the Commodity Credit Corporation (CCC) would use a risk-based fee structure for the GSM-102 and SCGP programs.10 As a result, fee rates are now based on the country risk that CCC is undertaking, as well as the repayment term and frequency under the guarantee. The new structure responds to a key finding by the WTO that the fees charged by the programs should be risk based. In addition, the CCC stopped accepting applications for payment guarantees under GSM-103. Any remaining country and regional allocations for GSM-103 coverage under FY2005 program announcements were reallocated to the existing GSM-102 program for that country or region.

On July 5, 2005, Secretary Johanns announced that the Administration was sending three proposed statutory changes to Congress to comply with the WTO case: 1) elimination of the Step 2 program; 2) removal of the 1% cap on fees that can be charged under the GSM-102 program; and 3) termination of the GSM-103 program.11 According to Secretary Johanns the proposed changes were worked out in collaboration with U.S. industry groups. Furthermore, Secretary Johanns said that repealing the Step 2 program would remove both the prohibited export and import substitution subsidies and address issues related to the actionable subsidies (i.e., suppression of cotton prices in world markets); eliminating the 1% fee cap would make the Export Credit Guarantee Program more risk-based; and terminating the GSM-103 program would reinforce the recent U.S. decision to stop using longer-term export credit guarantees.

A provision repealing the Step 2 program, effective August 1, 2006, is currently contained in the conference report on the pending budget reconciliation bill, S. 1932, the Deficit Reduction Act of 2005. The conference report was passed by both the House and the Senate in late December 2005, but further action must be taken by the House because of changes to the final bill made by the Senate unrelated to the Step 2 program. The National Cotton Council (NCC) announced its opposition to the

immediate elimination of cotton's Step 2 program as proposed by USDA.12 The NCC is an industry group representing cotton producers, ginners, warehousers, merchants, cottonseed processors/dealers, cooperatives and textile manufacturers. NCC chairman Woods Eastland expressed concern that the program not be changed in the middle of the marketing year when it could have disruptive effects on cotton producers and users alike. Eastland expressed the NCC's interest in working with Congress in effecting a "fair and appropriate" response to the WTO case. However, in previous testimony to Congress the NCC leadership has expressed a consistent interest in participating in the WTO's rules based international trading system and in maintaining an effective U.S. cotton program that complies with WTO rules.13

Brazil's Response.

Prohibited Subsidies. Because prohibited export subsidies had not been removed by July 1, 2005, Brazil requested (July 4, 2005) authorization from the WTO to impose countermeasures against U.S. cotton subsidies valued at $3 billion. According to WTO rules, trade sanctions are limited to a value not to exceed the level of lost benefits. Brazil proposed to suspend tariff concessions as well as obligations under the WTO Agreement on Trade-Related Intellectual Property Rights and the General Agreement on Trade in Services until the United States withdrew the exports subsidies identified by the WTO, in an amount estimated at $3 billion corresponding to: (1) Step 2 payments made in the most recently concluded marketing year (2004/05), and (2) the total of exporter applications received under the three export credit guarantee programs, for all unscheduled commodities and for rice, for the most recent fiscal year (2004).14 The United States objected to Brazil's proposed sanctions amount, and requested WTO arbitration (July 19, 2005; WT/DS267/24). However, the United States and Brazil reached a procedural agreement (August 18, 2005; WT/DS267/25) temporarily suspending arbitration proceedings in so far as the prohibited subsidies are involved.

Actionable Subsidies. To date, the Administration has not announced any specific initiative to address the programs deemed to cause prejudicial impact to Brazil's trade interest. Because the prejudicial effects of the price-contingent actionable subsidies had not been removed by September 21, 2005, Brazil requested authorization from the WTO to impose additional countermeasures valued at $1 billion as retaliation against the programs causing serious prejudice. Once again, the United States requested WTO arbitration (Oct 18, 2005; WT/DS267/27) over the level of the proposed sanctions. However, on November 21, 2005, the United States and Brazil reached another procedural agreement (December 7, 2005; WT/DS267/29) suspending further retaliation proceedings in so far as the actionable subsidies are involved.

Outlook. Brazil continues to undertake the procedural steps necessary to preserve its authority under the auspices of the WTO to retaliate in the event of noncompliance by the United States; although, Brazil has shown a willingness to permit the U.S. legislative process to make the changes needed to bring its farm programs into compliance with the WTO ruling, even if this process extends well beyond the deadlines established under the WTO dispute settlement ruling. However, reportedly Brazil may soon restart one or both of the arbitration proceedings.15

Potential Effects to U.S. Agriculture of Proposed Changes.

Eliminating the Step 2 Program. The Step 2 program has channeled nearly $3 billion to the U.S. cotton industry since 1996.16 According to the USDA's chief economist, Keith Collins, ending the Step 2 program would result in slightly lower domestic prices — by two to three cents per pound — and higher export prices for U.S. cotton.17 But he also anticipated that declines in producer prices would be likely to trigger an increase in CCP to U.S. cotton farmers that would offset losses from lower prices. An analysis by the Food and Agricultural Policy Research Institute (FAPRI) found a -1.3¢ decline in U.S. farm price and a 0.4¢ rise in international prices due to the elimination of Step 2 payments.18

Changing GSM-102 and Terminating GSM-103. In FY2004, about 11% of U.S. cotton exports were facilitated with export credit guarantees — FY2004 U.S. cotton exports were valued at $4,511 million of which $480 million were facilitated with GSM-102 export credit guarantees and another $8 million relied on SCGP guarantees. Redesign of export credit guarantees (as discussed above) would likely have a small but negative effect on U.S. cotton exports, thus reinforcing the results of removing Step 2.

Role of Congress.

Ultimately Congress is responsible for passing farm program legislation that complies with U.S. commitments in international trade agreements. Passage of the pending budget reconciliation bill, S. 1932, the Deficit Reduction Act of 2005, would eliminate the cotton Step 2 provisions. Further statutory changes will be needed to eliminate the alleged "subsidy" component of export credit guarantees as represented by the 1% cap on user fees. In addition, changes to those programs deemed part of the actionable subsidy ruling, i.e., CCP and marketing loan provision, would also necessitate legislative action. The legislation authorizing current farm programs is not set to expire until 2007. Senate Agriculture Committee Chairman Saxby Chambliss has said that he would review the Administration's proposal and work with industry and the Administration to identify the appropriate legislative solution for complying with the WTO ruling.19

CRS Report for Congress.
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Dispute Settlement in the WTO: An Overview.

http://fpc.state.gov/documents/organization/58269.pdf

Dispute resolution in the World Trade Organization (WTO) is carried out under the WTO Dispute Settlement Understanding (DSU), whose rules and procedures apply to virtually all WTO agreements. The DSU provides for consultations between disputing parties, panels and appeals, and possible compensation or retaliation if a defending party does not comply with an adverse WTO decision by a given date. Automatic establishment of panels, adoption of reports, and authorization of requests to retaliate, along with deadlines for various stages of the dispute process and improved multilateral surveillance and enforcement of WTO obligations, are aimed at producing a more expeditious and effective system than that which existed under the GATT. To date, 334 WTO complaints have been filed, slightly over half involving the United States either as a complaining party or defendant. Expressing dissatisfaction with WTO dispute settlement results in the trade remedy area, Congress directed the Executive Branch to address dispute settlement issues in WTO negotiations in its grant of trade promotion authority to the President in August 2002 (P.L. 107-210). WTO Members have been negotiating DSU revisions under a Doha Development Round mandate, though little concrete progress has resulted. The United States has been seeking greater transparency in dispute proceedings, and in September 2005, a WTO dispute proceeding was broadcast to the public for the first time. S. 817 (Stabenow), S. 1542 (Stabenow), and H.R. 4186 (Camp) would establish a Chief Trade Prosecutor in the Office of the United States Trade Representative (USTR) to assist the USTR in investigating and prosecuting WTO disputes. This report will be updated.

Background. From its inception, the General Agreement on Tariffs and Trade (GATT) has provided for consultations and dispute resolution among GATT Contracting Parties, allowing a party to invoke GATT dispute articles if it believes that another's measure, whether violative of the GATT or not, has caused it trade injury. Because the GATT does not set out a dispute procedure with great specificity, GATT Parties over time developed more detailed process including *ad hoc* panels and other practices. The procedure was perceived to have certain deficiencies, however, among them a lack of deadlines, the use of consensus decision-making (thus allowing a Party to block the establishment of panels and adoption of panel reports), and laxity in surveillance and implementation of dispute settlement results. Congress made reform of the GATT dispute process a principal U.S. goal in the Uruguay Round of Multilateral Trade Negotiations.

WTO Dispute Settlement Understanding. The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which went into effect January 1, 1995, continues past GATT dispute practice, but also contains several features aimed at strengthening the prior system.[1] A Dispute Settlement Body (DSB), consisting of representatives of all WTO Members, administers dispute proceedings. While the DSB ordinarily operates by consensus (i.e., without formal objection of any Member present), the DSU reverses past consensus practice at fundamental stages of the process. Thus, unless it decides by consensus *not* to do so, the DSB is to establish panels; adopt panel and appellate reports; and, where WTO rulings have not been implemented and if requested by a prevailing party, authorize the party to impose a retaliatory measure. The DSU also sets forth deadlines for various stages of the proceedings and improves multilateral monitoring of the implementation of adopted rulings.

Given that panel reports are to be adopted automatically, WTO Members have a right to appeal a panel report on issues of law. The DSU created a standing Appellate Body to carry out this new appellate function; the Body has seven members, three of whom serve on any one case.

The DSU provides for integrated dispute settlement—that is, the same rules apply to disputes under virtually all WTO agreements unless a specific agreement provides otherwise. If a dispute reaches the retaliatory stage, this approach allows a Member to impose a countermeasure in a sector or under an agreement other than the one at issue ("cross-retaliate"). The preferred outcome of the dispute mechanism is "a solution mutually acceptable to the parties and consistent with the covered agreements"; absent such a solution, the primary objective of the process is withdrawal of a violative measure, with compensation and retaliation being avenues of last resort. The DSU has proved popular, with 334 complaints filed from January 1, 1995, to date; slightly more than half involve the United States as either a complaining party or a defendant. The United States Trade Representative (USTR) represents the United States in WTO disputes.

The DSU was scrutinized by Members pursuant to an Uruguay Round Declaration, which called for completion of a review within four years after the WTO Agreement entered into force (i.e., by January 1, 1999). Members did not agree on any DSU revisions in the initial review and are continuing to negotiate on dispute settlement issues in the current Doha Round. Discussions have addressed "remand, sequencing, postretaliation, third-party rights, additional guidance to WTO adjudicative bodies, panel composition, time-savings, and transparency" and negotiators had aimed to intensify their work in the fall of 2005 so as to present their results at the December 2005 WTO Ministerial Meeting in Hong Kong.[2] The United States has proposed, *inter alia*, greater Member control over the dispute settlement process as well as increased transparency, including through open meetings and timely access to submissions and final reports.[3]

In mid-September 2005, a WTO panel proceeding was for the first time opened for public viewing. At the request of the United States, Canada, and the European Communities (EC), the primary parties in the EC's challenge to the U.S. and Canada's continued imposition of retaliatory tariffs in response to the EC's failure to comply with a WTO decision faulting its prohibition on hormone-treated beef, the panel agreed that meetings to which the disputing parties are invited to appear would be open to observation by the public through closed-circuit TV broadcast at the WTO.[4]

Steps in a WTO Dispute Proceeding.

Consultations (Art. 4). **If a WTO Member requests consultations with another Member under a WTO agreement, the latter must generally respond within 10 days and enter into consultations within 30 days. If the dispute is not resolved within 60 days after receipt of the request to consult, the complaining party may request a panel. The complainant may request a panel earlier if the defending Member has failed to enter into consultations or if the disputants agree that consultations have been unsuccessful.** ***Establishing a dispute panel (Arts. 6, 8).*** **If a panel is requested, the DSB must establish it at the second DSB meeting at which the request appears as an agenda item, unless it decides by consensus not to do so. The panel is generally composed of 3 persons. The Secretariat proposes the names of panelists to the disputants, who may not oppose them except for "compelling reasons." If there is no agreement on panelists within 20 days from the date the panel is established, either disputing party may request the WTO Director-General to appoint the panelists.**

Panel proceedings (Arts. 12, 15). **After considering written and oral arguments, the panel issues the descriptive part of its report (facts and argument) to the disputing parties. After considering any comments, the panel submits this portion along with its findings and conclusions to the disputants as an interim report. Absent further comments, the interim report is considered to be the final report and is circulated promptly to WTO Members. A panel must generally circulate its report to the disputants within six months after the panel is composed, but may take longer if needed. The period from panel establishment to circulation of the report to all Members should not exceed nine months. In practice, panels have increasingly failed to meet the six-month deadline.**

Within 60 days after a panel report is circulated to WTO Members, the report is to be adopted at a DSB meeting unless a disputing party appeals the report or the DSB decides by consensus not to adopt it. Within 60 days of being notified of an appeal (extendable to 90 days), the Appellate Body (AB) must issue a report that upholds, reverses, or modifies the panel report. An appellate report is to be adopted by the DSB, and unconditionally accepted by the disputing parties, unless the DSB decides by consensus not to adopt it within 30 days after circulation to Members. The period of time from the date the panel is established to the date the DSB considers the panel report for adoption is not to exceed nine months (12 months where the report is appealed) unless otherwise agreed by the disputing parties.

Implementation of Panel and Appellate Body Reports (Art. 21). **Thirty days after the panel and any AB reports are adopted, the Member must inform the DSB how it will implement the WTO ruling. If it is "impracticable" to comply immediately, the Member will have a "reasonable period of time" to do so. The period will be: (1) that proposed by the Member and approved by the DSB; (2) absent approval, the period mutually agreed by the disputing parties within 45 days after the date of adoption of the report or reports; or (3) failing agreement, the period determined by binding arbitration. Arbitration is to be completed within 90 days after the reports are adopted. To aid the arbitrator in determining a compliance period, the DSU provides a non-binding guideline of 15 months from the date of adoption; awards have ranged from six months to 15 months, one week. The DSU envisions a time period of no more than 18 months from the date a panel is established until the reasonable period of time is established. Where there is disagreement as to whether a Member has complied in a case, a panel may be convened to resolve the dispute (Article 21.5); the compliance panel has 90 days to issue its report, which may be appealed.**

Compensation and Suspension of Concessions (Art. 22). **If defending party fails to comply with the WTO recommendations and rulings within the compliance period, the party must, upon request, enter into negotiations with the prevailing party on a compensation agreement within 20 days after the expiration of this period; if negotiations fail, the prevailing party may request authorization from the DSB to retaliate.**

If requested, the DSB is to grant the authorization within 30 days after the compliance period expires unless it decides by consensus not to do so. The defending Member may request arbitration on the level of retaliation or whether the prevailing Member has followed DSU rules in formulating a proposal for cross-retaliation; the arbitration is to be completed within 60 days after the compliance period expires. Once a retaliatory measure is imposed, it may remain in effect only until the violative measure is removed or the disputing parties otherwise resolve the dispute.

Compliance Issues. While many WTO rulings have been satisfactorily implemented, a number of difficult cases have tested the implementation articles of the DSU, highlighting some deficiencies in the system and prompting suggestions for reform.[6] For example, gaps in the DSU have resulted in the problem of "sequencing," an issue that first manifested itself during the compliance phase of the U.S.-EC dispute over the EC's banana import regime. Article 22 of the DSU allows a prevailing party to request authorization to retaliate within 30 days after a compliance period ends if the defending party has not complied. Article 21.5 provides that disagreements over the adequacy of compliance measures are to be decided using WTO dispute procedures, "including whenever possible resort to the original panel"; the compliance panel's report is due within 90 days and may be appealed. The DSU does not integrate Article 21.5 into Article 22 processes, nor does it expressly state how compliance is to be determined so that a prevailing party may pursue action under Article 22.

Sequencing has been discussed but not resolved in the current WTO dispute settlement negotiations. Multilateral action is needed to revise WTO rules in this area given the January 2001 adoption of an Appellate Body report that in effect concluded that a panel convened to arbitrate the level of trade retaliation under Article 22.6 does not have a mandate to first decide if a WTO Member is in compliance with WTO rulings, and stated that rules regarding sequencing must be decided by WTO Members as a whole (*United States—Import Measures on Certain Products from the European Communities*, WT/DS165). In the meantime, disputing parties have been entering into bilateral agreements regarding the sequencing of compliance panels and requests to retaliate in specific proceedings.

WTO Dispute Settlement and U.S. Law. Adoption of panel and appellate reports finding that a U.S. measure violates a WTO agreement does not give the reports direct legal effect in this country. Thus, federal law would not be affected until Congress or the Executive Branch, as the case may be, changed the law or administrative measure at issue.[7] Procedures for Executive Branch compliance with adverse WTO decisions are set out in §§ 123 and 129 of the Uruguay Round Agreements Act (URAA). The DSU generally applies to disputes involving state and local measures covered by WTO agreements and Members are obligated to ensure compliance at this level (DSU, Art. 22.9 and n.17). Only the federal government may bring suit against a state or locality to declare its law invalid because of inconsistency with a WTO agreement; private remedies based on WTO obligations are also precluded by statute (URAA, § 102(b),(c)).

Sections 301-310 of the Trade Act of 1974 provide a means for private parties to petition the United States Trade Representative (USTR) to take action regarding harmful foreign trade practices. If the USTR decides to initiate an investigation, whether by petition or on its own accord, regarding an

allegedly WTO-inconsistent measure, he must invoke the WTO dispute process to seek resolution of the problem. The USTR may impose retaliatory measures to remedy an uncorrected foreign practice, some of which may involve suspending a WTO obligation (e.g., a tariff increase in excess of negotiated rates). The USTR may terminate a Section 301 case if the dispute is settled, but under §306 must monitor foreign compliance and may take further retaliatory action if compliance measures are found to be unsatisfactory. A "carousel" provision added to §306 in P.L. 106-200 directs the USTR periodically to revise the list of imports subject to Section 301 retaliation unless the USTR determines that implementation of WTO obligations is imminent or the USTR and the Section 301 petitioner agree that revision is unnecessary.

Article 23 of the DSU requires WTO Members to use DSU procedures in disputes involving WTO agreements and to act in accord with the DSU when determining if a violation has occurred, determining a compliance period, and taking any retaliatory action.

Section 301 may be generally be used consistently with the DSU, though some U.S. trading partners continued to complain that the statute allows unilateral action and forces negotiations through its threat of sanctions. The EC challenged Section 301 in the WTO in 1998, with the dispute panel finding that the language of § 304, which requires a USTR determination as to the legality of a foreign practice by a given date, is *prima facie*inconsistent with Article 23 because in some cases it mandates a determination and statutorily reserves the right for the determination to be one of inconsistency with WTO obligations before the exhaustion of DSU procedures. The panel also found, however, that the serious threat of violative determinations and consequently the *prima facie* inconsistency was removed because of U.S. undertakings, as set forth in the Uruguay Round Statement of Administrative Action (H.Doc. 103-316) and made before the panel, that the USTR would use its statutory discretion to implement Section 301 in conformity with WTO obligations. Moreover, the panel could not find that the DSU was violated by §306, which directs USTR to make a determination as to imposing retaliatory measures by a given date, given differing good faith interpretations of the "sequencing" ambiguities in the DSU. *See United States—Sections 301-310 of the Trade Act of 1974; Report of the Panel* (WT/DS152/R) (adopted January 2000). The EC has also challenged the "carousel" statute described above, but the case remains in consultations (WT/DS200). The issue has also been raised in Doha Round dispute settlement negotiations.

Recent Legislation Related to WTO Dispute Settlement. In its grant of trade promotion authority to the President in August 2002 (P.L. 107-210), Congress directed the Executive Branch to address dispute settlement issues in WTO negotiations, particularly to seek the adherence of panels to previously-agreed standards of review, and provisions encouraging the early identification and settlement of disputes.

CRS Report for Congress.
(RS20715)
(March 5, 2002)

Trade Retaliation: The "Carousel" Approach.

http://fpc.state.gov/documents/organization/9099.pdf

Section 407 of the Trade and Development Act of 2000 (P.L. 106-200) requires the U.S. Trade Representative (USTR) to periodically revise the list of products subject to retaliation when another country fails to implement a World Trade Organization (WTO) dispute decision. This periodic revision of the product list has become known as "carousel retaliation." The intent of switching products is to exert more pressure on a trading partner to comply with a WTO ruling. The impetus for more pressure came principally from U.S. banana and livestock exporters, who had become frustrated with the European Union (EU) and its repeated postponement of compliance with WTO dispute rulings. To date, the USTR has not revised a product list under Section 407, but credits the threat of action under carousel authority with helping to resolve the banana case, and says that carousel authority might be used as leverage in the future. An EU challenge of U.S. carousel retaliation still stands in the WTO dispute process.

Setting the Stage: The WTO Banana and Beef Disputes.

Many U.S. policymakers have expressed concern over the effectiveness of the WTO dispute resolution process to convince other countries to remove various trade barriers. Two WTO dispute cases were especially exasperating to U.S. exporters because of the length of time to decide the cases and the improbability that the losing party would change its practices. These involved banana and beef trade disputes with the European Union (EU).[1] They were the main reason that Congress considered alternative ways to pressure a trading partner to implement a WTO dispute decision.

All WTO disputes follow a procedure that normally takes about 2-3 years from start to finish. Disputes are administered by the WTO members, who act as the Dispute Settlement Body (DSB). Parties to the dispute first engage in consultations. If a satisfactory solution is not reached, the complainant may request a panel to hear the dispute. Once a panel report is issued, it will be adopted by the DSB, unless a party to the dispute appeals it or all DSB members vote not to adopt it. If the report is appealed, the Appellate Body submits its findings, along with the panel's report as modified by the appeal, to the DSB, which will adopt the reports unless all DSB members vote not to do so. If the complaining party prevails, the losing party is given a "reasonable period of time" for

implementation; an arbitrator might decide that time. The original panel can be called on to decide whether or not the losing party has implemented the decision. If a country does not implement the decision within the agreed upon time period, there are two possible alternatives for the complaining party. One is compensation, which is negotiated between the disputing parties. The other is suspension of concessions, or stated simply, retaliation. The complainant estimates its loss, the losing party can request arbitration on the level of the loss, and the DSB approves the final level.2

Banana Case. The WTO banana dispute began in 1995, the WTO's first year, but challenges of the EU banana regime had begun earlier.[3] The EU had a complicated import regime that gave preferences to banana imports from its former colonies and preferential licenses to European banana importers. In September 1995, the United States, Guatemala, Mexico, and Honduras requested consultations with the EU. Ecuador later joined the request. A panel was established and issued a report finding that the EU banana import regime violated certain WTO rules. The EU appealed the report. The Appellate Body upheld the panel's principal findings, and the DSU adopted the Appellate report. An arbitrator set a "reasonable time" for EU implementation at 15 months, or by January 1999. The EU argued that it came into compliance during the 15 months, but special panels to examine the question did not agree. The United States asked to suspend $520 million in trade concessions. The EU requested arbitration. The arbitrators decided the amount should be $191.4 million, and the DSB authorized the United States to suspend concessions in that amount.[4] On April 19, 1999, the United States imposed 100% tariffs on a list of eight items representing $191.4 million in imports from the EU. [This case was resolved in April 2001.]

In selecting items for the retaliation list, U.S. officials wanted to increase tariffs on items from EU countries that supported the banana regime. The higher tariffs would increase the total cost of the items and hurt EU exporters. To illustrate, U.S. officials selected "bath preparations, other than bath salts" as one of the items on the U.S. list.

Before the increase in tariffs, the U.S. duty on imports of these items from the EU was 4.9% ad valorem. That rate rose to 100% in April 1999. The two leading EU exporters of bath preparations in 1998 were the United Kingdom and France. These countries not coincidentally were also the leading supporters of the EU banana regime. In the four quarters before the 100% tariffs were imposed, the United States imported $7.6 billion in bath preparations from the United Kingdom and $7.5 billion from France. In the four quarters after the imposition of 100% tariffs, U.S. imports fell to $1.3 billion (83% decline) and $4.1 billion (45% decline) respectively.

Hormone Case. In January 1996, the United States requested consultations with the EU on its directive on the use of hormones in livestock. The directive restricted imports of meat produced with hormones. The United States requested a dispute panel. (Canada also challenged the EU practice.) The panels reported that the EU ban was inconsistent with the WTO Sanitary and Phytosanitary Agreement. The EU appealed, and the Appellate Body upheld some of the panels' findings but reversed others. The DSB adopted the Appellate Body report and the panels' reports as modified. An arbitrator set a reasonable time for implementation at 15 months, or by May 1999. A month before the time expired, the EU said it may not be able to comply with the DSB ruling and would consider offering compensation by the deadline. The United States requested authorization for suspension of concessions of $202 million. The EU requested arbitration, and arbitrators set the level at $116.8 million. The DSB authorized suspension of concessions in that amount. On July 27, 1999, the USTR announced duties in the amount authorized by the DSB. The time from consultation to retaliation in both the banana and hormone cases was about three and a half years.

The Congressional Response to Non-Compliance.

On September 22, 1999, two months after the USTR increased tariffs in the hormone dispute, Senator Mike DeWine, on behalf of nine other Senators, introduced S. 1619, the Carousel Retaliation Act of 1999.[5] The bill proposed an amendment to the "section 301" trade program to require the USTR to "carousel," or rotate, a retaliation list when a country does not implement a WTO dispute settlement. It would have required the USTR to rotate items 120 days after the first list of items and every 180 days thereafter. The USTR would not be required to rotate the list if compliance was imminent, or if both the USTR and the petitioners agreed that rotating was not necessary in that particular case.

The legislation attempted to more effectively place pressure on foreign governments, through their domestic exporters, to change their position on the disputed practice. In his statement introducing S. 1619, Senator DeWine said that "...some [WTO] member nations are simply undermining this entire [dispute] process by refusing to comply with the final dispute settlement decision, even after losing their cases on appeal."[6] He said that the EU had ignored WTO rulings, ignored the U.S. retaliation, and now was preparing to subsidize the products that had been identified for U.S. retaliation. Farm and cattle groups and the Hawaii Banana Industry Association supported the bill.

The Senate approved the language of S. 1619 as an amendment to H.R. 434, a broader bill that also dealt with trade with the Caribbean and with Africa, on November 3,1999. The House-approved version of H.R. 434 had not included a carousel provision. Section 407 of the conference report included the carousel provisions of the Senate bill and added a section on including reciprocal goods on the retaliation list. The conference report was released on May 3, 2000. The same day, a European spokesperson was quoted as saying that the carousel approach was a "very dangerous game" and that "the United States has to realize that one day this can be used against them."[7] The House and Senate approved the conference report, and the President signed the measure on May 18, 2000 (The Trade and Development Act of 2000; P.L. 106-200).

Summary of Section 407 of P.L. 106-200.

In the event that the United States initiates a retaliation list or takes other action under section 301 of the Trade Act of 1974 because a country fails to implement the recommendations of a WTO dispute settlement proceeding, the USTR shall periodically revise the list or action to affect other goods of the foreign country. The USTR is not to revise the list or action if the USTR determines that the country is about to implement the recommendation or if the USTR and the petitioning party agree that it is unnecessary. The USTR must review and revise the list 120 days after the date of the retaliation list and every 180 days thereafter. The USTR is to revise the list in a way that is most likely to result in the country's implementing the recommendation or in achieving a satisfactory solution. The USTR is to include on retaliation lists the reciprocal goods of the industries affected by the failure of the foreign country(ies) to implement the recommendation made in the dispute.

Although U.S. banana and meat producers clearly supported the carousel provision, other U.S. businesses did not. Many businesses claimed that the carousel approach would create confusion and cause hardship for retailers by continually raising and lowering tariffs. On May 17, 2000, the day before the President signed H.R. 434 into law, Representative Robert Menendez introduced H.R. 4478, the Small Business Trade Protection Act, for himself and six others. The purpose of H.R. 4478 was to exempt certain small businesses from the increased tariffs and other retaliatory measures imposed against EU products in response to the EU banana and beef hormone regimes. The bill would have exempted small importers (defined generally as those with fewer than 100 employees)

from the higher tariffs. It capped the exemption at 125% of the amount of the product imported the prior year from the countries concerned. It also provided that small importers who lost 50% or more of their revenues as a result of higher tariffs in the disputes would be eligible for full rebates of those tariffs. In related legislation, Representative Maxine Waters introduced H.R. 1362, a bill to bar the imposition of increased tariffs or other retaliatory measures against EU products in response to the banana regime of the European Union.

Recent Developments.

On May 26, 2000, just 8 days after the President signed the Trade and Development Act of 2000, the USTR issued a press release calling for comments on modification of the retaliation lists in the banana and beef hormone cases.[8] The press release said that the USTR was particularly interested in comments from small- and medium-sized businesses.

On the same day that the USTR issued its press release, EU members authorized the EU Commission to seek consultations with the United States on the carousel measure under WTO dispute procedures. On June 5, 2000, the EU made a formal request for consultations. In its submission requesting consultations, the EU argued that the carousel approach violated the WTO Dispute Settlement Understanding because the carousel approach was a unilateral means to impose trade retaliation and had not been agreed to multilaterally. The EU also argued that continual switching on the retaliation list caused more harm than that allowed under WTO dispute procedures. Other countries wanted to join the EU complaint. According to one report, 10 other countries, including Japan and Australia, sided with the EU at the July 27, 2000 meeting of the Dispute Settlement Body.

In its press release calling for comments, the USTR said that the Administration's goal was to announce modifications to the retaliation lists by June 19, 2000, which was the first business day that was 30 days after Section 407 entered into force.[10] That date passed without modifications. A reason for delay might have been many U.S. companies used possibly targeted products as inputs or sold such products, and did not want these products on the list. According to one report at the time, "Over 500 requests were received from US businesses and members of Congress looking to protect US firms that rely on EU imports from being unduly hurt by the 100 percent duties."[11] To date, the USTR has not revised the lists of products for retaliation. A serious concern has been a link between carousel retaliation and the U.S.-EU dispute over U.S. tax benefits for foreign sales corporations (FSC). In that dispute, the EU brought and won a case against the U.S. practice, and the United States amended its law in November 2000. While a decision was pending in the WTO on whether or not the amended U.S. law was in compliance with WTO rules, the EU and the United States informally agreed that the EU would not seek sanctions in the FSC case. The EU warned, however, that if the United States revised its product lists under the carousel provisions, the EU would ignore the informal agreement and pursue sanctions. In July 2001, the WTO ruled that the U.S. amendment was not WTO-compliant. The United States appealed the ruling, but lost its appeal on January 14, 2002. The EU and the United States continue to discuss the FSC case.

In April 2001, the United States and the EU reached an agreement in the banana dispute. As part of the agreement, the United States agreed to suspend its retaliatory tariffs from July 1, 2001. Revision of the retaliation list in this case then will no longer be an issue. In the hormone case, however, retaliatory tariffs remain in place. European officials have mentioned possible compensation in the form of increased market access for U.S. hormone-free beef, but nothing has been decided.

Policy Considerations.

There are at least three policies to consider in relation to the question of noncompliance with a WTO dispute decision. One policy is acceptance of non-compliance under the current WTO dispute procedures. The General Accounting Office (GAO) has found that a majority of WTO disputes involving the United States have resulted in greater market access or more protection of intellectual property rights. So, the WTO dispute process generally has benefitted U.S. interests. However, in a few cases, the outcome has not been greater market access. As the banana and hormone cases showed, a WTO dispute decision against a country does not necessarily result in the timely removal of its trade-restrictive practice. In those instances, the losing country may face higher tariffs or pay compensation, neither of which is a goal of dispute settlement.

A second policy is to seek further reform of multilateral dispute settlement procedures to increase the likelihood of compliance. If WTO Members find that retaliatory measures do not always effectively induce compliance and that this situation poses significant challenges to the overall effectiveness of the WTO dispute settlement system, Members may seek to revisit existing dispute remedies. The United States has already proposed in the current WTO dispute settlement review that the dispute procedures provide for the carouselling of retaliation lists. Some commentators have also suggested more aggressive monitoring of a defending party's compliance activities during the implementation period, especially where the period is long; automatic authorization of compensation for prevailing parties; and remedies for past damage resulting from violations of WTO obligations.

A third policy for consideration is unilateral action in an attempt to increase the chance of compliance. Unilateral action such as carousel retaliation might or might not improve compliance with WTO dispute decisions. If unilateral action is successful, the domestic industry is better off because it faces a less restrictive foreign market. If not successful, the domestic industry still faces the restrictive foreign market, U.S. consumers of imported goods on the retaliation list have to pay higher prices, and foreign exporters lose sales. In any case, continuous changes in retaliation lists could hurt some U.S. companies, especially small and medium-sized businesses and importers of items on the lists. The EU challenge in the WTO also could have international consequences. For example, if the U.S. practice is upheld, will other countries impose similar measures?

Depending upon the point of view, carousel retaliation promotes the WTO by strengthening the dispute process, or undermines the multilateral system through unilateral action.

EDITED U.S. CASES WITH THE U.S. AS A PARTY.

(Edited cases are on http://www.InternationalTradeRelations.com)

UNITED STATES - STANDARDS FOR REFORMULATED & CONVENTIONAL GASOLINE.

AB-1996-1 (1996).

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm

I. Introductory.

The United States appeals from certain conclusions on issues of law and certain legal interpretations contained in the Panel Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, 29 January 1996 (the "Panel Report"). That Panel had been established to consider a dispute between the United States, on the one hand, and Venezuela, later joined by Brazil, on the other. The dispute related to the implementation by the United States of its domestic legislation known as the Clean Air Act of 1990 (the "CAA") and, more specifically, to the regulation enacted by the United States' Environmental Protection Agency (the "EPA") pursuant to that Act, to control toxic and other pollution caused by the combustion of gasoline manufactured in or imported into the United States. This regulation is formally entitled "*Regulation of Fuels and Fuel Additives - Standards for Reformulated and Conventional Gasoline*", Part 80 of Title 40 of the Code of Federal Regulations, and is commonly referred to as the Gasoline Rule.

II. Issues Raised In This Appeal

A. The Claims of Error by the United States

It is important to focus upon the subject matter of this appeal. We seek to do this first by identifying the issues which have been raised by the Appellant, the United States. In what follows we highlight those same issues by listing certain other issues dealt with in the Panel proceedings but which have *not* been brought before the Appellate Body in this appeal, and which we accordingly exclude from consideration in this Appellate Report.

In its Notice of Appeal, dated 21 February 1996, and its Appellant's Submission, dated 4 March 1996, the United States claims that the Panel erred in law, firstly, in holding that the baseline establishment rules of the Gasoline Rule are not justified under Article XX(g) of the *General Agreement* and, secondly, in its interpretation of Article XX as a whole.

More specifically, the United States assigns as error the ruling of the Panel that the baseline establishment rules do not constitute a "measure" "relating to" the conservation of clean air within

the meaning of Article XX(g) of the *General Agreement*. Consequently, it is also the view of the United States that the Panel erred in failing to proceed further in its interpretation and application of Article XX(g), and in not finding that the baseline establishment rules satisfy the other requirements of Article XX(g) and the introductory provisions of Article XX.

The sharply limited scope of this appeal is underscored by noting the number of findings which the Panel had made but which have not been appealed from by the United States. Very briefly, the United States does not appeal from the findings or rulings made by the Panel on, or in respect of, the consistency of the baseline establishment rules with Article I:1, Article III:1, Article III:4, and Article XXIII:1(b) of the *General Agreement* and the applicability of Article XX(b) and Article XX(d) of the *General Agreement* and of the *TBT Agreement*. Understandably, the United States has also not appealed from the Panel's ruling that clean air is an exhaustible natural resource within the meaning of Article XX(g) of the *General Agreement*.

III. FINDINGS AND CONCLUSIONS

For the reasons set out in the preceding sections of this report, the Appellate Body has reached the following conclusions:

(a) the Panel erred in law in its conclusion that the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations did not fall within the terms of Article XX(g) of the *General Agreement*;

(b) the Panel accordingly also erred in law in failing to decide whether the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations fell within the ambit of the chapeau of Article XX of the *General Agreement*;

(c) the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations fail to meet the requirements of the chapeau of Article XX of the *General Agreement*, and accordingly are not justified under Article XX of the *General Agreement*.

The foregoing legal conclusions modify the conclusions of the Panel as set out in paragraph 8.1 of its Report. The Appellate Body's conclusions leave intact the conclusions of the Panel that were not the subject of appeal.

The Appellate Body *recommends* that the Dispute Settlement Body request the United States to bring the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations into conformity with its obligations under the *General Agreement*.

It is of some importance that the Appellate Body point out what this does *not* mean. It does not mean, or imply, that the ability of any WTO Member to take measures to control air pollution or, more generally, to protect the environment, is at issue. That would be to ignore the fact that Article XX of the *General Agreement* contains provisions designed to permit important state interests - including the protection of human health, as well as the conservation of exhaustible natural resources - to find expression. The provisions of Article XX were not changed as a result of the Uruguay Round of Multilateral Trade Negotiations. Indeed, in the preamble to the *WTO Agreement* and in the *Decision on Trade and Environment*, there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade),

their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the *General Agreement* and the other covered agreements.

MEASURES CONCERNING MEAT AND MEAT PRODUCTS (HORMONES).

WT/DS26/AB/R & WT/DS48/AB/R (16 January 1998)

1. The European Communities, the United States and Canada appeal from certain issues of law and legal interpretations in the Panel Reports, *EC Measures Concerning Meat and Meat Products (Hormones)*. These two Panel Reports, circulated to Members of the World Trade Organization ("WTO") on 18 August 1997, were rendered by two Panels composed of the same three persons. These Panel Reports are similar, but they are not identical in every respect. The Panel in the complaint brought by the United States was established by the Dispute Settlement Body (the "DSB") on 20 May 1996. On 16 October 1996, the DSB established the Panel in the complaint brought by Canada. The European Communities and Canada agreed, on 4 November 1996, that the composition of the latter Panel would be identical to the composition of the Panel established at the request of the United States.

2. The Panel dealt with a complaint against the European Communities relating to an EC prohibition of imports of meat and meat products derived from cattle to which either the natural hormones:oestradiol-17β, progesterone or testosterone, or the synthetic hormones: trenbolone acetate, zeranol or melengestrol acetate ("MGA"), had been administered for growth promotion purposes. This import prohibition was set forth in a series of Directives of the Council of Ministers that were enacted before 1 January 1995. Those Directives were:

- **Council Directive 81/602/EEC of 31 July 1981 ("Directive 81/602");**
- **Council Directive 88/146/EEC of 7 March 1988 ("Directive 88/146"); and**
- **Council Directive 88/299/EEC of 17 May 1988 ("Directive 88/299").**

3. Directive 81/602 prohibited the administration to farm animals of substances having a hormonal action and of substances having a thyrostatic action. It also prohibited the placing on the European market of both domestically produced and imported meat and meat products derived from farm animals to which such substances had been administered. Two exceptions to this prohibition were provided for. One exception covered substances with an oestrogenic, androgenic or gestagenic action

when used for therapeutic or zootechnical purposes and administered by a veterinarian or under a veterinarian's responsibility. The other exception related to three natural hormones (oestradiol - 17β, progesterone and testosterone) and two synthetic hormones (trenbolone acetate and zeranol) used for growth promotion purposes if allowed under the regulations of the Member States of the European Economic Community ("EEC"), until a detailed examination of the effects of these substances could be carried out and until the EEC could take a decision on the use of these substances for growth promotion. The sixth hormone involved in this appeal, MGA, was not included in the second exception; it was covered by the general prohibition concerning substances having a hormonal or thyrostatic action.

4. Seven years later, Directive 88/146 was promulgated prohibiting the administration to farm animals of the synthetic hormones: trenbolone acetate and zeranol, for any purposes, as well as the administration of the natural hormones: oestradiol - 17β, progesterone and testosterone, for growth promotion or fattening purposes. This Directive permitted Member States of the EEC to authorize, under specified conditions, the use of the three natural hormones for therapeutic and zootechnical purposes. Directive 88/146 explicitly prohibited both the intra-EEC trade and the importation from third countries of meat and meat products obtained from animals to which substances having oestrogenic, androgenic, gestagenic or thyrostatic action had been administered. Trade in meat and meat products derived from animals treated with such substances for therapeutic or zootechnical purposes was allowed only under certain conditions. Those conditions were set out in Directive 88/299.

5. Effective as of 1 July 1997, Directives 81/602, 88/146 and 88/299 were repealed and replaced with Council Directive 96/22/EC of 29 April 1996 ("Directive 96/22"). This Directive maintains the prohibition of the administration to farm animals of substances having a hormonal or thyrostatic action. As under the previously applicable Directives, it is prohibited to place on the market, or to import from third countries, meat and meat products from animals to which such substances, including the six hormones at issue in this dispute, were administered. This Directive also continues to allow Member States to authorize the administration, for therapeutic and zootechnical purposes, of certain substances having a hormonal or thyrostatic action. Under certain conditions, Directive 96/22 allows the placing on the market, and the importation from third countries, of meat and meat products from animals to which these substances have been administered for therapeutic and zootechnical purposes.

6. The Panel circulated its Reports to the Members of the WTO on 18 August 1997.The US Panel Report and the Canada Panel Report reached the same conclusions in paragraph 9.1:

> **(i) The European Communities, by maintaining sanitary measures which are not based on a risk assessment, has acted inconsistently with the requirements contained in Article 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures.**
> **(ii) The European Communities, by adopting arbitrary or unjustifiable distinctions in the levels of sanitary protection it considers to be appropriate in different situations which result in discrimination or a disguised restriction on international trade, has acted inconsistently with the requirement contained in Article 5.5 of the Agreement on the Application of Sanitary and Phytosanitary Measures.**
>
> **(iii) The European Communities, by maintaining sanitary measures which are not based on existing international standards without justification under Article 3.3 of the Agreement on the**

Application of Sanitary and Phytosanitary Measures, has acted inconsistently with the requirements of Article 3.1 of that Agreement.

In both Reports, the Panel recommended in paragraph 9.2: that the Dispute Settlement Body requests the European Communities to bring its measures in dispute into conformity with its obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures.

7. On 24 September 1997, the European Communities notified the DSB of its decision to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed two notices of appeal with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").Pursuant to Rule 21 of the *Working Procedures*, the European Communities filed an appellant's submission on 6 October 1997.On 9 October 1997, the United States and Canada filed appellants' submissions pursuant to Rule 23(1) of the *Working Procedures*. On 20 October 1997, the United States and Canada each filed an appellee's submission pursuant to Rule 22 of the *Working Procedures* and the European Communities filed its own appellee's submission pursuant to Rule 23(3) of the *Working Procedures*. On the same day, Australia, New Zealand and Norway filed separate third participants' submissions in accordance with Rule 24 of the *Working Procedures*.

8. The oral hearing was held on 4 and 5 November 1997.The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing this appeal. The participants and third participants also gave oral concluding statements.

XIV. Findings and Conclusions.

9. For the reasons set out in the preceding sections of this Report, the Appellate Body:

- **(a) reverses the Panel's general interpretative ruling that the *SPS Agreement* allocates the evidentiary burden to the Member imposing an SPS measure, and also reverses the Panel's conclusion that when a Member's measure is not based on an international standard in accordance with Article 3.1, the burden is on that Member to show that its SPS measure is consistent with Article 3.3 of the *SPS Agreement*;**
- **(b) concludes that the Panel applied the appropriate standard of review under the *SPS Agreement*;**
- **(c) upholds the Panel's conclusions that the precautionary principle would not override the explicit wording of Articles 5.1 and 5.2, and that the precautionary principle has been incorporated in, *inter alia*, Article 5.7 of the *SPS Agreement*;**

(d) upholds the Panel's conclusion that the *SPS Agreement*, and in particular Articles 5.1 and 5.5 thereof, applies to measures that were enacted before the entry into force of the *WTO Agreement*, but that remain in force thereafter;

(e) concludes that the Panel, although it sometimes misinterpreted some of the evidence before it, complied with its obligation under Article 11 of the DSU to make an objective assessment of the facts of the case;

(f) concludes that the procedures followed by the Panel in both proceedings -- in the selection and use of experts, in granting additional third party rights to the United States and Canada and in making findings based on arguments not made by the parties -- are consistent with the DSU and the *SPS Agreement*;

(g) reverses the Panel's conclusion that the term "based on" as used in Articles 3.1 and 3.3 has the same meaning as the term "conform to" as used in Article 3.2 of the *SPS Agreement*;

(h) modifies the Panel's interpretation of the relationship between Articles 3.1, 3.2 and 3.3 of the *SPS Agreement*, and reverses the Panel's conclusion that the European Communities by maintaining, without justification under Article 3.3, SPS measures which are not based on existing international standards, acted inconsistently with Article 3.1 of the *SPS Agreement*;

(i) upholds the Panel's finding that a measure, to be consistent with the requirements of Article 3.3, must comply with, *inter alia*, the requirements contained in Article 5 of the *SPS Agreement*;

(j) modifies the Panel's interpretation of the concept of "risk assessment" by holding that neither Articles 5.1 and 5.2 nor Annex A.4 of the *SPS Agreement* require a risk assessment to establish a minimum quantifiable magnitude of risk, nor do these provisions exclude *a priori*, from the scope of a risk assessment, factors which are not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences;

(k) reverses the Panel's finding that the term "based on" as used in Article 5.1 of the *SPS Agreement* entails a "minimum procedural requirement" that a Member imposing an SPS measure must submit evidence that it actually took into account a risk assessment when it enacted or maintained the measure;

(l) upholds the Panel's finding that the EC measures at issue are inconsistent with the requirements of Article 5.1 of the *SPS Agreement*, but modifies the Panel's interpretation by holding that Article 5.1, read in conjunction with Article 2.2, requires that the results of the risk assessment must sufficiently warrant the SPS measure at stake;

(m) reverses the Panel's findings and conclusions on Article 5.5 of the *SPS Agreement*; and

(n) concludes that the Panel exercised appropriate judicial economy in not making findings on Articles 2.2 and 5.6 of the *SPS Agreement*.

10. The foregoing legal findings and conclusions uphold, modify and reverse the findings and conclusions of the Panel in Parts VIII and IX of the Panel Reports, but leave intact the findings and conclusions of the Panel that were not the subject of this appeal.

11. The Appellate Body *recommends* that the Dispute Settlement Body request the European Communities to bring the SPS measures found in this Report and in the Panel Reports, as modified by this Report, to be inconsistent with the *SPS Agreement* into conformity with the obligations of the European Communities under that Agreement.

UNITED STATES - IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS

Report of the Appellate Body **AB-1998-4**

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm

Introduction : Statement of the Appeal

This is an appeal by the United States from certain issues of law and legal interpretations in the Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*. Following a joint request for consultations by India, Malaysia, Pakistan and Thailand on 8 October 1996, Malaysia and Thailand requested in a communication dated 9 January 1997, and Pakistan asked in a communication dated 30 January 1997, that the Dispute Settlement Body (the "DSB") establish a panel to examine their complaint regarding a prohibition imposed by the United States on the importation of certain shrimp and shrimp products by Section 609 of Public Law 101-162 ("Section 609") and associated regulations and judicial rulings. On 25 February 1997, the DSB established two panels in accordance with these requests and agreed that these panels would be consolidated into a single Panel, pursuant to Article 9 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), with standard terms of reference.

On 10 April 1997, the DSB established another panel with standard terms of reference in accordance with a request made by India in a communication dated 25 February 1997, and agreed that this third panel, too, would be merged into the earlier Panel established on 25 February 1997. The Report rendered by the consolidated Panel was circulated to the Members of the World Trade Organization (the "WTO") on 15 May 1998.

The relevant factual and regulatory aspects of this dispute are set out in the Panel Report, in particular at paragraphs 2.1-2.16. Here, we outline the United States measure at stake before the Panel and in these appellate proceedings. The United States issued regulations in 1987 pursuant to the Endangered Species Act of 1973 requiring all United States shrimp trawl vessels to use approved Turtle Excluder Devices ("TEDs") or tow-time restrictions in specified areas where there was a significant mortality of sea turtles in shrimp harvesting. These regulations, which became fully effective in 1990, were modified so as to require the use of approved TEDs at all times and in all areas where there is a likelihood that shrimp trawling will interact with sea turtles, with certain limited exceptions.

Section 609 was enacted on 21 November 1989. Section 609(a) calls upon the United States Secretary of State, in consultation with the Secretary of Commerce, *inter alia*, to "initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of … sea turtles" and to "initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles; … ." Section 609(b)(1) imposed, not later than 1 May 1991, an import ban on shrimp harvested with commercial fishing technology which may adversely affect sea turtles. Section 609(b)(2) provides that the import ban on shrimp will not apply to harvesting nations that are certified. Two kinds of annual certifications are required for harvesting nations, details of which were further elaborated in regulatory guidelines in 1991, 1993 and 1996: First, certification shall be granted to countries with a fishing environment which does not pose a threat of the incidental taking of sea turtles in the course of shrimp harvesting. According to the 1996 Guidelines, the Department of State "shall certify any harvesting nation meeting the following criteria without the need for action on the part of the government of the harvesting nation: (a) Any harvesting nation without any of the relevant species of sea turtles occurring in waters subject to its jurisdiction; (b) Any harvesting nation that harvests shrimp exclusively by means that do not pose a threat to sea turtles, *e.g.*, any nation that harvests shrimp exclusively by artisanal means; or (c) Any nation whose commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles do not occur."

Second, certification shall be granted to harvesting nations that provide documentary evidence of the adoption of a regulatory program governing the incidental taking of sea turtles in the course of shrimp trawling that is comparable to the United States program *and* where the average rate of incidental taking of sea turtles by their vessels is comparable to that of United States vessels. According to the 1996 Guidelines, the Department of State assesses the regulatory program of the harvesting nation and certification shall be made if the program includes: (i) the required use of TEDs that are "comparable in effectiveness to those used in the United States. Any exceptions to this requirement must be comparable to those of the United States program … "; and (ii) "a credible enforcement effort that includes monitoring for compliance and appropriate sanctions." The regulatory program may be in the form of regulations, or may, in certain circumstances, take the form of a voluntary arrangement between industry and government. Other measures that the harvesting nation undertakes for the protection of sea turtles will also be taken into account in making the comparability determination. The average incidental take rate "will be deemed comparable if the harvesting nation requires the use of TEDs in a manner comparable to that of the U.S. program …."

The 1996 Guidelines provide that all shrimp imported into the United States must be accompanied by a Shrimp Exporter's Declaration form attesting that the shrimp was harvested either in the waters of a nation currently certified under Section 609 or "under conditions that do not adversely affect sea turtles", that is: (a) "Shrimp harvested in an aquaculture facility in which the shrimp spend at least 30 days in ponds prior to being harvested"; (b) "Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States"; (c) "Shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear that, in accordance with the U.S. program … , would not require TEDs"; and (d) "Species of shrimp, such as the pandalid species, harvested in areas where sea turtles do not occur." On 8 October 1996, the United States Court of International Trade ruled that the 1996 Guidelines were in violation of Section 609 in allowing the import of shrimp from non-certified

countries if accompanied by a Shrimp Exporter's Declaration form attesting that they were caught with commercial fishing technology that did not adversely affect sea turtles. A 25 November 1996 ruling of the United States Court of International Trade clarified that shrimp harvested by manual methods which did not harm sea turtles could still be imported from non-certified countries. On 4 June 1998, the United States Court of Appeals for the Federal Circuit vacated the decisions of the United States Court of International Trade of 8 October and 25 November 1996. In practice, however, exemption from the import ban for TED-caught shrimp from non-certified countries remained unavailable while this dispute was before the Panel and before us.

The 1991 Guidelines limited the geographical scope of the import ban imposed by Section 609 to countries in the wider Caribbean/western Atlantic region, and granted these countries a three-year phase-in period. The 1993 Guidelines maintained this geographical limitation. On 29 December 1995, the United States Court of International Trade held that the 1991 and 1993 Guidelines violated Section 609 by limiting its geographical scope to shrimp harvested in the wider Caribbean/western Atlantic region, and directed the Department of State to extend the ban worldwide not later than 1 May 1996. On 10 April 1996, the United States Court of International Trade refused a subsequent request by the Department of State to postpone the 1 May 1996 deadline. On 19 April 1996, the United States issued the 1996 Guidelines, extending Section 609 to shrimp harvested in *all* foreign countries effective 1 May 1996.

In the Panel Report, the Panel reached the following conclusions:

> **In the light of the findings above, we conclude that the import ban on shrimp and shrimp products as applied by the United States on the basis of Section 609 of Public Law 101-162 is not consistent with Article XI:1 of GATT 1994, and cannot be justified under Article XX of GATT 1994.**

and made this recommendation:

> **The Panel *recommends* that the Dispute Settlement Body request the United States to bring this measure into conformity with its obligations under the WTO Agreement.**

On 13 July 1998, the United States notified the DSB of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a notice of appeal with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review*. On 23 July 1998, the United States filed an appellant's submission. On 7 August 1998, India, Pakistan and Thailand ("Joint Appellees") filed a joint appellees' submission and Malaysia filed a separate appellee's submission. On the same day, Australia, Ecuador, the European Communities, Hong Kong, China, and Nigeria each filed separate third participants' submissions. At the invitation of the Appellate Body, the United States, India, Pakistan, Thailand and Malaysia filed additional submissions on certain issues arising under Article XX(b) and Article XX(g) of the GATT 1994 on 17 August 1998. The oral hearing in the appeal was held on 19-20 August 1998. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

<u>Issues Raised in This Appeal</u>

The issues raised in this appeal by the appellant, the United States, are the following:

(a) whether the Panel erred in finding that accepting non-requested information from non-governmental sources would be incompatible with the provisions of the DSU as currently applied; and
(b) whether the Panel erred in finding that the measure at issue constitutes unjustifiable discrimination between countries where the same conditions prevail and thus is not within the scope of measures permitted under Article XX of the GATT 1994.

Article 13 -- Right to Seek Information

1. *Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate*. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. *A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate*. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. *Panels may seek information from any relevant source* and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.(emphasis added)

Article XX of the GATT 1994 reads, in its relevant parts:

> **Article XX -- General Exceptions**
>
> **Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:**
>
> **(a) necessary to protect human, animal or plant life or health;**
> **(b) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;**

In *United States - Gasoline*, we enunciated the appropriate method for applying Article XX of the GATT 1994:

> **In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions -- paragraphs (a) to (j) -- listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. *The analysis is,* in other words, *two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX*. (emphasis added)**

The sequence of steps indicated above in the analysis of a claim of justification under Article XX reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX. The Panel appears to suggest, albeit indirectly, that following the indicated sequence of steps, or

the inverse thereof, does not make any difference. To the Panel, reversing the sequence set out in *United States - Gasoline* "seems equally appropriate." We do not agree.

The task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter (like the Panel in this case) has not first identified and examined the specific exception threatened with abuse. The standards established in the chapeau are, moreover, necessarily broad in scope and reach: the prohibition of the *application* of a measure "in a manner which would constitute a means of *arbitrary* or *unjustifiable discrimination* between countries where the same conditions prevail" or "a *disguised restriction* on international trade."(emphasis added) When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies. What is appropriately characterizable as "arbitrary discrimination" or "unjustifiable discrimination", or as a "disguised restriction on international trade" in respect of one category of measures, need not be so with respect to another group or type of measures. The standard of "arbitrary discrimination", for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour.

The consequences of the interpretative approach adopted by the Panel are apparent in its findings. The Panel formulated a broad standard and a test for appraising measures sought to be justified under the chapeau; it is a standard or a test that finds no basis either in the text of the chapeau or in that of either of the two specific exceptions claimed by the United States. The Panel, in effect, constructed an *a priori* test that purports to define a category of measures which, *ratione materiae*, fall outside the justifying protection of Article XX's chapeau. In the present case, the Panel found that the United States measure at stake fell within that class of excluded measures because Section 609 conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the United States. It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.

We hold that the findings of the Panel quoted in paragraph 112 above, and the interpretative analysis embodied therein, constitute error in legal interpretation and accordingly reverse them.

Having reversed the Panel's legal conclusion that the United States measure at issue "is not within the scope of measures permitted under the chapeau of Article XX" , we believe that it is our duty and our responsibility to complete the legal analysis in this case in order to determine whether Section 609 qualifies for justification under Article XX.

In claiming justification for its measure, the United States primarily invokes Article XX(g). Justification under Article XX(b) is claimed only in the alternative; that is, the United States suggests

that we should look at Article XX(b) only if we find that Section 609 does not fall within the ambit of Article XX(g). We proceed, therefore, to the first tier of the analysis of Section 609 and to our consideration of whether it may be characterized as provisionally justified under the terms of Article XX(g).

We are not convinced by these arguments. Textually, Article XX(g) is *not* limited to the conservation of "mineral" or "non-living" natural resources. The complainants' principal argument is rooted in the notion that "living" natural resources are "renewable" and therefore cannot be "exhaustible" natural resources. We do not believe that "exhaustible" natural resources and "renewable" natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, "renewable", are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as "finite" as petroleum, iron ore and other non-living resources.

Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources. Moreover, two adopted GATT 1947 panel reports previously found fish to be an "exhaustible natural resource" within the meaning of Article XX(g). We hold that, in line with the principle of effectiveness in treaty interpretation, measures to conserve exhaustible natural resources, whether *living* or *non-living*, may fall within Article XX(g).

The actual *application* of the measure, through the implementation of the 1996 Guidelines and the regulatory practice of administrators, *requires* other WTO Members to adopt a regulatory program that is not merely *comparable*, but rather *essentially the same*, as that applied to the United States shrimp trawl vessels. Thus, the effect of the application of Section 609 is to establish a rigid and unbending standard by which United States officials determine whether or not countries will be certified, thus granting or refusing other countries the right to export shrimp to the United States. Other specific policies and measures that an exporting country may have adopted for the protection and conservation of sea turtles are not taken into account, in practice, by the administrators making the comparability determination.

We understand that the United States also applies a uniform standard throughout its territory, regardless of the particular conditions existing in certain parts of the country. The United States requires the use of approved TEDs at all times by domestic, commercial shrimp trawl vessels operating in waters where there is any likelihood that they may interact with sea turtles, regardless of the actual incidence of sea turtles in those waters, the species of those sea turtles, or other differences or disparities that may exist in different parts of the United States. It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.

Furthermore, when this dispute was before the Panel and before us, the United States did not permit imports of shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States if those shrimp originated in waters of countries not certified under Section 609. In other words, *shrimp caught using methods identical to those employed in the United States* have been excluded from the United States market solely because they have been caught in waters of *countries that have not been certified by the United States*. The resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles. This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, even though many of those Members may be differently situated. We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.

The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609. It is relevant to observe that an import prohibition is, ordinarily, the heaviest "weapon" in a Member's armoury of trade measures. The record does not, however, show that serious efforts were made by the United States to negotiate similar agreements with any other country or group of countries before (and, as far as the record shows, after) Section 609 was enforced on a world-wide basis on 1 May 1996. Finally, the record also does not show that the appellant, the United States, attempted to have recourse to such international mechanisms as exist to achieve cooperative efforts to protect and conserve sea turtles before imposing the import ban.

Clearly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable. The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative effects of the failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved, notwithstanding the explicit statutory direction in Section 609 itself to initiate negotiations as soon as possible for the development of bilateral and multilateral agreements. The principal consequence of this failure may be seen in the resulting unilateralism evident in the application of Section 609. As we have emphasized earlier, the policies relating to the necessity for use of particular kinds of TEDs in various maritime areas, and the operating details of these policies, are all shaped by the Department of State, without the participation of the exporting Members. The system and processes of certification are established and administered by the United States agencies alone. The decision-making involved in the grant, denial or withdrawal of certification to the exporting Members, is, accordingly, also unilateral. The unilateral character of the application of Section 609 heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability. When the foregoing differences in the means of application of Section 609 to various shrimp exporting countries are considered in their cumulative effect, we find, and so hold, that those differences in treatment constitute "unjustifiable discrimination" between exporting countries desiring certification in order to gain access to the United States shrimp market within the We next consider whether Section 609 has been applied in a manner constituting "arbitrary discrimination between countries where the same conditions prevail". We have already observed that Section 609, in its application, imposes a single, rigid and unbending requirement that countries applying for certification under Section 609(b)(2)(A) and (B) adopt a comprehensive regulatory program that is essentially the same

as the United States' program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries. Furthermore, there is little or no flexibility in how officials make the determination for certification pursuant to these provisions. In our view, this rigidity and inflexibility also constitute "arbitrary discrimination" within the meaning of the chapeau.

It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here. The non-transparent and *ex parte* nature of the internal governmental procedures applied by the competent officials in the Office of Marine Conservation, the Department of State, and the United States National Marine Fisheries Service throughout the certification processes under Section 609, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons for the denial, and the fact, too, that there is no formal legal procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994.

We find, accordingly, that the United States measure is applied in a manner which amounts to a means not just of "unjustifiable discrimination", but also of "arbitrary discrimination" between countries where the same conditions prevail, contrary to the requirements of the chapeau of Article XX. The measure, therefore, is not entitled to the justifying protection of Article XX of the GATT 1994. Having made this finding, it is not necessary for us to examine also whether the United States measure is applied in a manner that constitutes a "disguised restriction on international trade" under the chapeau of Article XX.

In reaching these conclusions, we wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.

What we *have* decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in *United States – Gasoline*, WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the *WTO Agreement*.

Findings and Conclusions

For the reasons set out in this Report, the Appellate Body:

(a) reverses the Panel's finding that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU;
(b) reverses the Panel's finding that the United States measure at issue is not within the scope of measures permitted under the chapeau of Article XX of the GATT 1994, and
(c) concludes that the United States measure, while qualifying for provisional justification under Article XX(g), fails to meet the requirements of the chapeau of Article XX, and, therefore, is not justified under Article XX of the GATT 1994.

The Appellate Body *recommends* that the DSB request the United States to bring its measure found in the Panel Report to be inconsistent with Article XI of the GATT 1994, and found in this Report to be not justified under Article XX of the GATT 1994, into conformity with the obligations of the United States under that Agreement.

UNITED STATES – SECTIONS 301-310 OF THE TRADE ACT OF 1974.

Report of the Panel
WT/DS152/R (22 December 1999)
http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds152_e.htm

FACTUAL ASPECTS

Basic Structure of Measures at Issue.

Section 301(a)

Section 301(a) applies to any case in which "the United States Trade Representative determines under section 304(a)(1) that (A) the rights of the United States under any trade agreement are being denied" or "(B) an act, policy or practice of a foreign country – (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (ii) is unjustifiable and burdens or restricts United States commerce".

According to Section 304(a)(1),

"On the basis of the investigation initiated under section 302 and the consultations (and the proceedings, if applicable) under section 303, the [United States] Trade Representative shall … determine whether … the rights to which the United States is entitled under any trade agreement are being denied, or any act, policy, or practice described in sub-section (a)(1)(B) or (b)(1) of section 301 exists".

If the DSB adopts a report finding that United States rights under a WTO Agreement have not been denied or that the act, policy or practice at issue "(I) is not a violation of, or inconsistent with, the rights of the United States, or (II) does not deny, nullify, or impair benefits to the United States under any trade agreement".

Section 301(a)(2)(B)(i) also provides that the USTR is not required to take action if "the Trade Representative finds that the foreign country is taking satisfactory measures to grant the rights of the United States under a trade agreement". The commitment of a WTO Member to implement DSB recommendations favourable to the United States within the period foreseen in Article 21 of the DSB

has, for example, been determined by the USTR to be a "satisfactory measure" justifying a termination of the investigation without taking any action under Section 301.

According to Section 301(a)(2)(B)(ii) and (iii), the USTR is not required to take action if the foreign country agrees to "eliminate or phase out the act, policy or practice" at issue or if it agrees to "an imminent solution to the burden or restriction on United States commerce", or "provide to the United States compensatory trade benefits that are satisfactory to the Trade Representative", when "it is impossible for the foreign country to achieve the results described in clause (i) or (ii)".

Further, according to Section 301(a)(2)(B)(iv) and (v), the USTR is not required to take action when she finds that: Section 301(a) also provides that if the USTR determines that one of these situations has occurred, "the Trade Representative shall take action authorized in [Section 301](c), subject to the specific direction, if any, of the President regarding any such action … to enforce such rights or to obtain the elimination of such act, policy, or practice".

According to Section 301(a)(2)(A), action is not required under Section 3

"(iv) in extraordinary cases, where the taking of action ... would have an adverse impact on the United States economy substantially out of proportion to the benefits of such action, taking into account the impact of not taking such action on the credibility of the provisions of this chapter"; or
"(v) the taking of action under this subsection would cause serious harm to the national security of the United States".

Section 301(a)(3) provides:

"(3) Any action taken under paragraph (1) to eliminate an act, policy, or practice shall be devised so as to affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce".

<u>Section 301(b)</u>

Section 301(b) applies to an act, policy or practice which, while not denying rights or benefits of the United States under a trade agreement, is nevertheless "unreasonable or discriminatory and burdens or restricts United States commerce".

Section 301(d)(3)(B) provides examples of unreasonable acts, among them the denial of opportunities for the establishment of an enterprise, failure to protect intellectual property rights, export targeting, toleration of anti-competitive practices by private firms and denial of worker rights. "Discriminatory" acts, policies and practices are defined in Section 301(d)(5) as including those that deny "national or most-favoured-nation treatment to United States goods, services, or investment". If the USTR determines that an act, policy or practice is actionable under Section 301(b) and determines that "action by the United States is appropriate" the USTR shall take retaliatory action "subject to the specific direction, if any, of the President regarding such action".

Scope of Authority to Take Action.

Section 301(c) authorizes the USTR to "suspend, withdraw, or prevent the application of, benefits of trade agreement concessions", or "impose duties or other import restrictions on the goods of, and …

fees or restrictions on the services of, such foreign country for such time as the Trade Representative determines appropriate". If the act, policy or practice of the foreign country fails to meet the eligibility criteria for duty-free treatment under the United States' Generalised System of Preferences, the Caribbean Basin Economic Recovery Act or the Andean Trade Preference Act, the USTR is also authorized to withdraw, limit or suspend such treatment. In addition, the USTR may enter into binding agreements with the country in question.

Procedures.

Sections 301-310 of the Trade Act of 1974 provide a means by which U.S. citizens may petition the United States government to investigate and act against potential violations of international trade agreements. These provisions also authorize the USTR to initiate such investigations at her own initiative. The USTR is a cabinet level official serving at the pleasure of the President, and her office is located within the Executive Office of the President. The USTR operates under the direction of the President and advises and assists the President in various Presidential functions.

According to Section 302, investigations may be initiated either upon citizen petition or at the initiative of the USTR. After a petition is filed, the USTR decides within 45 days whether or not to initiate an investigation. If the investigation is initiated, the USTR must, according to Section 303, request consultations with the country concerned, normally on the date of initiation but in any case not later than 90 days thereafter.

Section 303(a)(2) provides that, if the investigation involves a trade agreement and a mutually acceptable resolution is not reached "before the earlier of A) the close of the consultation period, if any, specified in the trade agreement, or B) the 150th day after the day on which consultation commenced", the USTR must request proceedings under the formal dispute settlement procedures of the trade agreement.

Section 304(a) provides that on or before the earlier of "(i) the date that is 30 days after the date on which the dispute settlement procedure is concluded, or (ii) the date that is 18 months after the date on which the investigation is initiated", "[o]n the basis of the investigation initiated under section 302 and the consultations (and the proceedings, if applicable) under section 303, the Trade Representative shall … determine whether" US rights are being denied. If the determination is affirmative, USTR shall at the same time determine what action it will take under section 301.

If the DSB adopts rulings favourable to the United States on a measure investigated under Section 301, and the WTO Member concerned agrees to implement that ruling within the reasonable period foreseen in Article 21 of the DSU, the USTR can determine that the rights of the United States are being denied but that "satisfactory measures" are being taken that justify the termination of the Section 301 investigation.

Section 306(a) requires the USTR to "monitor" the implementation of measures undertaken by, or agreements entered into with, a foreign government to provide a satisfactory resolution of a matter subject to dispute settlement to enforce the rights of the United States under a trade agreement.
Section 306(b) provides:

"(1) IN GENERAL.—If, on the basis of the monitoring carried out under subsection (a), the Trade Representative considers that a foreign country is not satisfactorily implementing a measure or agreement referred to in subsection (a), the Trade Representative shall determine what further action the Trade Representative shall take under section 301(a). For purposes of section 301, any such determination shall be treated as a determination made under section 304(a)(1).

(2) WTO DISPUTE SETTLEMENT RECOMMENDATIONS.—If the measure or agreement referred to in subsection (a) concerns the implementation of a recommendation made pursuant to dispute settlement proceedings under the World Trade Organization, and the Trade Representative considers that the foreign country has failed to implement it, the Trade Representative shall make the determination in paragraph (1) no later than 30 days after the expiration of the reasonable period of time provided for such implementation under paragraph 21 of the Understanding on Rules and Procedures Governing the Settlement of Disputes …".

Section 305(a)(1) provides that, "Except as provided in paragraph (2), the Trade Representative shall implement the action the Trade Representative determines under section 304(a)(1)(B), subject to the specific direction, if any, of the President regarding such action" "by no later than … 30 days after the date on which such determination is made".

According to Section 305(a)(2)(A), however, "the [USTR] may delay, by not more than 180 days, the implementation" of any action under Section 301 in response to a request by the petitioner or the industry that would benefit from the Section 301 action or if the USTR determines "that substantial progress is being made, or that a delay is necessary or desirable to obtain United States rights or satisfactory solution with respect to the acts, policies, or practices that are the subject of the action".

CONCLUSIONS.

In the light of the statutory and non-statutory elements of Sections 301-310, in particular the US undertakings articulated in the Statement of Administrative Action approved by the US Congress at the time it implemented the Uruguay Round agreements and confirmed and amplified in the statements by the US to this Panel, we conclude that those aspects of Sections 301-310 of the US Trade Act brought before us in this dispute are not inconsistent with US obligations under the WTO. More specifically we conclude that

(a) Section 304 (a)(2)(A) of the US Trade Act of 1974, is not inconsistent with Article 23.2(a) of the DSU;
(b) Section 306 (b) of the US Trade Act of 1974, irrespective of whether we accept the US or the EC approach in respect of Articles 21.5 and 22 of the DSU, is not inconsistent with either

-Article 23.2(a) of the DSU; or
-Article 23.2(c) of the DSU;

(c) Section 305 (a) of the US Trade Act of 1974, is not inconsistent with Article 23.2(c) of the DSU;
(d) Section 306 (b) of the US Trade Act of 1974 is not inconsistent with Articles I, II, III, VIII and XI of GATT 1994, as they have been referred to by the EC.

Significantly, all these conclusions are based in full or in part on the US Administration's undertakings mentioned above. It thus follows that should they be repudiated or in any other way removed by the US Administration or another branch of the US Government, the findings of conformity contained in these conclusions would no longer be warranted.

UNITED STATES – SECTION 211 OMNIBUS APPROPRIATIONS ACT OF 1998

AB-2001-7

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds176_e.htm

Introduction

The European Communities and the United States appeal from certain issues of law and legal interpretations in the Panel Report, *United States – Section 211 Omnibus Appropriations Act of 1998* (the "Panel Report"). The Panel was established on 26 September 2000 to consider a complaint by the European Communities with respect to Section 211 of the United States Omnibus Appropriations Act of 1998 ("Section 211"). The European Communities alleged that Section 211 is inconsistent with certain obligations of the United States under the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the "*TRIPS Agreement*"), as read with the relevant provisions of the *Paris Convention for the Protection of Industrial Property*, as amended by the Stockholm Act of 1967 (the "Paris Convention (1967)"), which are incorporated by reference into the *TRIPS Agreement*.

The background to this dispute and the measure at issue are described in detail in the Panel Report. Here, we set out those aspects of the measure that are relevant to this appeal. The complaint by the European Communities relates to Section 211, which was signed into law on 21 October 1998. *Section 211 states as follows*:

> **(a) (1) Notwithstanding any other provision of law, no transaction or payment shall be authorized or approved pursuant to section 515.527 of title 31, Code of Federal Regulations, as in effect on September 9, 1998, with respect to a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated unless the original owner of the mark, trade name, or commercial name, or the bona fide successor-in-interest has expressly consented.**
>
> **(2) No U.S. court shall recognize, enforce or otherwise validate any assertion of rights by a *designated national* based on common law rights or registration obtained under such section 515.527 of such a confiscated mark, trade name, or commercial name.**

(b) *No U.S. court shall recognize, enforce or otherwise validate any assertion of treaty rights by a designated national or its successor-in-interest* under sections 44 (b) or (e) of the Trademark Act of 1946 (15 U.S.C. 1126 (b) or (e)) for a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated unless the original owner of such mark, trade name, or commercial name, or the bona fide successor-in-interest has expressly consented.

(c) The *Secretary of the Treasury* shall promulgate such rules and regulations as are necessary to carry out the provisions of this section.

(d) In this section:

(1) The term *"designated national"* has the meaning given such term in section 515.305 of title 31, Code of Federal Regulations, as in effect on September 9, 1998, and includes a national of any foreign country who is a successor-in-interest to a designated national.
(2) The term "confiscated" has the meaning given such term in section 515.336 of title 31, Code of Federal Regulations, as in effect on September 9, 1998.

Section 211 applies to a defined category of trademarks, trade names and commercial names, specifically to those trademarks, trade names and commercial names that are "the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated" by the Cuban Government on or after 1 January 1959. Section 211(d) states that the term "designated national" as used in Section 211 has the meaning given to that term in Section 515.305 of Title 31, Code of Federal Regulations ("CFR"), and that it includes "a national of any foreign country who is a successor-in-interest to a designated national." The term "confiscated" is defined as having the meaning given that term in Section 515.336 of Title 31 CFR. Part 515 of Title 31 CFR sets out the Cuban Assets Control Regulations (the "CACR"), which were enacted on 8 July 1963 under the Trading with the Enemy Act of 1917. Under these regulations, "designated national" is defined as Cuba, a national of Cuba or a specially designated national "Confiscated" is defined as nationalized or expropriated by the Cuban Government on or after 1 January 1959 without payment of adequate and effective compensation.

Section 211(a)(1) relates to licensing regulations contained in the CACR. The CACR are administered by the Office of Foreign Assets Control ("OFAC"), an agency of the United States Department of the Treasury. Under United States law, all transactions involving property under United States jurisdiction, in which a Cuban national has an interest, require a licence from OFAC. OFAC has the authority to grant either of two categories of licences, namely general licences and specific licences. A general licence is a general authorization for certain types of transactions set out in OFAC regulations Such a licence is, in effect, a standing authorization for the types of transactions that are specified in the CACR. A specific licence, by contrast, is one whose precise terms are not set out in the regulations, so that a person wishing to engage in a transaction for which a general licence is not available must apply to OFAC for a specific licence.

Section 211 refers to Section 515.527 of Title 31 CFR. Prior to the entry into force of Section 211, a general licence was available under Section 515.527 for the registration and renewal of trademarks previously owned by Cuban nationals irrespective of whether such trademarks had been confiscated by the Cuban Government. Before the enactment of Section 211, Section 515.527 read as follows:

Section 515.527 Certain transactions with respect to United States intellectual property.

> **(a) Transactions related to the registration and renewal in the United States Patent and Trademark Office or the United States Copyright Office of patents, trademarks, and copyrights in which the Government of Cuba or a Cuban national has an interest are authorized.**

On 10 May 1999, some six months after the entry into force of Section 211, the CACR were amended by adding a new subparagraph (a)(2) to Section 515.527, which effectively prohibits registration and renewal of trademarks and trade names used in connection with a business or assets that were confiscated without the consent of the original owner or *bona fide* successor-in-interest. This provision reads:

> **(a) (2) No transaction or payment is authorized or approved pursuant to paragraph (a)(1) of this section with respect to a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated, as that term is defined in section 515.336, unless the original owner of the mark, trade name, or commercial name, or the bona fide successor-in-interest has expressly consented.**

The effect of Section 211, as read with the relevant provisions of the CACR, is to make inapplicable to a defined category of trademarks and trade names certain aspects of trademark and trade name protection that are otherwise guaranteed in the trademark and trade name law of the United States. In the United States, trademark and trade name protection is effected through the common law as well as through statutes. The common law provides for trademark and trade name creation through use. The Trademark Act of 1946 (the "Lanham Act") stipulates substantive and procedural rights in trademarks as well as trade names and governs unfair competition. Section 211(b) refers to Sections 44(b) and (e) of the Lanham Act.

Before the Panel, the European Communities argued that: Section 211(a)(1) is inconsistent with Article 2.1 of the *TRIPS Agreement* in conjunction with Article 6*quinquies* A(1) of the Paris Convention (1967) and Article 15.1 of the *TRIPS Agreement*; Section 211(a)(2) is inconsistent with Article 2.1 of the *TRIPS Agreement* in conjunction with Articles 2(1), 6*bis* (1) and 8 of the Paris Convention (1967), and Articles 3.1, 4, 16.1 and 42 of the *TRIPS Agreement*; and Section 211(b) is inconsistent with Article 2.1 of the *TRIPS Agreement* in conjunction with Articles 2(1), 6*bis* (1) and 8 of the Paris Convention (1967), and Articles 3.1, 4, 16.1 and 42 of the *TRIPS Agreement*.

In the Panel Report circulated on 6 August 2001, the Panel found that:

Section 211(a)(1) is not inconsistent with Article 15.1 of the TRIPS Agreement;

Section 211(a)(1) is not inconsistent with Article 2.1 of the TRIPS Agreement in conjunction with Article 6*quinquies*A(1) of the Paris Convention (1967);

it has not been proved that Section 211(a)(2) is inconsistent with Article 16.1 of the TRIPS Agreement;

Section 211(a)(2) is inconsistent with Article 42 of the TRIPS Agreement;

Section 211(a)(2) is not inconsistent with Article 2.1 of the TRIPS Agreement in conjunction with Article 6*bis* of the Paris Convention (1967);

Section 211(a)(2) is not inconsistent with Article 2.1 of the TRIPS Agreement in conjunction with Article 8 of the Paris Convention (1967);
Section 211(a)(2) is not inconsistent with Article 3.1 of the TRIPS Agreement and Article 2.1 of the TRIPS Agreement in conjunction with Article 2(1) of the Paris Convention (1967);
Section 211(a)(2) is not inconsistent with Article 4 of the TRIPS Agreement;
it has not been proved that Section 211(b) is inconsistent with Article 16.1 of the TRIPS Agreement;
it has not been proved that Section 211(b) is inconsistent with Article 42 of the TRIPS Agreement;
it has not been proved that Section 211(b) is inconsistent with Article 2.1 of the TRIPS Agreement in conjunction with Article 6*bis* of the Paris Convention (1967);
Section 211(b) is not inconsistent with Article 2.1 of the TRIPS Agreement in conjunction with Article 8 of the Paris Convention (1967);
Section 211(b) is not inconsistent with Article 3.1 of the TRIPS Agreement and Article 2.1 of the TRIPS Agreement in conjunction with Article 2(1) of the Paris Convention (1967); and
Section 211(b) is not inconsistent with Article 4 of the TRIPS Agreement.

The Panel ruled that trade names are not a category of intellectual property covered by the *TRIPS Agreement*. Consequently, the Panel limited its review to an examination of Section 211 as it relates to trademarks. The Panel recommended that the Dispute Settlement Body (the "DSB") request the United States to bring its measures into conformity with its obligations under the *TRIPS Agreement*.

On 4 October 2001, the European Communities notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 15 October 2001, the European Communities filed its appellant's submission. On 19 October 2001, the United States filed an other appellant's submission. On 26 October 2001, the European Communities and the United States each filed an appellee's submission.

On 2 November 2001, pursuant to Rule 28(1) of the *Working Procedure*s, the Division hearing the appeal requested that the participants submit additional written memoranda on the interpretation by domestic courts of Article 6*quinquies* of the Paris Convention (1967), or the interpretation by domestic courts of legislation incorporating Article 6 *quinquies*. Both participants filed the additional written memoranda on 6 November 2001, and served these memoranda on each other. Pursuant to Rule 28(2) of the *Working Procedure*s, the Division gave the participants an opportunity to respond to these memoranda at the oral hearing in this appeal.

The oral hearing in this appeal was held on 7, 8 and 9 November 2001. The participants presented oral arguments and responded to questions put to them by the Members of the Division.

Issues Raised in this Appeal

The measure at issue in this dispute is Section 211 of the United States Omnibus Appropriations Act, 1999, ("Section 211") , which became law in the United States on 21 October 1998. Section 211 consists of four subsections. In its request for the establishment of a panel, the European Communities indicated that it was challenging only subsections (a)(1), (a)(2) and (b). At the oral hearing in this appeal, the European Communities confirmed this by stating that the measure "includes 211(a)(1), 211(a)(2), and 211(b)" and that "[t]he other provisions are definitions and are auxiliary". The United States agreed.

With this in mind, we confine our rulings in this appeal to subsections (a)(1), (a)(2) and (b) of Section 211. We address subsections (c) and (d) only to the extent that the definitions they contain are relevant to our examination of the consistency of subsections (a) and (b) with the provisions of the *TRIPS Agreement* and of the Paris Convention (1967) that have been invoked by the European Communities.

Section 211 makes reference to Section 515.527 of the *Cuban Assets Control Regulations* (the "CACR"). The CACR were enacted on 8 July 1963 pursuant to the Trading with the Enemy Act, a statute enacted by the United States Congress on 6 October 1917. After the entry into force of Section 211, the CACR were amended by adding a new subparagraph (a)(2) to Section 515.527 of Title 31 CFR. Both parties to this dispute agree that neither the CACR nor the Trading with the Enemy Act is part of the measure at issue in this appeal. Thus, we refer to the CACR and to the Trading with the Enemy Act only to the extent that they are relevant for the interpretation of Section 211 and have been addressed by the participants in their arguments in this dispute.

***This dispute focuses on the protection of trademarks. In the legal regimes of most WTO Members, the ownership of a trademark is established exclusively through registration. The Panel established that this is not so under United States law*. Before the Panel, the United States submitted that, under United States law, "'use' in connection with a business or assets may create ownership rights in the trademark". The Panel established, further, that, in the United States, "the registration of a trademark confers a *prima facie* presumption of the registrant's ownership of the registered trademark." The European Communities agreed with the submission of the United States that "if the person registering a trademark in the United States is not the true owner of the trademark under [United States] law, the registration may be cancelled."**

Both the European Communities and the United States agree that, in the United States, the principal federal statute on trademark and trade name protection is the Trademark Act of 1946 (which is commonly referred to as the "Lanham Act"). Both parties to this dispute have also agreed that the Lanham Act also is not part of the measure at issue in this appeal. Thus, we refer to the Lanham Act only to the extent that it is relevant for the interpretation of Section 211. On appeal, the United States submits that the European Communities has not challenged the *application* of Section 211. At the oral hearing in this appeal, the European Communities confirmed that it has not challenged the application of the statute, and clarified that, instead, it is challenging the statute on its face. The European Communities confirmed as well that, in this dispute, the European Communities is not challenging the WTO-consistency of the decisions in *Havana Club Holding, S.A. v. Galleon S.A*. (the "*Havana Club Holding* decisions"). Like the Panel, the only applications of Section 211 we are aware of are the two United States court decisions relating to Section 211(b) in 1999 and in 2000 in *Havana Club Holding, S.A. v. Galleon S.A*. The request by the European Communities for the establishment of a panel does not contain any reference to the *Havana Club Holding* decisions. Thus, in this appeal, we examine the WTO-consistency of Section 211 on its face. The question of the WTO-

consistency of the *Havana Club Holding* decisions is not before us. However, as the European Communities has argued and as the United States has agreed, the *Havana Club Holding* decisions are relevant as evidence of how Section 211(b), as the European Communities has put it, "operates in practice". We agree.

Therefore, the measure at issue in this dispute consists of subsections (a)(1), (a)(2) and (b) of Section 211. With respect to this measure, the following issues are raised in this appeal:

(a) whether the Panel erred in finding that Section 211(a)(1) is not inconsistent with Article 2.1 of the *TRIPS Agreement* in conjunction with Article 6*quinquies* A(1) of the Paris Convention (1967);
(b) whether the Panel erred in finding that Section 211(a)(1) is not inconsistent with Article 15.1 of the *TRIPS Agreement*;
(c) whether the Panel erred in finding that the European Communities has not proved that Sections 211(a)(2) and (b) are inconsistent with Article 16.1 of the *TRIPS Agreement*;
(d) whether the Panel erred in finding that:

  (i) Section 211(a)(2) is inconsistent with Article 42 of the *TRIPS Agreement* with respect to the protection of trademarks; and
  (ii) the European Communities has not proved that Section 211(b) is inconsistent with Article 42 of the *TRIPS Agreement* with respect to the protection of trademarks;

(e) whether the Panel erred in finding that Sections 211(a)(2) and (b) are not inconsistent with Article 2.1 of the *TRIPS Agreement* in conjunction with Article 2(1) of the Paris Convention (1967) and Article 3.1 of the *TRIPS Agreement* in respect of the protection of trademarks;
(f) whether the Panel erred in finding that Sections 211(a)(2) and (b) are not inconsistent with Article 4 of the *TRIPS Agreement* in respect of the protection of trademarks; and
(g) whether the Panel erred in finding that trade names are not covered by the *TRIPS Agreement* and, consequently:

  (i) erred in not finding that Sections 211(a)(2) and (b) are inconsistent with Article 2.1 of the *TRIPS Agreement* in conjunction with Article 2(1) of the Paris Convention (1967) and Article 3.1 of the *TRIPS Agreement* in respect of the protection of trade names;
  (ii) erred in not finding that Sections 211(a)(2) and (b) are inconsistent with Article 4 of the *TRIPS Agreement* in respect of the protection of trade names;
  (iii) erred in not finding that Sections 211(a)(2) and (b) are inconsistent with Article 42 of the *TRIPS Agreement* in respect of the protection of trade names.

Findings and Conclusions

For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's finding in paragraph 8.89 of the Panel Report that Section 211(a)(1) is not inconsistent with Article 2.1 of the *TRIPS Agreement* in conjunction with Article 6*quinquies* A(1) of the Paris Convention (1967);
(b) upholds the Panel's finding in paragraph 8.70 of the Panel Report that Section 211(a)(1) is not inconsistent with Article 15.1 of the *TRIPS Agreement*;

(c) upholds the Panel's findings in paragraphs 8.112 and 8.159 of the Panel Report and finds that Sections 211(a)(2) and (b) are not inconsistent with Article 16.1 of the *TRIPS Agreement*;

(d) with respect to Article 42 of the *TRIPS Agreement*, and in relation to trademarks:

(i) reverses the Panel's finding in paragraph 8.102 of the Panel Report and finds that Section 211(a)(2) is not inconsistent with this Article;

(ii) upholds the Panel's finding in paragraph 8.162 of the Panel Report and finds that Section 211(b) is not inconsistent with this Article;

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e) with respect to Article 2.1 of the *TRIPS Agreement* in conjunction with Article 2(1) of the Paris Convention (1967) and Article 3.1 of the *TRIPS Agreement*, and in relation to trademarks:

(i) regarding successors-in-interest:

(a) reverses the Panel's finding in paragraph 8.140 of the Panel Report and finds that Section 211(a)(2) is <u>inconsistent</u> with these Articles;

(b) upholds the Panel's finding in paragraph 8.173 of the Panel Report and finds that Section 211(b) is not inconsistent with these Articles;

(ii) regarding original owners, reverses the Panel's findings in paragraphs 8.140 and 8.173 of the Panel Report and finds that Section 211(a)(2) and Section 211(b) are <u>inconsistent</u> with these Articles;

(f) reverses the Panel's findings in paragraphs 8.148 and 8.176 of the Panel Report regarding original owners and finds that, in this respect, and in relation to trademarks, Sections 211(a)(2) and (b) are <u>inconsistent</u> with Article 4 of the *TRIPS Agreement.*

(g) *reverses* the Panel's finding in paragraph 8.41 of the Panel Report that <u>trade names</u> are not covered under the *TRIPS Agreement*, and finds that WTO Members do have an obligation under the *TRIPS Agreement* to provide protection to trade names, and accordingly:

(i) with respect to Article 2.1 of the *TRIPS Agreement* in conjunction with Article 2(1) of the Paris Convention (1967) and Article 3.1 of the *TRIPS Agreement,* and in relation to <u>trade names</u>:

(a) regarding successors-in-interest, finds that Section 211(a)(2) is <u>inconsistent</u> with these Articles;

(b) regarding successors-in-interest, finds that Section 211(b) is not inconsistent with these Articles;

(c) regarding original owners, finds that Section 211(a)(2) and Section 211(b) are <u>inconsistent</u> with these Articles;

(ii) finds that, in relation to trade names, Sections 211(a)(2) and (b) are <u>inconsistent</u> with Article 4 of the *TRIPS Agreement*;

(iii) finds that, in relation to trade names, Sections 211(a)(2) and (b) are not inconsistent with Article 42 of the *TRIPS Agreement*; and

(iv) finds that Sections 211(a)(2) and (b) are not inconsistent with Article 2.1 of the *TRIPS Agreement* in conjunction with Article 8 of the Paris Convention (1967).

The Appellate Body *recommends* that the DSB request the United States to bring its measure, found in this Report and in the Panel Report as modified by this Report to be inconsistent with the *TRIPS Agreement*, into conformity with its obligations under that Agreement.

Concluding Remarks.

We wish to emphasize that this ruling is not a judgment on confiscation as that term is defined in Section 211. The validity of the expropriation of intellectual or any other property rights without compensation by a WTO Member within its own territory is not before us. Nor do we express any view, nor are we required to express any view in this appeal, on whether a Member of the WTO should, or should not, recognize in its own territory trademarks, trade names, or any other rights relating to any intellectual or other property rights that may have been expropriated or otherwise confiscated in other territories.

However, where a WTO Member chooses not to recognize intellectual property rights in its own territory relating to a confiscation of rights in another territory, a measure resulting from and implementing that choice must, if it affects other WTO Members, comply with the *TRIPS Agreement*, by which all WTO Members are voluntarily bound. In such a measure, that WTO Member must accord "no less favourable treatment" to the nationals of all other WTO Members than it accords to its own nationals, and must grant to the nationals of all other WTO Members "any advantage, favour, privilege or immunity" granted to any other WTO Member. In such a measure, a WTO Member may not discriminate in a way that does not respect the obligations of national treatment and most-favoured-nation treatment that are fundamental to the *TRIPS Agreement*.

UNITED STATES – COUNTERVAILING MEASURES CONCERNING CERTAIN PRODUCTS FROM THE EUROPEAN COMMUNITIES.

AB-2002-5 (December 9, 2002)

Report of the Appellate Body.

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds212_e.htm

Introduction

The United States appeals certain issues of law and legal interpretations in the Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities* (the "Panel Report"). The Panel was established to consider a complaint by the European Communities with respect to countervailing duties imposed or maintained by the United States on certain steel products originating in various Member States of the European Communities.

Countervailing duties were imposed or maintained by the United States Department of Commerce ("USDOC") in the course of 12 investigations: six original investigations, two administrative reviews, and four sunset reviews. Certain analyses in these investigations were undertaken pursuant to a United States statute, 19 U.S.C. § 1677(5)(F) ("Section 1677(5)(F)"), which reads as follows:

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

The subject products in the 12 original investigations and reviews in issue were produced by formerly state-owned enterprises that had been privatized at the time of the 12 underlying administrative determinations. The European Communities alleges that the privatizations in all 12 cases took place at arm's length and for fair market value. The United States did not rebut these allegations. Both participants agree that the changes in ownership relevant to this dispute concern only privatizations, that is, the change in ownership from government to private hands. All the privatizations concerned in this dispute involved a full change in ownership in the sense that in all 12 cases, governments had sold all, or substantially all, their ownership interests and, clearly, no longer had any controlling interests in the privatized producers.

The 12 investigations relate to the impact of privatization of the firms under investigation on the existence of a countervailable benefit. The imposition or maintenance of countervailing duties in the 12 determinations was based on the existence of subsidies for the privatized producers, specifically, on the continuing benefit conferred by non-recurring financial contributions bestowed by the governments on the producers prior to privatization.

The Panel found that the United States had acted inconsistently with Articles 10, 14, 19.1, 19.4, 21.1, 21.2, 21.3, and 32.5 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), and that it had nullified or impaired benefits accruing to the European Communities under these Agreements. The Panel recommended that the Dispute Settlement Body (the "DSB") request the United States to bring its measures into conformity with its obligations under the *SCM Agreement* and the *WTO Agreement*.

Factual Background

The *"Gamma"* Method.

The USDOC applied one of two different methods (referred to as the "*gamma*" and "same person" methods) in conducting the 12 determinations to assess the impact of a change in ownership effected through privatization on the continued existence of the benefit of a countervailable subsidy. The *gamma* method was formerly used by the USDOC to determine the extent to which a non-recurring financial contribution provided to a state-owned enterprise should be amortized over time to arrive at a countervailable subsidy rate, particularly after sale of the subsidized entity to a private firm. In applying this method, the USDOC employed an "irrebuttable presumption" that the benefits of that financial contribution would remain with the recipient over a standard period of time, such that "USDOC does not undertake an inquiry into whether and, if so, to what extent the subsidy continues to benefit production at any subsequent point in time. Rather, the USDOC simply will countervail the amount of the subsidy originally allocated to the year" under review. When confronted with a change in ownership of the producer under investigation, the USDOC would devise a ratio so as to allocate the "irrebuttably presumed" benefit between the seller and purchaser. This allocation "can result in the full pass through of benefits from prior subsidies, or absolutely no pass through of benefits, or anything in between, depending on the facts of a particular case."

The "Same Person" Method.

The "same person" method was devised as a replacement for the *gamma* method. This method provides for a two-step test. The first step consists of an analysis of whether the post-privatization entity is the same legal person that received the original subsidy before privatization. For this purpose, the USDOC examines the following non-exhaustive criteria: (i) continuity of general business operations; (ii) continuity of production facilities; (iii) continuity of assets and liabilities; and (iv) retention of personnel. If, as a result of the application of these criteria, the USDOC concludes that *no new legal person* was created, the analysis of whether a "benefit" exists stops there, and the USDOC will not assess whether the privatization was at arm's length and for fair market value. The subsidy is automatically found to continue to exist for the post-privatization firm. By contrast, if, as a consequence of the application of these criteria, the USDOC concludes that the post-privatization entity is *a new legal person*, distinct from the entity that received the pre-privatization subsidy, the USDOC will not impose duties on goods produced after privatization on account of the pre-privatization subsidy.

Issues Raised in this Appeal

The following issues are raised in this appeal:

- **One is whether the Panel erred in finding that privatization, at arm's length and for fair market value, "*systematically*" extinguishes the "benefit" from previously-bestowed non-recurring financial contributions.**
- **Another is whether the Panel erred in finding that the United States failed to comply with its obligations under Articles 10, 14, 19.1, 19.4, 21.1, 21.2, and 21.3 of the *SCM Agreement*, in using a method of calculating the "benefit" to the "recipient" that presumes conclusively that if the state-owned enterprise and the post-privatization firm are the same "legal person", the "benefit" received by the state-owned enterprise *automatically* continues to exist with the newly-privatized firm.**
- **A third is whether the Panel erred in finding that 19 U.S.C. § 1677(5)(F) is, *per se*, inconsistent with Articles 10, 14, 19, and 21 of the *SCM Agreement*, because it prevents the USDOC from *automatically* concluding that, following privatization at arm's length and for fair market value, the "benefit" of a prior non-recurring financial contribution bestowed on the state-owned enterprise no longer "accrue[s]" to the privatized producers; and, consequently, that the "United States has failed to ensure conformity with Article 32.5 of the *SCM Agreement* and Article XVI.4 of the *WTO Agreement*".**

Introduction to the Substantive Issues

Having dealt with the procedural issues, we turn now to the substantive issues in this appeal. Before doing so, it is useful to recall briefly the relevant law, the particular facts and circumstances, and the precise measures relevant to the appeal.

- **Article VI:3 of GATT 1994 permits Members of the WTO to impose a "countervailing duty" on products imported from other Members of the WTO "for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise." Article 10 of the *SCM Agreement* provides that "Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement." (footnote omitted)**
- **Article 1 of the *SCM Agreement* sets out when a "subsidy" that may be "offset[]"by "countervailing dut[ies]" "shall be deemed *to exist*" for the purpose of the *SCM Agreement*. (emphasis added) To satisfy the definition of a "subsidy", a "benefit" must be "conferred" on a "recipient". Only a "subsidy" that "exist[s]" and that "confer[s]" a "benefit" on a "recipient" may be "offset" by "countervailing duties".**

Article 19 of the *SCM Agreement* deals with the "Imposition and Collection of Countervailing Duties". Article 19.1 provides that, after, *inter alia*, "a final determination of the *existence* and *amount* of the subsidy", a Member may impose a countervailing duty "in accordance with the provisions" of that Article. (emphasis added) Among those provisions is Article 19.4, which provides that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to *exist*, calculated in terms of subsidization per unit of the subsidized and exported product." (emphasis added, footnote omitted).

Article 21 of the *SCM Agreement* deals with the "Duration and Review of Countervailing Duties and Undertakings". Article 21.1 provides, "A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury." Article 21.2 imposes certain obligations relating to "reviews" of countervailing duties, including the administrative reviews before us on appeal, and Article 21.3 imposes certain obligations relating to "sunset reviews" of countervailing duties.

Article 14 of the *SCM Agreement* requires that "any method used by the investigating authority" of a WTO Member "to calculate the benefit to the recipient … shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained."

Article 32.5 of the *SCM Agreement* provides, "Each Member shall take all necessary steps, of a general or particular character, to ensure … the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement". Similarly, Article XVI:4 of the *WTO Agreement* provides, "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements", which include the *SCM Agreement*.

Therefore, we find that the Panel erred in concluding that "[p]rivatizations at arm's length and for fair market value *must* lead to the conclusion that the privatized producer paid for what he got and thus did not get any benefit or advantage from the prior financial contribution bestowed upon the state-owned producer." (emphasis added) Privatization at arm's length and for fair market value *may* result in extinguishing the benefit. Indeed, we find that there is a rebuttable presumption that a benefit ceases to exist after such a privatization. Nevertheless, it does not *necessarily* do so. There is no inflexible rule *requiring* that investigating authorities, in future cases, *automatically* determine that a "benefit" derived from pre-privatization financial contributions expires following privatization at arm's length and for fair market value. It depends on the facts of each case. Therefore, we reverse the Panel's conclusion that:

> **[o]nce an importing Member has determined that a privatization has taken place at arm's-length and for fair market value, it *must* reach the conclusion that no benefit resulting from the prior financial contribution (or subsidization) continues to accrue to the privatized producer. (emphasis added)**

In sum, we reject the characterization made by the United States of our rationale in *US – Lead and Bismuth II*, and we reaffirm our finding in that case that an investigating authority, in an administrative review, when presented with information directed at proving that a "benefit" no longer exists following a privatization, *must* determine whether the continued imposition of countervailing duties is warranted in the light of that information. This obligation is premised, *not* on the creation of a new legal person, as the United States insists, but on the possibility that such a change in ownership has affected the continued existence of a benefit.

In our view, this finding, relating to administrative reviews, leads inevitably to the conclusion that the "same person" method, as such, is also inconsistent with the obligations of the *SCM Agreement* relating to original investigations. In an original investigation, an investigating authority must establish all conditions set out in the *SCM Agreement* for the imposition of countervailing duties. Those obligations, identified in Article 19.1 of the *SCM Agreement*, read in conjunction with Article 1, include a determination of the existence of a "benefit". As in the administrative reviews, the "same

person" method necessarily precludes a proper determination as to the existence of a "benefit" in original investigations where the pre- and post-privatization entity are the same legal person. Instead, in such cases, the "same person" method establishes an irrebuttable presumption that the pre-privatization "benefit" continues to exist after the change in ownership. Because it does not permit the investigating authority to satisfy all the prerequisites stated in the *SCM Agreement* before the imposition of countervailing duties, particularly the identification of a "benefit", we find that the "same person" method, as such, is inconsistent with the WTO obligations that apply to the conduct of original investigations.

In the light of these reasons, as they apply to original investigations, administrative reviews, and sunset reviews, we uphold the Panel's conclusion that "the same person methodology *is itself* inconsistent with the SCM Agreement". (emphasis added) We find that the same person method *as such* is inconsistent with the *SCM Agreement.*

Having upheld the Panel's conclusions in paragraphs 8.1(a) through (c) of the Panel Report, we now turn to evaluate the Panel's conclusion, in paragraph 8.1(d), regarding the relevant United States statute.

The Panel concluded, in paragraph 8.1(d) of the Panel Report, that:

> **To the extent that Section 1677(5)(F), as interpreted by the US Court of Appeals for the Federal Circuit and the SAA, requires the US Department of Commerce to apply a methodology where the benefit from a prior financial contribution is not systematically found to no longer accrue to the privatized producer solely by virtue of an arm's-length for fair market value privatization, is preventing the United States from exercising a WTO-compatible discretion. Therefore, Section 1677(5)(F) is inconsistent with Articles 10, 14, 19 and 21 of the SCM, as interpreted by the Panel and the Appellate Body Reports in *US – Lead and Bismuth II* and this Panel. As Section 1677(5)(F) is found to be inconsistent with the *SCM Agreement*, the United States has failed to ensure conformity with Article 32.5 of the *SCM Agreement* and Article XVI.4 of the WTO Agreement respectively.**

Section 1677(5)(F), the so-called "change in ownership" provision, provides:

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

The Panel acknowledged that this "statutory language alone indicates that the competent authority could have the discretion to implement Section 1677(5)(F) consistently with WTO law." However, in looking at the statute in the light of "other domestic interpretive tools such as the legislative history, the SAA, and relevant judicial interpretations", the Panel found that it "prohibit[ed] the United States from exercising its executive discretion so that it can systematically conclude that in cases of [a]rm's-length privatization for fair market value, no benefit accrues to the privatized producer from [a] prior financial contribution bestowed to the state-owned producers".

In short, the Panel found that Section 1677(5)(F) prevents the USDOC from determining automatically and in every case that, pursuant to a "*per se*" rule, upon privatization at arm's length and for fair market value, the remaining part of a benefit conferred by a prior financial contribution on the formerly state-owned enterprise does not "accrue" to the private owner. In the Panel's view, Section 1677(5)(F), as described in the SAA and as interpreted by the United States Court of Appeals for the Federal Circuit, "bound [the USDOC] to a non-compliant application of Section 1677(5)(F)." The Panel reached this conclusion because it saw the statute as *compelling* the USDOC to make its determinations in a way that prevents it from applying the irrebuttable presumption that the Panel erroneously saw as required by the *SCM Agreement*. On this basis, the Panel found that Section 1677(5)(F) mandates the United States to act inconsistently with the *SCM Agreement* and with Article XVI:4 of the *WTO Agreement*, and, *as such*, is inconsistent with United States' WTO obligations.

As stated earlier, we agree with the Panel that privatization at arm's length and at fair market price will *usually* extinguish the remaining part of a benefit bestowed by a prior, non-recurring financial contribution. However, we disagree with the Panel that this result will *necessarily* and *always* follow from every privatization at arm's length and for fair market value. For this reason, we reversed the Panel's conclusion that, under the *SCM Agreement*, investigating *authorities* "must" determine, *automatically*, that the remaining part of a benefit bestowed by a prior financial contribution does not continue to exist for a privatized firm following a transaction at arm's length and for fair market value. Accordingly, we have also found that, contrary to the Panel's understanding, the *SCM Agreement* permits an investigating authority to evaluate evidence directed at proving that, regardless of privatization at arm's length and for fair market value, the new private owner may nevertheless enjoy a benefit from a prior financial contribution bestowed on the state-owned enterprise. In the light of these earlier conclusions, we disagree with the Panel that Section 1677(5)(F) is inconsistent *per se* with the WTO obligations of the United States. The Panel's basis for this finding is incorrect.

For all these reasons, we reverse the Panel's conclusion that:

> **To the extent that Section 1677(5)(F), as interpreted by the US Court of Appeals for the Federal Circuit and the SAA, requires the US Department of Commerce to apply a methodology where the benefit from a prior financial contribution is not systematically found to no longer accrue to the privatized producer solely by virtue of an arm's-length for fair market value privatization, is preventing the United States from exercising a WTO-compatible discretion. Therefore, Section 1677(5)(F) is inconsistent with Articles 10, 14, 19 and 21 of the SCM, as interpreted by the Panel and the Appellate Body Reports in *US – Lead and Bismuth II* and this Panel. As Section 1677(5)(F) is found to be inconsistent with the *SCM Agreement*, the United States has failed to ensure conformity with Article 32.5 of the *SCM Agreement* and Article XVI.4 of the WTO Agreement respectively.**

Findings and Conclusions

For the reasons set out in this Report, the Appellate Body:

upholds the Panel's findings, in paragraphs 8.1 (a), (b) and (c) of the Panel Report, that the United States has acted inconsistently with Articles 10, 14, 19.1, 19.4, 21.1, 21.2 and 21.3 of the *SCM Agreement*, by imposing and maintaining countervailing duties without determining whether a "benefit" continues to exist in the following countervailing duty determinations:

reverses the Panel's finding, in paragraph 8.1(d), first sentence, of the Panel Report, that "[o]nce an importing Member has determined that a privatization has taken place at arm's-length and for fair market value, it must reach the conclusion that no "benefit" resulting from the prior financial contribution (or subsidization) continues to accrue to the privatized producer"; and

reverses the Panel's conclusion, in paragraph 8.1(d), second sentence, of the Panel Report, that Section 771(5)(F) of the Tariff Act 1930, as amended, 19 U.S.C. § 1677(5)(F), is inconsistent with the *SCM Agreement* and that, therefore, "the United States has failed to ensure conformity with Article 32.5 of the *SCM Agreement* and Article XVI.4 of the *WTO Agreement* respectively."

upholds the Panel's conclusion, in paragraph 8.2 of the Panel Report, that, insofar as the United States has infringed its obligations under the *SCM Agreement*, as set out in paragraphs 8.1(a), (b), and (c) of the Panel Report, these actions of the United States constitute *prima facie* nullification or impairment of benefits accruing to the European Communities, pursuant to Article 3.8 of the DSU; and, because the United States has failed to rebut this presumption, the United States has in fact nullified or impaired benefits accruing to the European Communities under the *SCM Agreement*.

The Appellate Body recommends that the Dispute Settlement Body request the United States to bring its measures and administrative practice (the "same person" method), as found in this Report and in the Panel Report as modified by this Report, to be inconsistent with the *SCM Agreement*, into conformity with its obligations under that Agreement.

UNITED STATES – TAX TREATMENT FOR "FOREIGN SALES CORPORATIONS"

AB-2001-814 January 2002

Report of the Appellate Body

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds108_e.htm

Introduction

The United States appeals certain issues of law and legal interpretations in the Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5. of the DSU by the European Communities* (the "Panel Report"). The Panel was established to consider a complaint by the European Communities concerning the consistency of the United States FSC Replacement and Extraterritorial Income Exclusion Act (the "ETI Act") with the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"), the *Agreement on Agriculture*, and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). The ETI Act is a measure taken by the United States with a view to complying with the recommendations and rulings of the Dispute Settlement Body (the "DSB") in *United States – Tax Treatment for "Foreign Sales Corporations"* ("*US – FSC*") Pertinent aspects of the ETI Act are described in Section II below, as well as in paragraphs 2.1-2.8 of the Panel Report.

In *US – FSC*, the *original panel* concluded that the *"FSC measure*", consisting of Sections 921-927 of the United States Internal Revenue Code (the "IRC") and related measures establishing special tax treatment for foreign sales corporations, was inconsistent with the United States' obligations under the *SCM Agreement* and under the *Agreement on Agriculture*. The Appellate Body upheld the original panel's finding that the FSC measure was inconsistent with United States' obligations under the *SCM Agreement* and modified the Panel's findings under the *Agreement on Agriculture*.

On 20 March 2000, the DSB adopted the reports of the original panel and the Appellate Body. The DSB recommended that the United States bring the FSC measure into conformity with its obligations under the covered agreements and that the FSC subsidies found to be prohibited export subsidies within the meaning of the *SCM Agreement* be withdrawn without delay, namely, "at the latest with effect from 1 October 2000." At its meeting on 12 October 2000, the DSB acceded to a request made by the United States to modify the time-period for complying with the DSB's recommendations and rulings in this dispute so as to expire on 1 November 2000. On 15 November 2000, with a view to such compliance, the United States promulgated the ETI Act. The background of this dispute is set out in further detail in the Panel Report.

The *European Communities* considered that the ETI Act did not comply with the recommendations and rulings of the DSB and that it was not consistent with the United States' obligations under the *SCM Agreement*, the *Agreement on Agriculture*, and the GATT 1994. The European Communities therefore requested that the matter be referred to the original panel pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"). On 20 December 2000, in accordance with Article 21.5 of the DSU, the DSB referred the matter to the original panel. The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 20 August 2001.

The Panel concluded that:

> the [ETI] Act is inconsistent with Article 3.1(a) of the *SCM Agreement* as it involves subsidies "contingent… upon export performance" within the meaning of Article 3.1(a) of the *SCM Agreement* by reason of the requirement of "use outside the United States" and fails to fall within the scope of the fifth sentence of footnote 59 of the *SCM Agreement* because it is not a measure to avoid the double taxation of foreign-source income within the meaning of footnote 59 of the *SCM Agreement*;
>
> the United States has acted inconsistently with its obligation under Article 3.2 of the *SCM Agreement* not to maintain subsidies referred to in paragraph 1 of Article 3 of the *SCM Agreement*;
>
> the [ETI] Act, by reason of the requirement of "use outside the United States", involves export subsidies as defined in Article 1(e) of the *Agreement on Agriculture* for the purposes of Article 10.1 of the *Agreement on Agriculture* and the United States has acted inconsistently with its obligations under Article 10.1 of the *Agreement on Agriculture* by applying the export subsidies, with respect to both scheduled and unscheduled agricultural products, in a manner that, at the very least, threatens to circumvent its export subsidy commitments under Article 3.3 of the *Agreement on Agriculture* and, by acting inconsistently with Article 10.1, the United States has acted inconsistently with its obligation under Article 8 of the *Agreement on Agriculture*;
>
> the [ETI] Act is inconsistent with Article III:4 of the *GATT 1994* by reason of the foreign articles/labour limitation as it accords less favourable treatment within the meaning of that provision to imported products than to like products of US origin; and
>
> the United States has not fully withdrawn the FSC subsidies found to be prohibited export subsidies inconsistent with Article 3.1(a) of the *SCM Agreement* and has therefore failed to implement the recommendations and rulings of the DSB made pursuant to Article 4.7 *SCM Agreement.*

The Panel also concluded that to the extent the United States had acted inconsistently with the *SCM Agreement*, the *Agreement on Agriculture* and the GATT 1994, the United States had nullified or impaired benefits accruing to the European Communities under those agreements.
On 15 October 2001, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").

By letter of 22 October 2001, the United States requested the Appellate Body pursuant to Rule 16(2) of the *Working Procedures* to modify the timetable set out in the Working Schedule for Appeal for

the filing of the appellant's submissions by the United States. The United States stated that suspected bioterrorist attacks had compromised the ability of the United States to conduct the necessary consultations with the United States Congress with regard to this appeal. ….. On 1 November 2001, the United States filed its appellant's submission. On 6 November 2001, the European Communities filed its other appellant's submission. On 16 November 2001, the European Communities and the United States each filed an appellee's submission. On the same day, Australia, Canada, India and Japan each filed a third participant's submission.

The oral hearing in this appeal was held on 26 and 27 November 2001. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

At the oral hearing, the Division requested the United States to reduce to writing, by 28 November 2001, certain of its responses to questioning. The Division also authorized the European Communities and the third participants, if they wished, to respond in writing by 30 November 2001. In response to this request, the United States filed an additional written memorandum on 28 November 2001. The European Communities filed a response to this additional written memorandum on 30 November 2001.

Background

Overview of United States Rules of Taxation.

In our Report in *US – FSC*, we provided certain general background information relating to United States rules of taxation. We said:

> **For United States citizens and residents, the tax laws of the United States generally operate "on a worldwide basis". This means that, generally, the United States asserts the right to tax all income earned "worldwide" by its citizens and residents. A corporation organized under the laws of one of the fifty American states or the District of Columbia is a "domestic", or United States, corporation, and is "resident" in the United States for purposes of this "worldwide" taxation system. …**
>
> **The United States generally taxes any income earned by foreign corporations within the territory of the United States. The United States generally does *not* tax income that is earned by foreign corporations outside the United States. However, [under Section 882(a) IRC], such "foreign-source" income of a foreign corporation generally will be subject to United States taxation when such income is "effectively connected with the conduct of a trade or business within the United States". … (footnotes omitted)**

This statement continues to describe the United States tax system and is relevant for the purposes of this appeal also. In addition, we note that, under Sections 1 and 11 IRC, the United States imposes a tax on the "taxable income" of its citizens and residents. According to Section 63(a) IRC, taxable income is equal to "gross income minus the deductions allowed" under the IRC. Section 61(a) IRC provides that gross income is "all income from whatever source derived". When a United States citizen or resident is subject to tax, in the United States, on *income which is also subject to tax in a foreign State, the United States grants the taxpayer tax credits, subject to certain limitations, in respect of the amount of foreign taxes paid*.

The provisions of the IRC relating to these rules of taxation have not been modified by the ETI Act, although the application of these rules has been altered by the adoption of the ETI Act.

ETI Act.

A detailed description of the measure at issue in this appeal is contained in paragraphs 2.2 to 2.8 of the Panel Report. Nevertheless, we consider it useful, at this stage, to provide an overview of the fundamental aspects and key provisions of the ETI Act.

The *ETI Act* consists of five sections. At issue in this dispute are, first, certain elements of Sections 2 and 5, which relate to foreign sales corporations and, second, certain elements of Section 3. Section 3, entitled "*Treatment of Extraterritorial Income*", amends the IRC by inserting into it a new Section 114, as well as a new Subpart E, which is in turn composed of new Sections 941, 942 and 943. The remaining sections of the ETI Act are not relevant for purposes of this dispute.

As we have said, the ETI Act was promulgated by the United States with a view to complying with the recommendations and rulings of the DSB in *US – FSC*. Section 2 of the ETI Act repeals the provisions of the IRC relating to FSCs. Section 5(b) prohibits foreign corporations from electing to be treated as FSCs after 30 September 2000 and provides for the termination of inactive FSCs. Nevertheless, Section 5(c) creates a "transition period" for certain transactions of existing FSCs. Specifically, under Section 5(c)(1) of the ETI Act, the repeal of the provisions of the IRC relating to FSCs "shall not apply" to *transactions of existing FSCs which occur before 1 January 2002* or to any other transactions of such FSCs which occur after 31 December 2001, pursuant to a binding contract between the FSC and an unrelated person which is in effect on 30 September 2000. These provisions *are the subject of the European Communities' claim that the United States has not fully withdrawn the FSC subsidies*, in accordance with Article 4.7 of the *SCM Agreement*.

Sections 114, 941, 942 and 943 IRC were inserted into the IRC by virtue of Section 3 of the ETI Act, and create new rules under which certain income is excluded from United States taxation. We refer to these new rules as the *"ETI measure"* (or sometimes simply as the "measure"), which we outline below. In these proceedings, the claims brought by the European Communities under Article 3.1 of the *SCM Agreement*, Articles 3.3, 8 and 10.1 of the *Agreement on Agriculture* and Article III:4 of the GATT 1994 contest various elements of this measure.

The tax treatment provided by the ETI measure is available to United States' citizens and residents, including natural persons, corporations and partnerships. In addition, the provisions of the ETI measure also apply to foreign corporations which elect to be treated, for tax purposes, as United States corporations. The ETI measure permits all these taxpayers to elect to have qualifying income taxed in accordance with the provisions of that measure. This election may be made by taxpayers on a *transaction-by-transaction basis.*

Generally, income from specific transactions will qualify for treatment in accordance with the provisions of the ETI measure if it is income attributable to gross receipts: (i) from specific types of transaction; (ii) involving "qualifying foreign trade property" ("QFTP"); and (iii) if the "foreign economic process requirement" is fulfilled with respect to each such transaction. Turning to the first of these conditions, the rules contained in the ETI measure apply, in particular, *to income arising from sale, lease or rental transactions*. The ETI measure also applies *to income earned from the performance of services* "related or subsidiary to" qualifying sales or lease transactions, as well as to income earned from the performance of certain other services.

The second condition is that these transactions involve *QFTP*. Section 943(a)(1) IRC *defines QFTP* as property which is: (A) manufactured, produced, grown or extracted within or outside the United States; (B) held primarily for sale, lease or rental, in the ordinary course of business, for direct use, consumption, or disposition outside the United States; and (C) *not more than 50 percent of the fair market value of which is attributable to*: (i) articles manufactured, produced, grown, or extracted outside the United States; and (ii) direct costs for labour performed outside the United States.

The third condition is that the "foreign economic process requirement" must be fulfilled with respect to each individual transaction. This requirement is fulfilled if the taxpayer (or any person acting under contract with the taxpayer) participated outside the United States in the solicitation, negotiation, or making of the contract relating to the transaction. Furthermore, a specified portion of the "direct costs" of the transaction must be attributable to activities performed outside the United States.

Section 942(a) IRC designates as "foreign trading gross receipts" the receipts generated in transactions satisfying all three of these conditions. Under Section 114(e) IRC, "*extraterritorial income"* is the gross income attributable to activities performed outside the United States.

Section 114(a) IRC provides that a taxpayer's gross income "does not include extraterritorial income". Section 114(b) IRC adds that this exclusion of extraterritorial income from gross income "shall not apply" to that portion of extraterritorial income which is not "qualifying foreign trade income" ("QFTI*"). Accordingly, the only portion of extraterritorial income which is excluded from gross income – and, thereby, from United States taxation – is QFTI.*

QFTI is an amount which, if excluded from the taxpayer's gross income, will result in a reduction of the taxable income of the taxpayer from the qualifying transaction. Pursuant to Section 941(a)(1) and (2) IRC, QFTI is calculated as the greatest of, or the taxpayer's choice of, the following three options: (i) 30 percent of the foreign sale and leasing income derived by the taxpayer from such transaction; (ii) 1.2 percent of the foreign trading gross receipts derived by the taxpayer from the transaction; or (iii) 15 percent of the foreign trade income derived by the taxpayer from the transaction.

<u>Issues Raised in this Appeal</u>

This appeal raises the following issues:

(a) whether the Panel erred in finding, in paragraphs 8.30 and 8.43 of the Panel Report, that the ETI measure – which is described in paragraphs 12-25 of this Report – *involves the foregoing of revenue which is "otherwise due" and thus gives rise to a "financial contribution" within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement;*

(b) whether the Panel erred in finding, in paragraphs 8.75 and 9.1(a) of the Panel Report, that the ETI measure includes *subsidies "contingent … upon export performance" within the meaning of Article 3.1(a) of the SCM Agreement;*

(c) whether the Panel erred in finding, in paragraphs 8.107 and 9.1(a) of the Panel Report that the ETI measure, viewed as a whole, does not fall within the scope *of footnote 59 of the SCM Agreement as a measure taken to avoid the double taxation of foreign-source income*;

(d) whether the Panel erred in finding, in paragraphs 8.122 and 9.1(c) of the Panel Report, that the ETI measure involves export subsidies inconsistent with the United States' obligations under Articles 3.3, 8 and 10.1 of the *Agreement on Agriculture*;

(e) *whether the Panel erred in finding, in paragraphs 8.158 and 9.1(d) of the Panel Report, that the ETI measure is inconsistent with the United States' obligations under Article III:4 of the GATT 1994 because it accords less favourable treatment to imported products as compared with like products of United States origin;*

(f) whether the Panel erred in finding, in paragraphs 8.170 and 9.1(e) of the Panel Report, that the United *States has not fully withdrawn the subsidies* found, in *US – FSC,* to be prohibited export subsidies under Article 3.1(a) of the *SCM Agreement*, and in finding that the United States has, therefore, failed to implement the recommendations and rulings of the DSB made pursuant to Article 4.7 of the *SCM Agreement*; and

whether the Panel erred in its interpretation of Article 10.3 of the DSU in declining, in its decision of 21 February 2001, reproduced in paragraph 6.3 of the Panel Report, to rule that all the written submissions of the parties filed prior to the only meeting of the Panel must be provided to the third parties

Findings and Conclusions

For the reasons set out in this Report, the Appellate Body:

(a) *upholds* the Panel's finding, in paragraphs 8.30 and 8.43 of the Panel Report, that the ETI measure involves the foregoing of revenue which is "*otherwise due" and thus gives rise to a "financial contribution" within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement;*

(b) *upholds* the Panel's finding, in paragraphs 8.75 and 9.1(a) of the Panel Report, that the ETI measure includes subsidies "contingent … upon export performance" within the meaning of Article 3.1(a) of the *SCM* upholds the Panel's finding, in paragraphs 8.107 and 9.1(a) of the Panel Report, that the ETI measure, viewed as a whole*, does not fall within the scope of footnote 59 of the SCM Agreement as a measure taken to avoid the double taxation of foreign-source income*;

(d) *upholds* the Panel's finding, in paragraphs 8.122 and 9.1(c) of the Panel Report, that the ETI measure involves *export subsidies inconsistent* with the United States' obligations under Articles 3.3, 8 and 10.1 of the *Agreement on Agriculture*;

(e) *upholds* the Panel's finding, in paragraphs 8.158 and 9.1(d) of the Panel Report, that the ETI *measure is inconsistent with the United States' obligations under Article III:4 of the GATT 1994 because it accords less favourable treatment to imported products as compared with like products of United States origin*;

(f) *upholds* the Panel's finding, in paragraphs 8.170 and 9.1(e) of the Panel Report, that the United States *has not fully withdrawn the subsidies* found, in the *Agreement*;

finds that the Panel erred in its interpretation of Article 10.3 of the DSU in declining, in its decision of 21 February 2001, reproduced in paragraph 6.3 of the Panel Report, to rule that all the written submissions of the parties filed prior to the only meeting of the Panel must be provided to the third parties.

The Appellate Body *recommends* that the DSB request the United States to bring the ETI measure, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with its obligations under Article 3.1(a) of the *SCM Agreement*, under Articles 3.3, 8 and 10.1 of the *Agreement on Agriculture*, and under Article III:4 of the GATT 1994, into conformity with its obligations under those Agreements, and that the DSB request the United States to implement fully the recommendations and rulings of the DSB in *US – FSC*, made pursuant to Article 4.7 of the *SCM Agreement*.

UNITED STATES – DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF CERTAIN STEEL PRODUCTS

AB-2003-3

Report of the Appellate Body (10 November 2003)

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds248_e.htm

Introduction.

The United States appeals certain issues of law and legal interpretations developed in the Panel Reports, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* (the "Panel Reports").

The Panel was established by the DSB on 3 June 2002, pursuant to a request by the European Communities, to examine the consistency of ten safeguard measures applied by the United States on 20 March 2002 on imports of certain steel products. On 14 June 2002, pursuant to Article 9.1 of the DSU, the DSB referred to the Panel complaints on the same matter brought by Japan and Korea. On 24 June 2002, the DSB, pursuant to Article 9.1 of the DSU, also referred to this single Panel complaints on the same matter submitted by China, Norway, and Switzerland. On 8 July 2002, the DSB, pursuant to Article 9.1 of the DSU, also referred to this single Panel a complaint on the same matter submitted by New Zealand. On 29 July 2002, the DSB, pursuant to Article 9.1 of the DSU, also referred to this single Panel a complaint on the same matter submitted by Brazil.

In their requests for the establishment of a panel, the Complaining Parties claimed that the ten safeguard measures applied by the United States on imports of certain steel products were inconsistent with the obligations of the United States contained in Articles 2, 3, 4, 5, 7, 8, 9, and 12 of the *Agreement on Safeguards*, Articles I, II, X, XIII, and XIX of the GATT 1994, as well as Article XVI of the *WTO Agreement*.

The Panel issued eight Panel Reports—in the form of one document—that were circulated to the Members of the WTO on 11 July 2003. The Panel concluded, in all of the Panel Reports, that all ten safeguard measures imposed by the United States were inconsistent with the *Agreement on Safeguards* and the GATT 1994.

In particular, the Panel found that:

the application of safeguard measures by the United States on imports of CCFRS, hot-rolled bar, and stainless steel rod was inconsistent with Articles 2.1 and 3.1 of the *Agreement on Safeguards*, because "the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to 'increased imports'" ;

> the application of safeguard measures by the United States on imports of CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar was inconsistent with Articles 2.1, 3.1, and 4.2(b) of the *Agreement on Safeguards*, because "the United States failed to provide a reasoned and adequate explanation that a 'causal link' existed between any increased imports and serious injury to the relevant domestic producers";
>
> the application of safeguard measures by the United States on imports of tin mill products and stainless steel wire was inconsistent with Articles 2.1, 3.1, and 4.2(b) of the *Agreement on Safeguards*, because "the United States failed to provide a reasoned and adequate explanation of how the facts supported its determinations with respect to 'increased imports'" and the existence of a "causal link" between any increased imports and serious injury, "since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance"
>
> the application of safeguard measures by the United States on imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire was inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards*, because "the United States failed to comply with the requirement of 'parallelism' between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure".

In addition, the Panel concluded, in the Panel Reports concerning the complaints of China, the European Communities, New Zealand, Norway, and Switzerland, that:

> **the application of safeguard measures by the United States on imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire was inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards*, because "the United States failed to provide a reasoned and adequate explanation demonstrating that 'unforeseen developments' had resulted in increased imports causing serious injury to the relevant domestic producers".**

The Panel concluded that, to the extent that the United States had acted inconsistently with the provisions of the *Agreement on Safeguards* and the GATT 1994 set out above, it had nullified or impaired the benefits accruing to the Complaining Parties under the *Agreement on Safeguards* and the GATT 1994. The Panel recommended that the DSB request the United States to bring all the safeguard measures into conformity with its obligations under the *Agreement on Safeguards* and the GATT 1994.

Factual Background.

On 28 June 2001, the USITC initiated a safeguard investigation at the request of the USTR, in order to determine whether certain steel products were being imported into the United States in such increased quantities as to cause or threaten to cause serious injury to the domestic industry producing like or directly competitive products. Pursuant to this investigation, the USITC made affirmative determinations of serious injury to the domestic industry with respect to imports of: CCFRS; hot-rolled bar; cold-finished bar; rebar; FFTJ; stainless steel bar; stainless steel rod; and a determination of threat of serious injury with respect to imports of welded pipe. The USITC made divided determinations with respect to tin mill products; stainless steel wire; stainless steel fittings and flanges; and tool steel. The USITC recommended that tariffs and tariff-rate quotas be imposed for the products for which it made affirmative determinations. Subsequently, following a request from the USTR, the USITC issued supplementary information on the economic analysis of remedy options, on unforeseen developments, and an injury determination for imports from all sources other than Canada and Mexico.

Based on the USITC determination, the President of the United States imposed definitive safeguard measures on imports of certain steel products pursuant to Proclamation 7529 of 5 March 2002. The Proclamation imposed tariffs ranging from 30 percent to 8 percent on imports of certain carbon flat-rolled steel, hot-rolled bar, cold-finished bar, rebar, welded pipe, fittings, flanges and tool joints, stainless steel bar, stainless steel rod, tin mill products, and stainless steel wire. The products subject to these safeguard measures were products for which the USITC had made affirmative determinations; with respect to tin mill products and stainless steel wire, for which the USITC had made divided determinations, the President decided to consider the determinations of the groups of commissioners voting in the affirmative with regard to each of these products to be the determination of the USITC. Imports from Canada, Israel, Jordan, and Mexico were excluded from the application of the measures. The measures were imposed for a period of three years and one day , and became effective on 20 March 2002.

Issues Raised In This Appeal.

Members of the WTO have agreed in the *Agreement on Safeguards* that Members may suspend their trade concessions temporarily by applying import restrictions as safeguard measures if certain prerequisites are met. These prerequisites are set forth in Article XIX of the GATT 1994, dealing with "Emergency Action on Imports of Particular Products", and in the *Agreement on Safeguards*, which, by its terms, clarifies and reinforces the disciplines of Article XIX. Together, Article XIX and the *Agreement on Safeguards* confirm the right of WTO Members to apply safeguard measures when, as a result of unforeseen developments and of the effect of obligations incurred, including tariff concessions, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. However, as Article 2.1 of the *Agreement on Safeguards* makes clear, the right to apply such measures arises "*only*" if these prerequisites are shown to exist. In this case, we will address the issues raised on appeal with respect to the ten safeguard measures applied by the United States to imports of certain steel products, in the following order:

> whether the Panel erred in finding that the United States acted inconsistently with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation demonstrating that unforeseen developments resulted in increased imports

causing serious injury to the domestic producers of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire;

whether the Panel erred in finding that the United States acted inconsistently with Articles 2.1 and 3.1 of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation of how the facts supported its determinations that imports of CCFRS, tin mill products, hot-rolled bar, stainless steel rod and stainless steel wire increased;

whether the Panel erred in finding that the United States acted inconsistently with Articles 2.1 and 4.2 of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation establishing explicitly that imports from sources not excluded from the scope of the measure satisfy, *alone*, the conditions required for the application of safeguard measures on imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, stainless steel rod, and stainless steel wire;

whether the Panel erred in finding that the United States acted inconsistently with Articles 2.1, 3.1, and 4.2(b) of the *Agreement on Safeguards* by failing to provide a reasoned and adequate explanation demonstrating the existence of a causal link between increased imports of CCFRS, tin mill products, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, stainless steel bar, and stainless steel wire, and serious injury or threat of serious injury to the relevant domestic industry;

whether the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the GATT 1994 and the *Agreement on Safeguards*; and

whether the Panel acted inconsistently with Article 12.7 of the DSU by failing to provide the "basic rationale" behind certain of its findings and conclusions.

Findings and Conclusions.

For the reasons set out in this Report, the Appellate Body:

upholds the Panel's conclusions, in the relevant sections of paragraph 11.2 of the Panel Reports concerning the complaints of China, the European Communities, New Zealand, Norway, and Switzerland , that the application of all safeguard measures at issue in this dispute is inconsistent with the requirements of Article XIX:1(a) of the GATT 1994 and Article 3.1 of the *Agreement on Safeguards* because "the United States failed to provide a reasoned and adequate explanation demonstrating that 'unforeseen developments' had resulted in increased imports causing serious injury to the relevant domestic producers";

upholds the Panel's conclusions, in the relevant sections of paragraph 11.2 of the Panel Reports, that the application of the safeguard measures on imports of CCFRS, stainless steel rod and hot-rolled bar is inconsistent with the requirements of Articles 2.1 and 3.1 of the *Agreement on Safeguards* because "the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to 'increased imports'";
reverses the Panel's conclusions, in the relevant sections of paragraph 11.2 of the Panel Reports, that the application of the safeguard measures on imports of tin mill products and stainless steel wire is inconsistent with Articles 2.1 and 3.1 of the *Agreement on Safeguards* because "the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination with respect to 'increased imports', since the explanation given consisted of alternative explanations partly departing from each other,

which given the different product bases, cannot be reconciled as a matter of substance"; and finds it unnecessary to complete the analysis to decide whether the determination with respect to "increased imports" for tin mill products and stainless steel wire is consistent with Articles 2.1 and 3.1 of the *Agreement on Safeguards*;

reverses the Panel's conclusions, in the relevant sections of paragraph 11.2 of the Panel Reports, that the application of the safeguard measures on imports of tin mill products and stainless steel wire is inconsistent with Articles 2.1, 4.2(b), and 3.1 of the *Agreement on Safeguards* because "the United States failed to provide a reasoned and adequate explanation of how the facts supported its determination of a 'causal link' between any increased imports and serious injury, since the explanation given consisted of alternative explanations partly departing from each other, which given the different product bases, cannot be reconciled as a matter of substance"; and finds it unnecessary to complete the analysis to decide whether the determination with respect to a "causal link" for tin mill products and stainless steel wire is consistent with Articles 2.1, 4.2(b), and 3.1 of the *Agreement on Safeguards*;

upholds the Panel's conclusions, in the relevant sections of paragraph 11.2 of the Panel Reports, that the application of all safeguard measures at issue in this dispute is inconsistent with Articles 2.1 and 4.2 of the *Agreement on Safeguards* because "the United States failed to comply with the requirement of 'parallelism' between the products for which the conditions for safeguard measures had been established, and the products which were subjected to the safeguard measure";

finds that the United States did not substantiate the claim raised under Article 11 of the DSU;

finds that the Panel satisfied its duty, under Article 12.7 of the DSU, to set out a "basic rationale behind [its] findings" with respect to Article XIX:1(a) of the GATT 1994; and

declines to rule on the conditional appeals of the Complaining Parties relating to Articles 2.1, 4.1(c), 5.1, and 9.1 of the *Agreement on Safeguards*.

The Appellate Body *recommends* that the DSB request the United States to bring its safeguard measures, which have been found in this Report, into conformity with its obligations under those Agreements.

CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000.

AB-2002-716
(January 2003)
Report of the Appellate
http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm

Introduction.

The United States appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Continued Dumping and Subsidy Offset Act 2000* (the "Panel Report"). On 12 July 2001, Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand requested the establishment of a panel to examine the WTO-consistency of the United States Continued Dumping and Subsidy Offset Act of 2000 (the "CDSOA"). At its meeting of 23 August 2001, the Dispute Settlement Body (the "DSB") established the Panel.

The United States appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Continued Dumping and Subsidy Offset Act 2000* (the "Panel Report").

In the Panel Report, circulated to the Members of the World Trade Organization (the "WTO") on 16 September 2002, the Panel found that the CDSOA is inconsistent with Articles 5.4, 18.1 and 18.4 of the *Anti-Dumping Agreement*; Articles 11.4, 32.1 and 32.5 of the *SCM Agreement*; Articles VI:2 and VI:3 of the GATT 1994; and Article XVI:4 of the *WTO Agreement*.

The Panel concluded that the CDSOA nullifies or impairs benefits accruing to the Complaining Parties under the *Anti-Dumping Agreement*, the *SCM Agreement* and the GATT 1994 to the extent that the CDSOA is inconsistent with those agreements. Consequently, the Panel recommended that the DSB request the United States to bring the CDSOA into conformity with its obligations under the *Anti-Dumping Agreement*, the *SCM Agreement* and the GATT 1994.

Factual Background.

The CDSOA was enacted on 28 October 2000 as part of the Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act, 2001. The CDSOA amended Title VII of the Tariff Act of 1930 (the "Tariff Act"), entitled "Countervailing and Antidumping Duties", by adding a new Section 754 entitled "Continued Dumping and Subsidy Offset".

The CDSOA provides that the United States Commissioner of Customs ("Customs") shall distribute, on an annual basis, duties assessed pursuant to a countervailing duty order, an anti-dumping duty order, or a finding under the United States Antidumping Act of 1921, to "affected domestic producers" for "qualifying expenditures". An "affected domestic producer" is defined as a domestic producer that: (a) was a petitioner or interested party in support of the petition with respect to which an anti-dumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered; and (b) remains in operation. The term "qualifying expenditures" refers to expenditures on specific items identified in the CDSOA, which were incurred after the issuance of the anti-dumping duty finding, or order or countervailing duty order. Those expenditures must relate to the production of the same product that is subject to the anti-dumping or countervailing duty order, with the exception of expenses incurred by associations which must relate to the same case.

The CDSOA, together with its implementing regulations issued by Customs, provides that Customs shall establish a special account and a clearing account with respect to each countervailing duty order, anti-dumping duty order, or a finding under the Antidumping Act of 1921. All anti-dumping and countervailing duties assessed under such orders or findings are first deposited into a "clearing account". Transfers from "clearing accounts" to "special accounts" are made by Customs throughout the fiscal year. Such transfers are made only after the entries in question that are subject to a countervailing duty order or an anti-dumping order or finding have been properly "liquidated". Thus, when, and only when, the entries have been liquidated, will the proceeds be transferred to a special account. Only once there are funds in a special account (not a clearing account), can distributions to domestic producers under the CDSOA be made. Therefore, if liquidation of entries has been enjoined, for instance, by a court—perhaps pending judicial review of the determination of dumping or countervailable subsidization—or if liquidation of entries has been suspended due to an administrative review of those entries, the relevant special account will be empty and no distribution can be made to domestic producers under the CDSOA.

Pursuant to the CDSOA, Customs shall distribute all funds (including all interest earned on the funds) from the assessed duties received in the preceding fiscal year (and contained in the special accounts) to each affected domestic producer based on a certification by the affected domestic producer that it is eligible to receive the distribution and desires to receive a distribution for qualifying expenditures incurred since the issuance of the order or finding. Funds deposited in each special account during each fiscal year are to be distributed no later than 60 days after the beginning of the following fiscal year. There is no statutory or regulatory requirement as to how a disbursement is to be spent. The Panel found that CDSOA distributions to "affected domestic producers" made as of December 2001 totalled over $206 million.

<u>Issues Raised in This Appeal.</u>

The following issues are raised in this appeal:

> whether the Panel erred in finding, in paragraphs 7.51 and 8.1 of the Panel Report, that the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA") is a non-permissible specific action against dumping or a subsidy, contrary to Article 18.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") and Article 32.1 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*");

whether the Panel erred in finding, in paragraphs 7.66 and 8.1 of the Panel Report, that the CDSOA is inconsistent with Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*;

whether the Panel erred in finding, in paragraphs 7.93 and 8.1 of the Panel Report, that the CDSOA is inconsistent with certain provisions of the *Anti-Dumping Agreement* and the *SCM Agreement* and that, therefore, the United States has failed to comply with Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article XVI.4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*");

whether the Panel erred in finding, in paragraph 8.4 of the Panel Report, that, pursuant to Article 3.8 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), the CDSOA nullifies or impairs benefits accruing to the Complaining Parties under those Agreements; and

whether the Panel acted inconsistently with Article 9.2 of the DSU by rejecting, in paragraph 7.6 of the Panel Report, the request by the United States for a separate panel report on the dispute brought by Mexico.

Findings and Conclusions.

For the reasons set out in this Report, the Appellate Body:

upholds the finding of the Panel, in paragraphs 7.51 and 8.1 of the Panel Report, that the CDSOA is a non-permissible specific action against dumping or a subsidy, contrary to Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*;

consequently upholds the Panel's finding, in paragraphs 7.93 and 8.1 of the Panel Report, that the CDSOA is inconsistent with certain provisions of the *Anti-Dumping Agreement* and the *SCM Agreement* and that, therefore, the United States has failed to comply with Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article XVI:4 of the *WTO Agreement*;

upholds the Panel's finding, in paragraph 8.4 of the Panel Report, that, pursuant to Article 3.8 of the DSU, to the extent that the CDSOA is inconsistent with provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*, the CDSOA nullifies or impairs benefits accruing to the Complaining Parties under those Agreements;

reverses the Panel's findings, in paragraphs 7.66 and 8.1 of the Panel Report, that the CDSOA is inconsistent with Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*;

rejects the Panel's conclusion, in paragraph 7.63 of the Panel Report, that the United States may be regarded as not having acted in good faith with respect to its obligations under Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*; and

rejects the claim of the United States that the Panel acted inconsistently with Article 9.2 of the DSU by not issuing a separate panel report in the dispute brought by Mexico.

The Appellate Body *recommends* that the DSB request the United States bring the CDSOA into conformity with its obligations under the *Anti-Dumping Agreement*, the *SCM Agreement*, and the GATT 1994.

MEXICO – MEASURES AFFECTING TELECOM SERVICES.

Report of the Panel (2 April 2004)

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds204_e.htm

This report of the Panel on Mexico – Measures affecting Telecommunications Services is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 2 April 2004 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/452).

Introduction.

On 17 August 2000, the United States requested consultations with Mexico pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") and Article XXIII of the General Agreement on Trade in Services (the "GATS"). This request concerned Mexico's GATS commitments and obligations on basic and value-added telecommunications services.

Factual Aspects.

This dispute concerns provisions in Mexico's domestic laws and regulations on telecommunications which govern the supply of telecommunication services.

Mexico's Telecommunication Market.

Prior to 1997, long-distance and international telecommunications services in Mexico were supplied on a monopoly basis by Teléfonos de México, S.A. de C.V. ("Telmex"). Since that date, Mexico has authorized multiple Mexican carriers to provide international services over their networks. Under Mexican laws, the largest carrier of outgoing calls to a particular international market, has the exclusive right to negotiate the terms and conditions for the termination of international calls in Mexico that apply to any carrier between Mexico and that international market. Telmex is presently the largest carrier of outgoing calls for all markets. Currently, there are 27 carriers ("concesionarios" or "concessionaires") allowed to provide long distance services, including two United States-affiliated carriers – Avantel (WorldCom) and Alestra (AT/T). Of these 27 long-distance concessionaries 11 are authorized to operate international gateways, allowing them to carry incoming and outgoing international calls. Telmex remains the largest supplier of basic telecommunications services in Mexico, including international outbound traffic.

Mexico's Telecommunications Legislation & Regulation.

The Federal Telecommunications Law (the "FTL") of Mexico provides the legal framework for the regulation of telecommunications activities in Mexico. Its purpose is "to govern the use, utilization and exploitation of the radio-electrical spectrum, of the telecommunications networks, and of satellite communication". More broadly, it is intended to "promote efficient development of telecommunicateions; exercise the authority of the State on these matters to ensure national sovereignty; to promote a healthy competition among the different telecommunications service providers in order to offer better services, diversity and quality for the benefit of the users and to promote an adequate social coverage".

The "interconnection" of public telecommunications networks with foreign networks is carried out through agreements entered into by the interested parties. Should these require agreement with a foreign government, the concessionaire must request the Secretariat to enter into the appropriate agreement.

Direct interconnection with foreign public telecommunications networks in order to carry international traffic may only be done by "international gateway operators." These are long-distance service licensees authorized by the Commission "to operate a switching exchange as an international gateway", that is, the exchange is "interconnected to international incoming and outgoing circuits authorised by the Commission to carry international traffic". Traffic is "switched" when it is "carried by means of a temporary connection between two or more circuits between two or more users, allowing the users the full and exclusive use of the connection until it is released."

Each international gateway operator must apply the same "uniform settlement rate" to every long-distance call to or from a given country, regardless of which operator originates or terminates the call. The uniform settlement rate for each country is established, through negotiations with the operators of that country, by the long-distance service licensee having the greatest percentage of outgoing long-distance market share for that country in the previous six months.

Each international gateway operator must also apply the principle of "proportionate return". Under this principle, *incoming* calls (or associated revenues) from a foreign country must be distributed among international gateway operators in proportion to each international gateway operator's market share in *outgoing* calls to that country.

Mexico has undertaken specific commitments for telecommunications services under Articles XVI (Market Access), XVII (National Treatment), and Article XVIII (Additional Commitments). Its additional commitments consist of undertakings known as the "reference paper". These commitments are reproduced in Annex B.

Parties' Requests for Findings and Recommendations.

The United States requests the Panel to find that:

Mexico's failure to ensure that Telmex provides interconnection to United States basic telecom suppliers on a cross-border basis on cost-oriented, reasonable rates, terms and conditions is inconsistent with its obligations under Sections 2.1 and 2.2 of the Reference Paper, as inscribed in Mexico's GATS Schedule of Commitments.

Arguments of the Parties.

The United States claims that Mexico's ILD Rules fail to ensure that Telmex provides interconnection to United States basic telecom suppliers on a cross-border basis with cost-oriented, reasonable rates, terms and conditions and that this is inconsistent with its obligations under Sections 2.1 and 2.2 of the Reference Paper, as inscribed in Mexico's GATS Schedule of Commitments. The United States argues that the interconnection obligations in Section 2 of the Reference Paper apply: (i) as legally binding GATS commitments; (ii) because of the specific commitments Mexico has undertaken in its GATS Schedule; and (iii) to the circumstances at issue in this case, namely the interconnection between United States service suppliers and Telmex for the purpose of delivering their basic telecom services from the United States into Mexico.

Findings.

The United States presents three main claims. First, that Mexico has failed to ensure that its major telecommunications supplier provides interconnection "on terms, conditions … and cost-oriented rates that are … reasonable", in accordance with Section 2 of its Reference Paper commitments. Second, that Mexico has not maintained appropriate measures to prevent Telmex, a major supplier, from engaging in "anti-competitive practices", in accordance with Section 1 of its Reference Paper commitments. Third, that Mexico has failed to ensure "access to and use of" its public telecommunications transport networks and services, including private leased circuits, on "reasonable and non-discriminatory terms and conditions", in accordance with its obligations under Section 5 of the GATS Annex on Telecommunications.

This case is the first panel proceeding in the WTO to deal solely with trade in services under the GATS. It is also the first WTO panel proceeding to deal with telecommunications services. The Panel is fully aware that the interpretation of the complex layers of GATS Articles, Annexes, Protocols and Schedules with GATS market access commitments, national treatment commitments and additional commitments poses many challenges to WTO Members and WTO dispute settlement bodies. This is especially so in the early years of GATS jurisprudence when the sometimes different approaches used by governments in the drafting of their respective GATS schedules may give rise to divergent understandings and expectations. Just as the interpretation and application of GATT provisions have dynamically evolved in response to the several hundred GATT dispute settlement proceedings since 1948, so the interpretation and clarification of GATS provisions is likely to evolve over time. The diverse backgrounds of the panelists, and the assistance granted by the Secretariat pursuant to Article 27.1 of the DSU, have ensured that this Panel was fully aware of the legal and technical complexity of the regulation of telecommunications services, including their rapid technological evolution and the drafting history of GATS provisions to which both parties to this dispute referred extensively.

Telecommunications in the WTO.

This case concerns obligations undertaken by Mexico as part of the GATS. The GATS, which is an integral part of the WTO Agreement, consists of a number of articles in its main body and several annexes, including an Annex on Telecommunications (the "Annex"). Both the main body of the GATS and the Annex are applicable to every WTO Member. In addition, each WTO Member has attached its own schedule to the GATS, in which the Member makes individual specific commitments on market access, national treatment, and any additional commitments the Member may wish to make. These specific commitments are inscribed by service sector and mode of supply of the service, and may be subject to limitations on market access and national treatment.

Special GATS negotiations intended to deepen and widen commitments in basic telecommunications were concluded in 1997. Members participating in these negotiations made commitments, or further commitments, in their schedules on market access or national treatment. Many, including Mexico, also made additional commitments in the form of a "Reference Paper", which contained a set of pro-competitive regulatory principles applicable to the telecommunications sector.

Conclusions and Recommendation.

In the light of our findings, we conclude that:

Mexico has not met its GATS commitments under Section 2.2(b) of its Reference Paper since it fails to ensure that a major supplier provides interconnection at cost-oriented rates to United States suppliers for the cross-border supply, on a facilities basis in Mexico, of the basic telecommunications services at issue ;

Mexico has not met its GATS commitments under Section 1.1 of its Reference Paper to maintain "appropriate measures" to prevent anti-competitive practices, since it maintains measures that require anti-competitive practices among competing suppliers which, alone or together, are a major supplier of the services at issue;

Mexico has not met its obligations under Section 5(a) of the GATS Annex on Telecommunications since it fails to ensure access to and use of public telecommunications transport networks and services on *reasonable terms* to United States service suppliers for the cross-border supply, on a facilities basis in Mexico, of the basic telecommunications services at issue;

Mexico has not met its obligations under Section 5(b) of the GATS Annex on Telecommunications, since it fails to ensure that United States commercial agencies, whose commercial presence Mexico has committed to allow, have access to and use of private leased circuits within or across the border of Mexico, and are permitted to interconnect these circuits to public telecommunications transport networks and services or with circuits of other service suppliers.

The Panel has found that, contrary to claims of the United States:

Mexico has not violated Section 2.2(b) of its Reference Paper, with respect to cross-border supply, on a *non-facilities* basis in Mexico, of the basic telecommunications services at issue;

Mexico has not violated Section 5(a) of the GATS Annex on Telecommunications, with respect to the cross-border supply, on a *non-facilities* basis in Mexico, of the basic telecommunications services at issue;

Mexico has not violated Section 5(b) of the GATS Annex on Telecommunications, with respect to the cross-border supply, on a *non-facilities* basis into Mexico, of the basic telecommunications services at issue.

The Panel notes that, pursuant to Article 12.11 of the DSU, it has taken into account in its findings GATS provisions on differential and more-favourable treatment for developing country Members. In particular, the Panel has examined Mexico's arguments that commitments of such Members have to be interpreted in the light of Article IV of the GATS, paragraph 5 of the preamble to the GATS, and paragraph 5(g) of the Annex on Telecommunications The Panel emphasizes that its findings in no way prevent Mexico from actively pursuing the development objectives referred to in these provisions by extending telecommunications networks and services at affordable prices in a manner consistent with its GATS commitments.

The Panel notes that Article 19 of the DSU provides that "[w]here a panel … concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." Unlike some other covered agreements (e.g. GATT Article XXIII:1 in connection with Article 3.8 of the DSU), the GATS does not require that, in the case of a violation complaint (GATS Article XXIII:1), "nullification or impairment" of treaty benefits has to be claimed by the complaining WTO Member and examined by a Panel. Whereas Article XXIII:1 of the GATT specifically conditions access to WTO dispute settlement procedures on an allegation that a "benefit" or the "attainment of an objective" under that agreement are being "nullified or impaired", the corresponding provision in the GATS (Article XXIII:1) permits access to dispute settlement procedures if a Member "fails to carry out its obligations or specific commitments" under the GATS. In this respect, we note that the Appellate Body in *EC – Bananas III* stated that the panel in that case "erred in extending the scope of the presumption in Article 3.8 of the DSU to claims made under the GATS". Having found that Mexico has violated certain provisions of the GATS, we are therefore bound by Article 19 of the DSU to proceed directly to the recommendation set out in that provision.

We therefore recommend that the Dispute Settlement Body request Mexico to bring its measures into conformity with its obligations under the GATS.

United States – Measures affecting the cross-border supply of gambling & betting services.

AB-2005-1

WT/DS285/AB/R (7 April 2005)

Report of the Appellate Body

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm

Introduction.

The United States, and Antigua and Barbuda ("Antigua"), each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (the "Panel Report"). The Panel was established to consider a complaint by Antigua concerning certain measures of state and federal authorities that allegedly make it unlawful for suppliers located outside the United States to supply gambling and betting services to consumers within the United States.

Before the Panel, Antigua claimed that certain restrictions imposed by the United States through federal and state laws resulted in a "total prohibition" on the cross-border supply of gambling and betting services from Antigua. Antigua contended that such a "total prohibition" was contrary to obligations of the United States under the *General Agreement on Trade in Services* (the "GATS"). In particular, Antigua asserted that the GATS Schedule of the United States includes specific commitments on gambling and betting services. Antigua argued that, because the United States made full market access and national treatment commitments (that is, inscribed "None" in the relevant columns of its GATS Schedule), the United States, in maintaining the measures at issue, is acting inconsistently with its obligations under its GATS Schedule, as well as under Articles VI, XI, XVI, and XVII of the GATS.

In its oral and written submissions to the Panel, the United States maintained its objections to the Panel's consideration of Antigua's claims on the basis of an alleged "total prohibition", reiterating its argument that Antigua had failed to establish a *prima facie* case. In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 10 November 2004, the Panel addressed this argument by "identify[ing] the measures that the Panel [would] consider in determining whether the specific provisions of the GATS that Antigua [had] invoked have been violated." The Panel determined, first, that Antigua was not entitled to rely on the alleged "total prohibition" as a "measure" in and of itself.[y] The Panel then determined that the following laws of the United States

had been "sufficiently identified [by Antigua] so as to warrant a substantive examination by the Panel":

Federal laws:

> **Section 1084 of Title 18 of the United States Code (the "Wire Act");**
> **Section 1952 of Title 18 of the United States Code (the "Travel Act"); and**
> **Section 1955 of Title 18 of the United States Code (the "Illegal Gambling Business Act", or "IGBA").**

State laws:

> **Colorado: Section 18-10-103 of the Colorado Revised Statutes;**
> **Louisiana: Section 14:90.3 of the Louisiana Revised Statutes (Annotated);**
> **Massachusetts: Section 17A of chapter 271 of the Annotated Laws of Massachusetts;**
> **Minnesota: Section 609.755(1) and Subdivisions 2-3 of Section 609.75 of the Minnesota Statutes (Annotated);**
> **New Jersey: Paragraph 2 of Section VII of Article 4 of the New Jersey Constitution, and Section 2A:40-1 of the New Jersey Code;**
> **New York: Section 9 of Article I of the New York Constitution and Section 5-401 of the New York General Obligations Law;**
> **South Dakota: Sections 22-25A-1 through 22-25A-15 of the South Dakota Codified Laws; and**
> **Utah: Section 76-10-1102 of the Utah Code (Annotated).**

After evaluating Antigua's claims with respect to these federal and state measures, the Panel concluded that:

> **(a) the United States' Schedule under the GATS includes specific commitments on gambling and betting services under sub-sector 10.D;**
> **(b) by maintaining the following measures, ... the United States fails to accord services and service suppliers of Antigua treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule, contrary to Article XVI:1 and Article XVI:2 of the GATS:**
>
> **Federal laws**
>
> **(1) the Wire Act;**
> **(2) the Travel Act (when read together with the relevant state laws);[1072] and**
> **(3) the Illegal Gambling Business Act (when read together with the relevant state laws).**
>
> **State laws:**
>
> **(1) Louisiana: § 14:90.3 of the La. Rev. Stat. Ann.;**
> **(2) Massachusetts: § 17A of chapter 271 of Mass. Ann. Laws;**
> **(3) South Dakota: § 22-25A-8 of the S.D. Codified Laws; and**
> **(4) Utah: § 76-10-1102(b) of the Utah Code.**

(c) Antigua has failed to demonstrate that the measures at issue are inconsistent with Articles VI:1 and VI:3 of the GATS;

(d) The United States has not been able to demonstrate that the Wire Act, the Travel Act (when read together with the relevant state laws) and the Illegal Gambling Business Act (when read together with the relevant state laws):

are provisionally justified under Articles XIV(a) and XIV(c) of the GATS; and are consistent with the requirements of the chapeau of Article XIV of the GATS.

Issues Raised in This Appeal.

The following issues are raised in this appeal:

with respect to the measures at issue,

whether the Panel erred in finding that the "total prohibition on the cross-border supply of gambling and betting services" alleged by Antigua was neither capable of constituting an autonomous measure that can be challenged in and of itself, nor identified as a measure in Antigua's request for the establishment of a panel; whether the Panel erred in examining the consistency of the following measures with the United States' obligations under Article XVI of the GATS:

State laws:

1. **Colorado: Section 18-10-103 of the Colorado Revised Statutes;**
2. **Louisiana: Section 14:90.3 of the Louisiana Revised Statutes (Annotated);**
3. **Massachusetts: Section 17A of chapter 271 of the Annotated Laws of Massachusetts;**
4. **Minnesota: Section 609.755(1) and Subdivisions 2-3 of Section 609.75 of the Minnesota Statutes (Annotated);**
5. **New Jersey: Paragraph 2 of Section VII of Article 4 of the New Jersey Constitution, and Section 2A:40-1 of the New Jersey Code;**
6. **New York: Section 9 of Article I of the New York Constitution and Section 5-401 of the New York General Obligations Law;**
7. **South Dakota: Sections 22-25A-1 through 22-25A-15 of the South Dakota Codified Laws; and**
8. **Utah: Section 76-10-1102 of the Utah Code (Annotated);**

whether, by undertaking such an examination of the above measures, the Panel acted inconsistently with its obligations under Article 11 of the DSU;

with respect to the United States' GATS Schedule,

whether the Panel erred in finding that subsector 10.D of the United States' GATS Schedule includes specific commitments with respect to gambling and betting services;

with respect to Article XVI of the GATS,

whether the Panel erred in its interpretation of sub-paragraphs (a) and (c) of Article XVI:2 of the GATS and, in particular:

> **in finding that a prohibition on the remote supply of gambling and betting services constitutes a "zero quota" on the supply of such services by particular means, and that such a "zero quota" is a limitation that falls within sub-paragraphs (a) and (c) of Article XVI:2;**

in finding that measures imposing criminal liability on *consumers* of cross-border gambling and betting services are not inconsistent with sub-paragraphs (a) and (c) of Article XVI:2 and, in finding for that reason, that the relevant laws of the states of Colorado, Minnesota, New Jersey, and New **York are not inconsistent with those provisions;**

if the Appellate Body reverses the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI:2, then whether the Panel erred in finding that the restrictions on market access that are prohibited by Article XVI are limited to those listed in Article XVI:2; and

whether the Panel erred in applying its interpretation of Article XVI to relevant United States federal and state laws so as to find them inconsistent with the United States' obligations under Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2;

with respect to Article XIV of the GATS,

whether, in considering the United States' defence under Article XIV, and in its analysis under that provision, the Panel failed to satisfy its obligations under Article 11 of the DSU;

whether the Panel improperly allocated the burden of proof under Article XIV;

whether the Panel erred in finding that the United States did not demonstrate that the Wire Act, the Travel Act, and the IGBA are necessary to protect public morals or to maintain public order within the meaning of Article XIV(a);

whether the Panel erred in finding that the United States did not demonstrate that the Wire Act, the Travel Act, and the IGBA are necessary to secure compliance with laws or regulations which are not inconsistent with the GATS, within the meaning of Article XIV(c); and

whether the Panel erred in finding that the United States did not demonstrate that the Wire Act, the Travel Act, and the IGBA satisfy the requirements of the chapeau of Article XIV.

Conclusion under the Chapeau.

In paragraph 6.607 of the Panel Report, the Panel expressed its overall conclusion under the chapeau of Article XIV as follows:

the United States has not demonstrated that it does not apply its prohibition on the remote supply of wagering services for horse racing in a manner that does not constitute "arbitrary and unjustifiable discrimination between countries where like conditions prevail" and/or a "disguised restriction on trade" in accordance with the requirements of the chapeau of Article XIV.

This conclusion rested on the Panel's findings relating to two instances allegedly revealing that the measures at issue discriminate between domestic and foreign service suppliers, contrary to the defence asserted by the United States under the chapeau. The first instance found by the Panel was based on "inconclusive" evidence of the alleged non-enforcement of the three federal statutes. We

have reversed this finding. The second instance found by the Panel was based on "the ambiguity relating to" the scope of application of the IHA and its relationship to the measures at issue.[y] We have upheld this finding.

Thus, *our* conclusion—that the Panel did not err in finding that the United States has not shown that its measures satisfy the requirements of the chapeau—relates solely to the possibility that the IHA exempts only *domestic* suppliers of remote betting services for horse racing from the prohibitions in the Wire Act, the Travel Act, and the IGBA. In contrast, the *Panel's* overall conclusion under the chapeau was broader in scope. As a result of our reversal of one of the two findings on which the Panel relied for its conclusion in paragraph 6.607 of the Panel Report, we must *modify* that conclusion. We *find*, rather, that the United States has not demonstrated that—in the light of the existence of the IHA—the Wire Act, the Travel Act, and the IGBA are applied consistently with the requirements of the chapeau. Put another way, we uphold the Panel, but only in part.

<u>Overall Conclusion on Article XIV.</u>

Our findings under Article XIV lead us to modify the overall conclusions of the Panel in paragraph 7.2(d) of the Panel Report The Panel found that the United States failed to justify its measures as "necessary" under paragraph (a) of Article XIV, and that it also failed to establish that those measures satisfy the requirements of the chapeau.

We have found instead that those measures satisfy the "necessity" requirement. We have also upheld, but only in part, the Panel's finding under the chapeau. We explained that the only inconsistency that the Panel could have found with the requirements of the chapeau stems from the fact that the United States did not demonstrate that the prohibition embodied in the measures at issue applies to both foreign *and* domestic suppliers of remote gambling services, notwithstanding the IHA—which, according to the Panel, "does appear, on its face, to permit" *domestic* service suppliers to supply remote betting services for horse racing. In other words, the United States did not establish that the IHA does not alter the scope of application of the challenged measures, particularly vis-à-vis domestic suppliers of a specific type of remote gambling services. In this respect, we wish to clarify that the Panel did not, and we do not, make a finding as to whether the IHA does, in fact, permit domestic suppliers to provide certain remote betting services that would otherwise be prohibited by the Wire Act, the Travel Act, and/or the IGBA.

Therefore, we *modify* the Panel's conclusion in paragraph 7.2(d) of the Panel Report. We *find*, instead, that the United States has demonstrated that the Wire Act, the Travel Act, and the IGBA fall within the scope of paragraph (a) of Article XIV, but that it has not shown, in the light of the IHA, that the prohibitions embodied in these measures are applied to both foreign and domestic service suppliers of remote betting services for horse racing. For this reason alone, we *find* that the United States has not established that these measures satisfy the requirements of the chapeau. Here, too, we uphold the Panel, but only in part.

Findings and Conclusions.

For the reasons set out in this Report, the Appellate Body:

with respect to the measures at issue,

***upholds* the Panel's finding, in paragraph 6.175 of the Panel Report, that "the alleged 'total prohibition' on the cross-border supply of gambling and betting services ... cannot constitute a single and autonomous 'measure' that can be challenged in and of itself";**

***finds* that the Panel *did not err* in examining whether the following three federal laws are consistent with the United States' obligations under Article XVI of the GATS:**
***finds* that the Panel *erred* in examining whether eight state laws, namely, those of Colorado, Louisiana, Massachusetts, Minnesota, New Jersey, New York, South Dakota and Utah, are consistent with the United States' obligations under Article XVI of the GATS;**

with respect to the United States' GATS Schedule,

***upholds*, albeit for different reasons, the Panel's finding that subsector 10.D of the United States' Schedule to the GATS includes specific commitments on gambling and betting services;**

with respect to Article XVI of the GATS,

***upholds* the Panel's findings that a prohibition on the remote supply of gambling and betting services is a "limitation on the number of service suppliers" within the meaning of Article XVI:2(a), and that such a prohibition is also a "limitation on the total number of service operations or on the total quantity of service output" within the meaning of Article XVI:2(c);**

***upholds* the Panel's finding, in paragraph 7.2(b)(i) of the Panel Report, that, by maintaining the Wire Act, the Travel Act, and the Illegal Gambling Business Act, the United States acts inconsistently with its obligations under Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2;**

***reverses* the Panel's finding, in paragraph 7.2(b)(ii) of the Panel Report, that four state laws, namely, those of Louisiana, Massachusetts, South Dakota and Utah, are inconsistent with the United States' obligations under Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2; and**

***need not rule* on the Panel's findings that restrictions on service *consumers* as opposed to service *suppliers* are neither limitations on "service suppliers" for the purposes of Article XVI:2(a), nor limitations on "service operations" or "service output" for the purposes of Article XVI:2(c);**

with respect to Article XIV of the GATS,

***finds* that the Panel *did not fail* to satisfy its obligations under Article 11 of the DSU by deciding to examine the United States' defence under Article XIV; as regards the burden of proof**
as regards paragraph (a) of Article XIV,

> ***upholds* the Panel's finding, in paragraph 6.487 of the Panel Report, that "the concerns which the Wire Act, the Travel Act and the Illegal Gambling Business Act seek to address fall within the scope of 'public morals' and/or 'public order'";**

reverses **the Panel's finding that, because the United States did not enter into consultations with Antigua, the United States was not able to justify the Wire Act, the Travel Act and the Illegal Gambling Business Act as "necessary" to protect public morals or to maintain public order;**
finds **that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are "measures ... necessary to protect public morals or to maintain public order"; and**
finds **that the Panel *did not fail* to "make an objective assessment of the facts of the case", as required by Article 11 of the DSU;**

as regards paragraph (c) of Article XIV,

reverses **the Panel's finding that, because the United States did not enter into consultations with Antigua, the United States was not able to justify the Wire Act, the Travel Act and the Illegal Gambling Business Act as "necessary" to secure compliance with the Racketeer Influenced and Corrupt Organizations statute; and**
need not determine **whether the Wire Act, the Travel Act, and the Illegal Gambling Business Act are measures justified under paragraph (c) of Article XIV;**

as regards the chapeau of Article XIV,

reverses **the Panel's finding, in paragraph 6.589 of the Panel Report, that "the United States has failed to demonstrate that the manner in which it enforced its prohibition on the remote supply of gambling and betting services against TVG, Capital OTB and Xpressbet.com is consistent with the requirements of the chapeau";**
finds **that the Panel *did not fail* to "make an objective assessment of the facts of the case", as required by Article 11 of the DSU; and**

modifies **the Panel's conclusion in paragraph 6.607 of the Panel Report and *finds*, rather, that the United States has not demonstrated 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 chapeau;**

The Appellate Body *recommends* that the Dispute Settlement Body request the United States to bring its measures, found in this Report and in the Panel Report as modified by this Report to be inconsistent with the *General Agreement on Trade in Services*, into conformity with its obligations under that Agreement.

UNITED STATES – SUBSIDIES ON UPLAND COTTON.

AB-2004-5

WT/DS267/AB/R (3 March 2005)

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm

Findings and Conclusions.

For the reasons set out in this Report, the Appellate Body: as regards procedural matters:

… in relation to production flexibility contract payments and market loss assistance payments:

> **upholds the Panel's finding, in paragraphs 7.118, 7.122, 7.128, and 7.194(ii) of the Panel Report, that Articles 4.2 and 6.2 of the DSU do not exclude expired measures from the potential scope of consultations or a request for establishment of a panel and, therefore, that production flexibility contract payments and market loss assistance payments fell within the Panel's terms of reference; and**
>
> **finds that the Panel set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind this finding, as required by Article 12.7 of the DSU; and**

… in relation to export credit guarantee programs:

> **upholds the Panel's ruling, in paragraph 7.69 of the Panel Report, that "export credit guarantees to facilitate the export of United States upland cotton, and other eligible agricultural commodities ... are within its terms of reference"; and**
>
> **upholds the Panel's ruling, in paragraph 7.103 of the Panel Report, that "Brazil provided a statement of available evidence with respect to export credit guarantee measures relating to upland cotton and eligible United States agricultural products other than upland cotton, as required by Article 4.2 of the *SCM Agreement*";**

… as regards the application of Article 13 of the *Agreement on Agriculture* to this dispute:

… in relation to Article 13(a)(ii):

> **upholds the Panel's finding, in paragraphs 7.388, 7.413, 7.414, and 8.1(b) of the Panel Report, that production flexibility contract payments and direct payments are not green box measures**

that fully conform to paragraph 6(b) of Annex 2 of the *Agreement on Agriculture*; and, therefore, are not exempt from actions under Article XVI of GATT 1994 and Part III of the *SCM Agreement* by virtue of Article 13(a)(ii) of the *Agreement on Agriculture*; and

declines to rule on Brazil's conditional request that the Appellate Body find that the updating of base acres for direct payments under the FSRI Act of 2002 means that direct payments are not green box measures that fully conform to paragraph 6(a) of Annex 2 of the *Agreement on Agriculture*; and, therefore, are not exempt from actions under Article XVI of GATT 1994 and Part III of the *SCM Agreement* by virtue of Article 13(a)(ii) of the *Agreement on Agriculture*; and

… in relation to Article 13(b)(ii):

modifies the Panel's interpretation, set out in paragraph 7.494 of the Panel Report, of the phrase "support to a specific commodity" in Article 13(b)(ii) of the *Agreement on Agriculture*; but upholds the Panel's finding, in paragraphs 7.518 and 7.520 of the Panel Report, that Step 2 payments to domestic users, marketing loan program payments, production flexibility contract payments, market loss assistance payments, direct payments, counter-cyclical payments, crop insurance payments, and cottonseed payments (the "challenged domestic support measures") granted "support to a specific commodity", namely, upland cotton;

declines to rule on the United States' appeal that only the price gap methodology described in paragraph 10 of Annex 3 of the *Agreement on Agriculture* may be used to measure the value of marketing loan program payments and deficiency payments for the purposes of the comparison required by Article 13(b)(ii) of the *Agreement on Agriculture*; and

upholds the Panel's finding, in paragraphs 7.608 and 8.1(c) of the Panel Report, that the "challenged domestic support measures" granted, in the years 1999, 2000, 2001 and 2002, support to a specific commodity, namely, upland cotton, in excess of that decided during the 1992 marketing year; and, therefore, that these measures are not exempt from actions based on Articles 5 and 6 of the *SCM Agreement* and Article XVI:1 of the GATT 1994 by virtue of Article 13(b)(ii) of the *Agreement on Agriculture*;

… as regards serious prejudice:

… in relation to Article 6.3(c) of the *SCM Agreement*:

upholds the Panel's finding, in paragraphs 7.1416 and 8.1(g)(i) of the Panel Report, that the effect of the marketing loan program payments, Step 2 payments, market loss assistance payments, and counter-cyclical payments (the "price-contingent subsidies") is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*, by in turn upholding the Panel's findings:

(A) regarding the "market" and "price" in assessing whether "the effect of the subsidy is ... significant price suppression ... in the same market" within the meaning of Article 6.3(c) of the *SCM Agreement*:

- **in paragraphs 7.1238-7.1240 of the Panel Report, that the "same market" may be a "world market";**

- in paragraph 7.1247 of the Panel Report, that a "world market" for upland cotton exists; and
- in paragraph 7.1274 of the Panel Report, that "the A-Index can be taken to reflect a world price in the world market for upland cotton"; and

(B) regarding the "effect" of the price-contingent subsidies under Article 6.3(c) of the *SCM Agreement*:

- **in paragraphs 7.1312 and 7.1333 of the Panel Report, that "significant price suppression" occurred within the meaning of Article 6.3(c);**
- **in paragraphs 7.1355 and 7.1363 of the Panel Report, that "a causal link exists" between the price-contingent subsidies and the significant price suppression found by the Panel under Article 6.3(c) and that this link is not attenuated by other factors raised by the United States;**
- **in paragraphs 7.1173, 7.1186, and 7.1226 of the Panel Report, that it was not required to quantify precisely the benefit conferred on upland cotton by the price-contingent subsidies and, consequently, not identifying the precise amount of counter-cyclical payments and market loss assistance payments that benefited upland cotton; and**
- **in paragraph 7.1416 of the Panel Report, that the effect of the price-contingent subsidies for marketing years 1999 to 2002 "is significant price suppression ... in the period MY 1999-2002"; and**

finds that the Panel, as required by Article 12.7 of the DSU, set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind its finding, in paragraphs 7.1416 and 8.1(g)(i) of the Panel Report, that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*; and

… in relation to Article 6.3(d) of the *SCM Agreement*:

finds it unnecessary, for the purposes of resolving this dispute, to rule on the interpretation of the phrase "world market share" in Article 6.3(d) of the *SCM Agreement*, and neither upholds nor reverses the Panel's findings in this regard; and

declines to rule on Brazil's conditional request for the Appellate Body to find that the effect of the price-contingent subsidies is an increase in the United States' world market share in upland cotton within the meaning of Article 6.3(d) of the *SCM Agreement*;

… as regards user marketing (Step 2) payments:

upholds the Panel's findings, in paragraphs 7.1088, 7.1097-7.1098, and 8.1(f) of the Panel Report, that Step 2 payments to *domestic users* of United States upland cotton, under Section 1207(a) of the FSRI Act of 2002, are subsidies contingent on the use of domestic over imported goods that are inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*; and

upholds the Panel's findings, in paragraphs 7.748-7.749, 7.760-7.761, and 8.1(e) of the Panel Report, that Step 2 payments to *exporters* of United States upland cotton, pursuant to Section 1207(a) of the FSRI Act of 2002, are subsidies contingent upon export performance within the

meaning of Article 9.1(a) of the *Agreement on Agriculture* that are inconsistent with Articles 3.3 and 8 of that Agreement and Articles 3.1(a) and 3.2 of the *SCM Agreement*;

… as regards export credit guarantee programs:

upholds the Panel's finding, in paragraphs 7.901, 7.911, and 7.932 of the Panel Report, that Article 10.2 of the *Agreement on Agriculture* does not exempt export credit guarantees from the export subsidy disciplines in Article 10.1 of that Agreement;

finds that the Panel did not improperly apply the burden of proof in finding that the United States' export credit guarantee programs are prohibited export subsidies under Article 3.1(a) of the *SCM Agreement* and are consequently inconsistent with Article 3.2 of that Agreement;

declines to find that the Panel erred by failing to make the necessary findings of fact in assessing whether the export credit guarantee programs are provided at premium rates that are inadequate to cover long-term operating costs and losses within the meaning of item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*; and, consequently,

upholds the Panel's finding, in paragraph 7.869 of the Panel Report, that "the United States export credit guarantee programmes at issue—GSM 102, GSM 103 and SCGP—constitute a *per se* export subsidy within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement*", and upholds the Panel's findings, in paragraphs 7.947 and 7.948 of the Panel Report, that these export credit guarantee programs are export subsidies for purposes of Article 3.1(a) of the *SCM Agreement* and are inconsistent with Articles 3.1(a) and 3.2 of that Agreement; and

finds that the Panel did not err in exercising judicial economy in respect of Brazil's allegation that the United States' export credit guarantee programs are prohibited export subsidies, under Article 3.1(a) of the *SCM Agreement*, because they confer a "benefit" within the meaning of Article 1.1 of that Agreement;

… as regards circumvention of export subsidy commitments:

reverses the Panel's finding, in paragraph 7.881 of the Panel Report, that Brazil did not establish actual circumvention in respect of poultry meat and pig meat; finds, however, that there are insufficient uncontested facts in the record to complete the legal analysis to determine whether the United States' export credit guarantees to poultry meat and pig meat have been applied in a manner that "results in" circumvention of the United States' export subsidy commitments, within the meaning of Article 10.1 of the *Agreement on Agriculture*;

modifies the Panel's interpretation, in paragraphs 7.882-7.883 and 7.896 of the Panel Report, of the phrase "threatens to lead to .... circumvention" in Article 10.1 of the *Agreement on Agriculture* to the extent that the Panel's interpretation requires "an unconditional legal entitlement" to receive the relevant export subsidies as a condition for a finding of threat of circumvention, but upholds, for different reasons, the Panel's finding, in paragraph 7.896 of the Panel Report, that Brazil has not established that "the export credit guarantee programmes at issue are generally applied to scheduled agricultural products other than rice and other unscheduled agricultural products (not supported under the programmes) in a

manner which threatens to lead to circumvention of United States export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture*"; and

finds that the Panel did not err in confining its examination of Brazil's threat of circumvention claim to scheduled products other than rice and unscheduled products not supported under the United States' export credit guarantee programs;

… as regards the ETI Act of 2000, declines Brazil's request that the Appellate Body reverse the Panel's conclusion that Brazil did not make a *prima facie* case that the ETI Act of 2000 is inconsistent with the United States' WTO obligations; and

… as regards Article XVI:3 of the GATT 1994:

finds it unnecessary, for the purposes of resolving this dispute, to rule on the interpretation of the phrase "any form of subsidy which operates to increase the export" in Article XVI:3 of the GATT 1994, and neither upholds nor reverses the Panel's findings in this regard; and

The Appellate Body recommends that the Dispute Settlement Body request the United States to bring its measures, found in this Report and in the Panel Report as modified by this Report to be inconsistent with the *Agreement on Agriculture* and the *SCM Agreement*, into conformity with its obligations under those Agreements.

EC – EXPORT SUBSIDIES ON SUGAR
WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R
AB-2005-2 (28 April 2005)
http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds265_e.htm

Introduction.

The European Communities appeals certain issues of law and legal interpretations contained in the Panel Reports, *European Communities − Export Subsidies on Sugar* (the "Panel Reports"). The Panel was established to consider complaints by Australia, Brazil, and Thailand (the "Complaining Parties") regarding export subsidies for sugar and sugar-containing products accorded under Council Regulation (EC) No. 1260/2001 of 19 June 2001 ("EC Regulation 1260/2001") and related instruments (together, the "EC sugar regime").

EC Regulation 1260/2001 is valid for the marketing years 2001/2002 to 2005/2006 and establishes, *inter alia*: quotas for sugar production; an intervention price for raw and white sugar, respectively; a basic price and a minimum price for beet for quota sugar production; quota (that is, "A" and "B") sugar as well as non-quota (that is, "C") sugary; import and export licensing requirements; producer levies; and preferential import arrangements. Furthermore, the EC sugar regime provides "export refunds" for C sugar. These "refunds", which are direct export subsidies, cover the difference between the European Communities' internal market price and the prevailing world market price for sugar. Non-quota sugar (that is, C sugar) must be exported, unless it is carried forward, but no "export refunds" are provided for such exports. The factual aspects of the EC sugar regime are set out in greater detail in the Panel Reports.

The Complaining Parties claimed before the Panel that, under the EC sugar regime, the European Communities provided export subsidies for sugar in excess of its reduction commitment levels specified in Section II, Part IV of the European Communities' Schedule[y], in violation of certain provisions of the *Agreement on Agriculture* and the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") governing export subsidies. The Complaining Parties alleged that such subsidies in excess of the European Communities' reduction commitment levels were provided to exports of C sugar as well as to sugar equivalent in volume to sugar imported into the European Communities under preferential arrangements with certain African–Caribbean–Pacific countries[y] (the "ACP Countries") and India.

The Panel Reports were circulated to Members of the World Trade Organization ("WTO") on 15 October 2004. The Panel concluded, at paragraph 8.1 of the Panel Reports, that:

- the European Communities' budgetary outlay and quantity commitment levels for exports of subsidized sugar are determined with reference to the entry specified in Section II, Part IV of its Schedule, and the content of Footnote 1 thereto in relation to these entries is of no legal effect and does not enlarge or otherwise modify the European Communities' specified commitment levels;
- the European Communities' quantity commitment level for exports of sugar pursuant to Articles 3.3 and 8 of the *Agreement on Agriculture* is 1,273,500 tonnes per year, effective from the marketing year 2000/2001;
- the European Communities' budgetary outlay commitment level for exports of sugar pursuant to Articles 3.3 and 8 of the *Agreement on Agriculture* is €499.1 million per year, effective from the marketing year 2000/2001;
- the Complaining Parties have provided *prima facie* evidence that, since 1995, the European Communities' total exports of sugar exceed its quantity commitment level. In particular, in the marketing year 2000/2001, the European Communities exported 4,097,000 tonnes of sugar, that is, 2,823,500 tonnes in excess of its commitment level;
- there is *prima facie* evidence that the European Communities has been providing export subsidies within the meaning of Article 9.1(a) of the *Agreement on Agriculture* to what the European Communities considers to be exports of "ACP/India equivalent sugar" since 1995; and
- there is *prima facie* evidence that the European Communities has been providing export subsidies within the meaning of Article 9.1(c) of the *Agreement on Agriculture* to its exports of C sugar since 1995.

Issues Raised in This Appeal.

The following issues are raised in this appeal:

whether the Panel erred in finding, in paragraph 7.37 of the Panel Reports, that the alleged "payments", within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, in the form of low-priced sales of C beet to sugar producers, fell within the Panel's terms of reference;

whether the Panel erred in finding, in paragraphs 7.191, 7.198, 7.222, and 8.1(a) of the Panel Reports, that Footnote 1 to Section II, Part IV of the European Communities' Schedule ("Footnote 1") is of no legal effect and does not enlarge or otherwise modify the European Communities' commitment levels specified in that Schedule;

whether the Panel erred in finding, in paragraph 7.292 of the Panel Reports, that the alleged payments in the form of low-priced sales of C beet to sugar producers are "financed by virtue of governmental action", within the meaning of Article 9.1(c) of the *Agreement on Agriculture*;

whether the Panel erred in finding, in paragraph 7.334 of the Panel Reports, that the production of C sugar receives a "payment on the export financed by virtue of governmental action", within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, in the form of transfers of financial resources through cross-subsidization resulting from the operation of the European Communities' sugar regime;

whether, as a result of its findings under (c) and (d) above, the Panel erred in finding, in paragraph 8.1(f) of the Panel Reports, that there is *prima facie* evidence that the European Communities has been providing export subsidies, within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, to its exports of C sugar since 1995;

whether the Panel erred in finding, in paragraphs 7.374 and 8.4 of the Panel Reports, that the European Communities' violations of the *Agreement on Agriculture* nullified or impaired the benefits accruing to the Complaining Parties under the *Agreement on Agriculture*;

whether the Panel erred in finding, in paragraph 7.74 of the Panel Reports, that Australia, Brazil, and Thailand (the "Complaining Parties") acted in good faith, under Article 3.10 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), in the initiation and conduct of the present dispute settlement proceedings and have not been estopped, through their actions or silence, from alleging that the European Communities' exports of C sugar are in excess of its export subsidy reduction commitments;

whether the Panel erred, in paragraph 7.387 of the Panel Reports, in exercising judicial economy and declining to examine the Complaining Parties' claims under Articles 3.1(a) and 3.2 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"); and

whether certain aspects of the European Communities' Notice of Appeal satisfy the requirements of Rule 20(2)(d) of the *Working Procedures for Appellate Review* (the "*Working Procedures*").

Findings and Conclusions.

For the reasons set forth in this Report, the Appellate Body:

<u>upholds</u> the Panel's finding, in paragraph 7.37 of the Panel Reports, that the alleged "payments", within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, in the form of low-priced sales of C beet to sugar producers, fell within the Panel's terms of reference;

<u>upholds</u> the Panel's finding, in paragraphs 7.191, 7.198, 7.222, and 8.1(a) of the Panel Reports, that Footnote 1 to Section II, Part IV of the European Communities' Schedule does not enlarge or otherwise modify the European Communities' commitment levels specified in that Schedule;

<u>upholds</u> the Panel's finding, in paragraph 7.292 of the Panel Reports, that the alleged payments in the form of low-priced sales of C beet to sugar producers are "financed by virtue of governmental action", within the meaning of Article 9.1(c) of the *Agreement on Agriculture*;

<u>upholds</u> the Panel's finding, in paragraph 7.334 of the Panel Reports, that the production of C sugar receives a "payment on the export financed by virtue of governmental action", within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, in the form of transfers of financial resources through cross-subsidization resulting from the operation of the European Communities' sugar regime;

<u>upholds</u>, as a result of its findings under (c) and (d) above, the Panel's finding, in paragraph 8.1(f) of the Panel Reports, that there is *prima facie* evidence that the European Communities

has been providing export subsidies, within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, to its exports of C sugar since 1995;

upholds, as a result of its findings under (b), (c), (d), and (e) above, the Panel's finding, in paragraphs 7.340 and 8.3 of the Panel Reports, that the European Communities, through its sugar regime, acted inconsistently with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*;

upholds the Panel's finding, in paragraphs 7.374 and 8.4 of the Panel Reports, that the European Communities' violations of the *Agreement on Agriculture* nullified or impaired the benefits accruing to the Complaining Parties under the *Agreement on Agriculture*;

upholds the Panel's finding, in paragraph 7.74 of the Panel Reports, that the Complaining Parties acted in good faith, under Article 3.10 of the DSU, in the initiation and conduct of the present dispute settlement proceedings and, assuming *arguendo* that estoppel applies, have not been estopped, through their actions or silence, from alleging that the European Communities' exports of C sugar are in excess of its export subsidy reduction commitments;

finds that the Panel erred, in paragraph 7.387 of the Panel Reports, in exercising judicial economy, and thereby failed to discharge its obligation under Article 11 of the DSU with respect to the Complaining Parties' claims under Article 3 of the *SCM Agreement*, but is not in a position, and therefore declines, to complete the legal analysis and to examine the Complaining Parties' claims under the *SCM Agreement* left unaddressed by the Panel; and

finds that the European Communities' Notice of Appeal satisfies the requirements of Rule 20(2)(d) of the *Working Procedures for Appellate Review*.

The Appellate Body recommends that the Dispute Settlement Body request the European Communities to bring Council Regulation (EC) No. 1260/2001, as well as all other measures implementing or related to the European Communities' sugar regime, found in this Report, and in the Panel Reports as modified by this Report, to be inconsistent with the *Agreement on Agriculture*, into conformity with its obligations under that Agreement.

EC – PROTECTION OF TRADEMARKS & GEOGRAPHICAL INDICATIONS FOR AGRICULTURAL PRODUCTS & FOODSTUFFS.

Complaint by the United States.
Report of the Panel
WT/DS174/R (5 March 2005)
http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds174_e.htm

CONCLUSIONS AND RECOMMENDATION.

In light of the findings set out in this report, the Panel concludes as follows:
From Section A of the findings:

(a) the measures and claims in the United States' request for establishment of a panel did not fail to meet the requirements of Article 6.2 of the DSU that it identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly;

(b) the claims under Article 2(2) of the Paris Convention (1967) are within the Panel's terms of reference;

From Section B of the findings:

(c) the United States has made a prima facie case that the equivalence and reciprocity conditions in Article 12(1) of the Regulation apply to the availability of protection for GIs that refer to geographical areas located in third countries outside the European Communities, including WTO Members, and the European Communities has not succeeded in rebutting that case;

(d) the Regulation is inconsistent with Article 3.1 of the TRIPS Agreement:

- **(i) with respect to the equivalence and reciprocity conditions, as applicable to the availability of protection for GIs;**
- **(ii) with respect to the application procedures, insofar as they require examination and transmission of applications by governments;**
- **(iii) with respect to the objection procedures, insofar as they require verification and transmission of objections by governments; and**
- **(iv) with respect to the requirements of government participation in the inspection structures under Article 10, and the provision of the declaration by governments under Article 12a(2)(b);**

(e) the United States has not made a prima facie case in support of its claim that the Regulation is inconsistent with Article 3.1 of the TRIPS Agreement:

- **(i) with respect to the equivalence and reciprocity conditions, as allegedly applicable to objections;**
- **(ii) with respect to the standing requirements for objections;**
- **(iii) with respect to the allegedly prescriptive requirements for inspection structures; or**
- **(iv) with respect to the labelling requirement;**

(f) the United States has not made a prima facie case in support of its claim that the Regulation is inconsistent with Article 2(1) of the Paris Convention, as incorporated by Article 2.1 of the TRIPS Agreement:

- **(i) with respect to the equivalence and reciprocity conditions, as allegedly applicable to objections;**
- **(ii) with respect to the standing requirements for objections; or**
- **(iii) with respect to the inspection structures;**

(g) the Regulation does not impose a requirement of domicile or establishment inconsistently with Article 2(2) of the Paris Convention (1967) as incorporated by Article 2.1 of the TRIPS Agreement:

- **(i) with respect to the availability of protection for GIs; or**
- **(ii) with respect to the objection procedures;**

(h) the Regulation is inconsistent with Article III:4 of GATT 1994:

- **(i) with respect to the reciprocity and equivalence conditions, as applicable to the availability of protection for GIs;**
- **(ii) with respect to the application procedures, insofar as they require examination and transmission of applications by governments, and these requirements are not justified by Article XX(d) of GATT 1994; and**
- **(iii) with respect to the requirements of government participation in the inspection structures under Article 10, and the provision of the declaration by governments under Article 12a(2)(b), and these requirements are not justified by Article XX(d) of GATT 1994;**

(i) the United States has not made a prima facie case in support of its claims that the Regulation is inconsistent with Article III:4 of GATT 1994:

- **(i) with respect to the equivalence and reciprocity conditions, as allegedly applicable to objections;**
- **(ii) with respect to the objection procedures, insofar as they require verification and transmission of objections by governments;**
- **(iii) with respect to the allegedly prescriptive requirements for inspection structures; or**
- **(iv) with respect to the labelling requirement;**

From Section C of the findings:

(j) the Regulation is inconsistent with Article 16.1 of the TRIPS Agreement with respect to the coexistence of GIs with prior trademarks but this is justified by Article 17 of the TRIPS Agreement. In this respect:

(i) Article 24.3 of the TRIPS Agreement is inapplicable; and
(ii) Article 24.5 of the TRIPS Agreement is inapplicable;

From Section D of the findings:

(k) the United States has not made a prima facie case in support of its claim under Article 4 of the TRIPS Agreement, with respect to the application and objection procedures;

(l) the Panel rejects the United States' claim under Article 4 of the TRIPS Agreement , with respect to the execution of the Regulation by the authorities of EC member States;

(m) the United States has not made a prima facie case that the European Communities has failed to implement its obligation under Article 22.2 of the TRIPS Agreement; and

(n) the Panel rejects the United States' claim that the Regulation is inconsistent with Article 1.1 of the TRIPS Agreement.

Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the Regulation as such is inconsistent with the covered agreements, it has nullified or impaired benefits accruing to the United States under these agreements.

In light of these conclusions, the Panel recommends pursuant to Article 19.1 of the DSU that the European Communities bring the Regulation into conformity with the TRIPS Agreement and GATT 1994.

The Panel suggests, pursuant to Article 19.1 of the DSU, that one way in which the European Communities could implement the above recommendation with respect to the equivalence and reciprocity conditions, would be to amend the Regulation so as for those conditions not to apply to the procedures for registration of GIs located in other WTO Members which, it submitted to the Panel, is already the case. This suggestion is not intended to diminish the importance of the above recommendation with respect to any of the Panel's other conclusions.

U.S, – TAX TREATMENT FOR "FOREIGN SALES CORPORATIONS"

Second Recourse to Article 21.5 of
the DSU by the EC.
13 February 2006ab-2005-9
Report of the Appellate
www.wto.org/english/tratop_e/dispu_e/cases_e/ds108_e.htm

Introduction.

The United States appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations", Second Recourse to Article 21.5 of the DSU by the European Communities* (the "Panel Report"). The Panel was established to consider a complaint by the European Communities regarding the American Jobs Creation Act of 2004 (the "Jobs Act") and the United States' compliance with the recommendations and rulings of the Dispute Settlement Body (the "DSB") adopted on the basis of the Panel and Appellate Body Reports in *United States – Tax Treatment for "Foreign Sales Corporations"* ("*US – FSC*") and *United States – Tax Treatment for "Foreign Sales Corporations", Recourse to Article 21.5 of the DSU by the European Communities* ("*US – FSC (Article 21.5 – EC)*"). Relevant aspects of the Jobs Act are described in paragraph 0 below, as well as in paragraphs 2.13 to 2.17 of the Panel Report.

The panel in *US – FSC* (the "original panel") concluded that the "FSC measure", consisting of Sections 921 to 927 of the United States Internal Revenue Code (the "IRC") and related measures establishing special tax treatment for foreign sales corporations ("FSC"), was inconsistent with the United States' obligations under the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") and the *Agreement on Agriculture*. The Appellate Body upheld the original panel's finding that the FSC measure was inconsistent with the United States' obligations under the *SCM Agreement* and modified the original panel's findings under the *Agreement on Agriculture*.

On 20 March 2000, the DSB adopted the reports of the original panel and the Appellate Body. The DSB recommended that the United States bring the FSC measure into conformity with its obligations under the covered agreements and that the FSC subsidies found to be prohibited export subsidies within the meaning of the *SCM Agreement* be withdrawn without delay, pursuant to Article 4.7 of the *SCM Agreement*, namely, "at the latest with effect from 1 October 2000". At its meeting held on 12 October 2000, the DSB agreed to a request made by the United States to modify the time period to comply with the recommendations and rulings of the DSB so as to expire on 1 November 2000. The United States promulgated on 15 November 2000, the FSC Repeal and Extraterritorial Income

("ETI") Exclusion Act of 2000 (the "ETI Act") in order to comply with the recommendations and rulings of the DSB.

The European Communities considered that the ETI Act did not comply with the DSB recommendations and rulings in the original dispute, because the ETI Act was not consistent with the United States' obligations under the *SCM Agreement*, the *Agreement on Agriculture*, and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). As a result, the European Communities had recourse to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"). On 20 December 2000, the DSB referred the matter to a panel under Article 21.5 of the DSU. The first Article 21.5 panel report was circulated to the Members of the World Trade Organization (the "WTO") on 20 August 2001.

The panel in the first Article 21.5 proceedings concluded that the ETI Act was inconsistent with the United States' obligations under the *SCM Agreement*, the *Agreement on Agriculture*, and the GATT 1994. In addition, it also held that, by making available indefinitely the FSC tax benefit for certain transactions by virtue of Section 5(c)(1)(B) ("Section 5") of the ETI Act, the United States "ha[d] not fully withdrawn the FSC subsidies found to be prohibited export subsidies [in the original proceedings] and ha[d] therefore failed to implement the recommendations and rulings of the DSB [in the original proceedings] made pursuant to Article 4.7 [of the] *SCM Agreement*." The Appellate Body upheld those findings of the first Article 21.5 panel. The Appellate Body also recommended that the DSB "request the United States to bring the ETI measure ... into conformity with its obligations ... and ... to implement fully the recommendations and rulings of the DSB in *US – FSC*, made pursuant to Article 4.7 of the *SCM Agreement*." On 29 January 2002, the DSB adopted the reports of the first Article 21.5 panel and the Appellate Body.

On 22 October 2004, the United States, with a view to bringing its measures into conformity with its WTO obligations, enacted the Jobs Act, repealing the tax exclusion of the ETI Act. The Jobs Act applies from 1 January 2005. Section 101 of the Jobs Act is entitled "Repeal of exclusion for extraterritorial income". Section 101(a) provides that "Section 114 [of the IRC] is hereby repealed." Section 101(b) is entitled "Conforming Amendments" and provides, in sub-paragraph (1): "Subpart E of Part III of subchapter N of chapter 1 (relating to qualifying foreign trade income) is hereby repealed." At the same time, Section 101(d) contains a "transition provision", pursuant to which the ETI tax scheme remains available, on a reduced basis, for certain transactions in the period between 1 January 2005 and 31 December 2006. Further, Section 101(f) contains a "grandfathering provision", pursuant to which the ETI tax scheme remains available *indefinitely* with respect to certain transactions. Finally, Section 101 of the Jobs Act does not repeal or otherwise make reference to Section 5 of the ETI Act, which "grandfathered" indefinitely FSC subsidies with respect to certain transactions. A more detailed description of the Jobs Act is contained in paragraphs 2.13 to 2.17 of the Panel Report.

The European Communities considered that the United States had failed to withdraw its prohibited subsidies as required by Article 4.7 of the *SCM Agreement*, had failed to bring its scheme into conformity with its WTO obligations, and had therefore failed to implement the recommendations and rulings of the DSB of 20 March 2000 and 29 January 2002. The European Communities also considered that the United States continued to violate certain provisions of the *SCM Agreement*, the *Agreement on Agriculture*, and the GATT 1994. The European Communities therefore had recourse to Article 21.5 of the DSU for a second time. On 20 December 2000, the DSB referred the matter to a panel under Article 21.5 of the DSU. The Panel Report was circulated to WTO Members on 30 September 2005.

The Panel found that:

> **The panel and Appellate Body findings in the first 21.5 compliance proceedings, as adopted by the DSB, established that the ETI scheme was in violation of Articles 3.1(a) and 3.2 of the *SCM Agreement*, Articles 10.1, 8 and 3.3 of the *Agreement on Agriculture* and Article III:4 of the GATT 1994. Pursuant to Articles 101(d) and (f) of the Jobs Act, the ETI benefits remain available throughout 2005 and 2006 (albeit at reduced percentages), and indefinitely (in the case of certain transactions). The inconsistencies with Articles 3.1(a) and 3.2 of the *SCM Agreement*, Articles 10.1, 8 and 3.3 of the *Agreement on Agriculture* and Article III:4 of GATT 1994 remain.**
>
> **We further note the indefinite grandfathering of the original FSC subsidies for certain transactions, through the continued operation of [S]ection 5[] of the ETI Act. As confirmed by the United States in response to Panel questioning, nothing in the legislative language of the Jobs Act modifies, implicitly or explicitly, these transition rules for the FSC subsidies.**

The Panel concluded that:

> **... to the extent that the United States, by enacting Section 101 of the Jobs Act, maintains prohibited FSC and ETI subsidies through the transition and grandfathering measures at issue, it continues to fail to implement fully the operative DSB recommendations and rulings to withdraw the prohibited subsidies and to bring its measures into conformity with its obligations under the relevant covered agreements.**

The Panel also stated that:

> **Since the original DSB recommendations and rulings in 2000 remain operative through the results of the compliance proceedings in 2002, we make no new recommendation.**

On 28 November 2005, the European Communities notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the DSU, and filed a Notice of Other Appeal pursuant to Article 23(1) of the *Working Procedures*. On 29 November 2005, the European Communities filed an other appellant's submission. On 9 December 2005, the European Communities and the United States each filed an appellee's submission. On the same day, Australia and Brazil each filed a third participant's submission and China notified its intention to appear at the oral hearing as a third participant. On 16 December 2005, the Director of the Appellate Body Secretariat informed the parties that Mr. John Lockhart was prevented from continuing to serve on the Division for serious personal reasons falling within Rule 12 of the *Working Procedures*. In accordance with Rule 13 of the *Working Procedures*, the Appellate Body selected Ms. Merit E. Janow to replace Mr. Lockhart. The oral hearing in this appeal was held on 9 January 2006.

Findings and Conclusions.

For the reasons set forth in this Report, the Appellate Body:

> **upholds the Panel's finding, in paragraph 7.87 of the Panel Report, that Section 5(c)(1)(B) of the FSC Repeal and Extraterritorial Income Exclusion Act of 2000, grandfathering prohibited FSC subsidies, was within its terms of reference; and**
>
> **upholds the Panel's finding and conclusion, in paragraphs 7.65 and 8.1 of the Panel Report, that "to the extent that the United States, by enacting Section 101 of the American Jobs Creation Act of 2004, maintains prohibited FSC and ETI subsidies through [the] transitional and grandfathering measures, it continues to fail to implement fully the operative DSB recommendations and rulings to withdraw the prohibited subsidies and to bring its measures into conformity with its obligations under the relevant covered agreements."**

Signed in the original in Geneva this 26th day of January 2006.

Mexico – Tax Measures on Soft Drinks and Other Beverages.

Report of the Appellate Body.
WT/DS308/AB/R (6 March 2006)
http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds308_e.htm

Introduction.

Mexico appeals certain issues of law and legal interpretations developed in the Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages* (the "Panel Report"). The Panel was established to consider a complaint by the United States concerning certain tax measures and bookkeeping requirements imposed by Mexico on soft drinks and other beverages that use sweeteners other than cane sugar.

The measures challenged by the United States include: (i) a 20 per cent tax on the transfer or, as applicable, the importation of soft drinks and other beverages that use any sweetener other than cane sugar (the "soft drink tax"); (ii) a 20 per cent tax on specific services (commission, mediation, agency, representation, brokerage, consignment, and distribution), when such services are provided for the purpose of transferring products such as soft drinks and other beverages that use any sweetener other than cane sugar (the "distribution tax"); and (iii) a number of requirements imposed on taxpayers subject to the soft drink tax and to the distribution tax (the "bookkeeping requirements"). Before the Panel, the United States claimed that these measures are inconsistent with paragraphs 2 and 4 of Article III of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

In its first written submission to the Panel, Mexico requested that the Panel decide, as a preliminary matter, to "decline to exercise its jurisdiction in this case" and that it "recommend to the parties that they submit their respective grievances to an Arbitral Panel, under Chapter Twenty of the NAFTA, which can address both Mexico's concern with respect to market access for Mexican cane sugar in the United States under the NAFTA and the United States' concern with respect to Mexico's tax measures." Mexico also stated that, in the event the Panel decided to exercise jurisdiction, the Panel should find that the measures are justified pursuant to Article XX(d) of the GATT 1994.

On 18 January 2005, the Panel issued a preliminary ruling in which it rejected Mexico's request. In doing so, the Panel concluded that, "under the DSU, it had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it." The Panel added that, "even if it had such

discretion, the Panel did not consider that there were facts on record that would justify the Panel declining to exercise its jurisdiction in the present case."

In its Report, circulated to Members of the World Trade Organization (the "WTO") on 7 October 2005, the Panel concluded that:

(a) With respect to Mexico's soft drink tax and distribution tax:

(i) As imposed on sweeteners, imported beet sugar is subject to internal taxes in excess of those applied to like domestic sweeteners, in a manner inconsistent with Article III:2, first sentence, of the GATT 1994;
(ii) As imposed on sweeteners, imported HFCS is being taxed dissimilarly compared with the directly competitive or substitutable products, so as to afford protection to the Mexican domestic production of cane sugar, in a manner inconsistent with Article III:2, second sentence, of the GATT 1994;
(iii) As imposed on sweeteners, imported beet sugar and HFCS are accorded less favourable treatment than that accorded to like products of national origin, in a manner inconsistent with Article III:4 of the GATT 1994;
(iv) As imposed on soft drinks and syrups, imported soft drinks and syrups sweetened with non-cane sugar sweeteners (including HFCS and beet sugar) are subject to internal taxes in excess of those applied to like domestic products, in a manner inconsistent with Article III:2, first sentence, of the GATT 1994.

(b) With respect to Mexico's bookkeeping requirements: As imposed on sweeteners, imported beet sugar and HFCS are accorded less favourable treatment than that accorded to like products of national origin, in a manner inconsistent with Article III:4 of the GATT 1994.

The Panel rejected Mexico's defence under Article XX(d) of the GATT 1994, concluding that "the challenged tax measures are not justified as measures that are necessary to secure compliance by the United States with laws or regulations which are not inconsistent with the provisions of the GATT 1994."[y] The Panel therefore recommended "that the Dispute Settlement Body request Mexico to bring the inconsistent measures … into conformity with its obligations under the GATT 1994."

On 6 December 2005, Mexico notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the DSU, and filed a Notice of Appeal pursuant to Rule 20(1) of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 13 December 2005, Mexico filed an appellant's submission. In its appeal, Mexico challenges the Panel's preliminary ruling rejecting Mexico's request that the Panel decline to exercise jurisdiction in this case, as well as the Panel's findings concerning Article XX(d) of the GATT 1994. Mexico did not appeal the Panel's findings under Article III of the GATT 1994. On 6 January 2006, the United States filed an appellee's submission. On the same day, China, the European Communities, and Japan each filed a third participant's submission. Also on the same day, Canada and Guatemala each notified the Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant.
By letter dated 5 January 2006, Mexico requested authorization to correct certain clerical errors in its appellant's submission pursuant to Rule 18(5) of the *Working Procedures*. On 9 January 2006, the Appellate Body Division hearing the appeal ("the Division") invited all participants and third participants to comment on Mexico's request, in accordance with Rule 18(5). On 11 January 2006,

the United States responded that, although some of the requested corrections are not "clearly clerical", within the meaning of Rule 18(5), "[i]n the circumstances of this dispute", the United States did not object to Mexico's request. No other comments were received. By letter dated 16 January 2006, the Division authorized Mexico to correct the clerical errors in its appellant's submission but emphasized, however, that it had not been requested, and did not make, a finding "as to whether all of the corrections requested by Mexico are 'clerical' within the meaning of Rule 18(5) of the *Working Procedures*."

On 13 January 2006, the Appellate Body received an *amicus curiae* brief from *Cámara Nacional de las Industrias Azucarera y Alcoholera* (National Chamber of the Sugar and Alcohol Industries) of Mexico. The Division did not find it necessary to take the brief into account in resolving the issues raised in this appeal.

The oral hearing in this appeal was held on 18 January 2006. The participants and third participants presented oral arguments (with the exception of Guatemala) and responded to questions posed by the Members of the Division hearing the appeal.

Issues Raised in This Appeal.

The following issues are raised in this appeal:

- **(a) whether the Panel erred in concluding that a WTO panel "has no discretion to decide whether or not to exercise its jurisdiction in a case properly before it" and, if so, whether the Panel erred in declining to exercise that discretion in the circumstances of this dispute;**
- **(b) whether the Panel erred in concluding that Mexico's measures do not constitute measures "to secure compliance with laws or regulations", within the meaning of Article XX(d) of the GATT 1994; and**
- **(c) whether the Panel failed to make an objective assessment of the facts of the case, as required by Article 11 of the DSU, in concluding that "even if the assumption were to be made in the abstract that international countermeasures are potentially capable of qualifying as measures designed to secure compliance", within the meaning of Article XX(d) of the GATT 1994, "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case."**

Findings and Conclusions.

For the reasons set out in this Report, the Appellate Body:

upholds the Panel's conclusion, in paragraphs 7.1, 7.18, and 9.1 of the Panel Report, that, "under the DSU, it ha[d] no discretion to decline to exercise its jurisdiction in the case that ha[d] been brought before it";

upholds the Panel's conclusion, in paragraph 8.198 of the Panel Report, that Mexico's measures do not constitute measures "to secure compliance with laws or regulations", within the meaning of Article XX(d) of the GATT 1994;

rejects Mexico's claim that the Panel failed to fulfil its obligations under Article 11 of the DSU, in finding, in paragraph 8.186 of the Panel Report, that "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case"; and

as a consequence, upholds the Panel's conclusion, in paragraphs 8.204 and 9.3 of the Panel Report, that "Mexico has not established that the challenged measures are justified under Article XX of the GATT 1994".

The Appellate Body recommends that the Dispute Settlement Body request Mexico to bring the measures that were found in the Panel Report to be inconsistent with the *General Agreement on Tariff and Trade 1994* into conformity with its obligations under that Agreement.

U.S. – final dumping determination on softwood lumber (Canada)

Recourse to article 21.5 of the dsu by Canada.

AB-2006-3

WT/DS264/AB/RW (15 August 2006)

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds277_e.htm

Introduction.

Canada appeals certain issues of law and legal interpretations developed in the Panel Report, United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada (the "Panel Report"). The Panel was established to consider a complaint by Canada regarding the consistency with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement") of a measure taken by the United States to comply with the recommendations and rulings of the Dispute Settlement Body (the "DSB") in the US – Softwood Lumber V proceedings.

The original dispute concerned an anti-dumping investigation by the United States Department of Commerce (the "USDOC") that led to the imposition, in May 2002, of anti-dumping duties on imports of softwood lumber from Canada. Before the panel in US – Softwood Lumber V (the "original panel"), Canada claimed that, in imposing anti-dumping duties on imports of softwood lumber from Canada, the United States had acted inconsistently with several provisions of the Anti-Dumping Agreement, as well as with Articles VI:1 and VI:2 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"). The original panel found, inter alia, that the United States had acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of "zeroing". In the light of its finding on Article 2.4.2, the original panel applied judicial economy and declined to rule on Canada's claims under Article 2.4 of the Anti-Dumping Agreement ("fair comparison") in respect of zeroing. The original panel's finding of inconsistency with Article 2.4.2 was upheld by the Appellate Body.

The original panel and Appellate Body reports were adopted by the DSB on 31 August 2004. On 6 December 2004, Canada and the United States jointly informed the DSB, pursuant to Article 21.3(b) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), that they had mutually agreed that the reasonable period of time to implement the recommendations and rulings of the DSB would be seven and one-half months, that is, from 31 August 2004 to 15 April

2005. The reasonable period of time was later extended to 2 May 2005 by agreement between the parties.

On 2 May 2005, the USDOC issued a new final determination pursuant to Section 129 of the Uruguay Round Agreement Act (the "Section 129 Determination"). In the original determination, the USDOC had calculated the margins of dumping by comparing weighted-average normal value to the weighted average of export prices. By contrast, in the Section 129 Determination, the USDOC established the margins of dumping on the basis of a comparison of normal value and export prices on a transaction-to-transaction basis. On 19 May 2005, the United States notified the DSB that, with the Section 129 Determination, it had implemented the DSB's recommendations and rulings. Canada, however, considered that the United States had failed to bring its measure into conformity with its obligations under the Anti-Dumping Agreement. Canada therefore requested that the matter of compliance be referred to a panel pursuant to Article 21.5 of the DSU. On 1 June 2005, the DSB referred the matter to the original panel. In the Article 21.5 proceedings, Canada claimed that the use of zeroing by the USDOC in the Section 129 Determination is inconsistent with the United States' obligations under Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement.

Canada, however, considered that the United States had failed to bring its measure into conformity with its obligations under the Anti-Dumping Agreement. Canada therefore requested that the matter of compliance be referred to a panel pursuant to Article 21.5 of the DSU. On 1 June 2005, the DSB referred the matter to the original panel. In the Article 21.5 proceedings, Canada claimed that the use of zeroing by the USDOC in the Section 129 Determination is inconsistent with the United States' obligations under Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement.

The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 3 April 2006. The Article 21.5 Panel (the "Panel") found that "the [US] DOC was entitled not to offset the non-dumped transactions against the dumped transactions when calculating the margin of dumping for each respondent foreign producer or exporter." Consequently, the Panel rejected Canada's claim that "the [US] DOC's use of zeroing in the [transaction-to-transaction] comparison methodology at issue is inconsistent with Article 2.4.2 of the [Anti-Dumping] Agreement." In addition, the Panel rejected Canada's claim that "the United States has violated the fair comparison obligation provided for in the first sentence of Article 2.4 of the [Anti-Dumping] Agreement."

The Panel concluded that:

> **the determination of the [US]DOC in the section 129 proceeding investigation is not inconsistent with the asserted provisions of Articles 2.4 and 2.4.2 of the [Anti-Dumping] Agreement.**
>
> **We therefore consider that the United States has implemented the recommendations and rulings of the DSB in US – Softwood Lumber V, to bring its measure into conformity with its obligations under the [Anti-Dumping] Agreement.**

Having found that the United States did not act inconsistently with its obligations under the Anti-Dumping Agreement, the Panel did not make any recommendation under Article 19.1 of the DSU. On 17 May 2006, Canada notified the DSB, pursuant to Article 16.4 of the DSU, of its intention to appeal certain issues of law and legal interpretations developed in the Panel Report, and filed a Notice of Appeal pursuant to Rule 20 of the Working Procedures for Appellate Review (the "Working Procedures"). On 24 May 2006, Canada filed an appellant's submission. On 12 June 2006, the United

States filed an appellee's submission. On the same day, the European Communities, Japan, New Zealand, and Thailand each filed a third participant's submission, and China and India each notified the Appellate Body Secretariat of its intention to appear at the oral hearing and make an oral statement.

Issues Raised in This Appeal.

The following issues are raised in this appeal:

whether the Panel erred in finding that the use of zeroing when margins of dumping are established by comparing normal value and export prices on a transaction-to-transaction basis is not inconsistent with Article 2.4.2 of the Anti-Dumping Agreement; and whether the Panel erred in finding that the use of zeroing when margins of dumping are established by comparing normal value and export prices on a transaction-to-transaction basis is not inconsistent with the requirement of "fair comparison" in Article 2.4 of the Anti-Dumping Agreement.

Article 2.4.2 of the Anti-Dumping Agreement ……..

We do not agree with the conclusions that the United States and the Panel draw from the phrase "all comparable export transactions". The Appellate Body has recognized that Article 2.4.2 allows investigating authorities to use "multiple averaging" under the weighted average-to-weighted average comparison methodology. In the case of that methodology, transactions may be divided into groups, for instance, according to model or product type. Because of this possibility, the phrase "all comparable export transactions" implies that two requirements must be met when investigating authorities make the comparison by grouping transactions and averaging them. First, they must include in each group only those export transactions that are "comparable". Secondly, they must include "all" comparable export transactions corresponding to that group, and none of these export transactions may be left out arbitrarily. Such a scenario does not arise in the same way when comparisons are made under the transaction-to-transaction comparison methodology. As transactions are not divided into groups under the transaction-to-transaction comparison methodology, the phrase "all comparable export transactions" is not pertinent to that methodology and, consequently, no inference may be drawn from the fact that this phrase does not appear in relation to the transaction-to-transaction methodology. Accordingly, we disagree with the United States' and the Panel's view that the phrase "all comparable export transactions" would be deprived of effect and meaning if zeroing were prohibited under the transaction-to-transaction comparison methodology.

In sum, the results of the transaction-specific comparisons cannot be considered "margins of dumping" within the meaning of Article 2.4.2. The "margins of dumping" established under the transaction-to-transaction comparison methodology provided in Article 2.4.2 result from the aggregation of the transaction-specific comparisons. Article 2.4.2 does not permit an investigating authority, when aggregating the results of transaction-specific comparisons, to disregard transactions in which export price exceeds normal value.

We disagree with the Panel's analysis of the "mathematical equivalence" argument for several reasons. First, the United States acknowledges that it has never applied the methodology provided in the second sentence of Article 2.4.2, nor has it provided examples of how other WTO Members have applied this methodology. Thus, the United States' argument on "mathematical equivalence" rests on

a non-tested hypothesis. Secondly, we note that the methodology in the second sentence of Article 2.4.2 is an exception. Article 2.4.2 clearly provides that investigating authorities "shall normally" use one of the two methodologies set out in the first sentence of that provision. Neither the participants, nor the third participants, disagree with this description of the relationship between the two sentences of Article 2.4.2. Being an exception, the comparison methodology in the second sentence of Article 2.4.2 (weighted average-to-transaction) alone cannot determine the interpretation of the two methodologies provided in the first sentence, that is, transaction-to-transaction and weighted average-to-weighted average.

In sum, we find the concerns of the Panel and the United States over the third comparison methodology (weighted average-to-transaction) being rendered inutile by a prohibition of zeroing under the transaction-to-transaction methodology to be overstated. It could be argued, on the contrary, that the use of zeroing under the two comparison methodologies set out in the first sentence of Article 2.4.2 would enable investigating authorities to capture pricing patterns constituting "targeted dumping", thus rendering the third methodology inutile.

Thus, our examination of the relevant context in the Anti-Dumping Agreement and the GATT 1994 does not support the United States' interpretation that the use of zeroing is permissible under the transaction-to-transaction comparison methodology in Article 2.4.2 of the Anti-Dumping Agreement.

Conclusion on Canada's Claim under Article 2.4.2 ……..

On the basis of the above analysis, we conclude that zeroing is not permitted under the transaction-to-transaction methodology set out in the first sentence of that provision. The "margins of dumping" established under this methodology are the results of the aggregation of the transaction-specific comparisons of export prices and normal value. In aggregating these results, an investigating authority must consider the results of all of the comparisons and may not disregard the results of comparisons in which export prices are above normal value.

We have found that Article 2.4.2 does not admit an interpretation that would allow the use of zeroing under the transaction-to-transaction comparison methodology. Therefore, the contrary view is not a permissible interpretation of Article 2.4.2 within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement.

For these reasons, we reverse the Panel's finding, in paragraph 5.66 of the Panel Report, that "the [US]DOC was entitled not to offset the non-dumped transactions against the dumped transactions when calculating the margin of dumping for each respondent foreign producer or exporter." We reverse also the Panel's conclusion, in paragraph 6.1 of the Panel Report, that "the determination of the [US]DOC in the section 129 proceeding investigation is not inconsistent with ... Article[] 2.4.2 of the [Anti-Dumping] Agreement." We find, instead, that the use of zeroing by the USDOC in the Section 129 Determination is inconsistent with the United States' obligations under Article 2.4.2 of the Anti-Dumping Agreement.

We turn next to Canada's claim under Article 2.4 of the Anti-Dumping Agreement. Before examining Article 2.4, we provide a brief summary of the Panel's findings and the arguments of the participants and the third participants.

Article 2.4 of the Anti-Dumping Agreement provides:

> **A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made**

We recall that Article 2.4.2 begins with the phrase "[s]ubject to the provisions governing fair comparison in paragraph 4". Thus, the application of the comparison methodologies set out in Article 2.4.2 of the Anti-Dumping Agreement, including the transaction-to-transaction methodology applied in the investigation underlying this dispute, is expressly made subject to the "fair comparison" requirement set out in Article 2.4.

Findings and Conclusions.

For the reasons set out in this Report, the Appellate Body:

reverses the Panel's finding, in paragraphs 5.66 and 6.1 of the Panel Report, that the USDOC's Section 129 Determination is not inconsistent with Article 2.4.2 of the Anti-Dumping Agreement and finds, instead, that the use of zeroing by the USDOC in the Section 129 Determination is inconsistent with the United States' obligations under Article 2.4.2 of the Anti-Dumping Agreement;

reverses the Panel's finding, in paragraphs 5.78 and 6.1 of the Panel Report, that the USDOC's Section 129 Determination is not inconsistent with Article 2.4 of the Anti-Dumping Agreement and finds, instead, that the use of zeroing in the Section 129 Determination is inconsistent with the "fair comparison" requirement in Article 2.4; and consequently, reverses the Panel's conclusion, in paragraph 6.2 of the Panel Report, that "the United States has implemented the recommendations and rulings of the DSB in US – Softwood Lumber V, to bring its measure into conformity with its obligations under the [Anti-Dumping] Agreement".

The Appellate Body recommends that the Dispute Settlement Body request the United States to bring its measure into conformity with its obligations under the Anti-Dumping Agreement.

EC -- MEASURES AFFECTING APPROVAL & MARKETING OF BIOTECH PRODUCTS.

Reports of the Panel
WT/DS291/R
WT/DS292/R
WT/DS293/R
(29 September 2006)
http://www.wto.org/english/tratop_e/dispu_e/291r_8_e.doc

CONCLUSIONS & RECOMMENDATIONS.

1. Before concluding, the Panel wishes to make clear the issues on which it made a decision, and those which it did not address.

A. OVERVIEW OF THE ISSUES ADDRESSED AND DECIDED BY THE PANEL.

The issues before the Panel concerned the alleged failure of the European Communities to reach final decisions regarding the approval of biotech products from October 1998 to the time of establishment of the Panel on 29 August 2003, and the WTO-consistency of prohibitions imposed by certain EC member States with regard to specific biotech products after these products had been approved by the European Communities for Community-wide marketing.
In light of this, the Panel did *not* examine:

- **whether biotech products in general are safe or not.**
- **whether the biotech products at issue in this dispute are "like" their conventional counterparts. Although this claim was made by the Complaining Parties (*i.e.*, the United States, Canada and Argentina) in relation to some aspects of their complaints, the Panel did not find it necessary to address those aspects of the complaints.**
- **whether the European Communities has a right to require the pre-marketing approval of biotech products. This was not raised by the Complaining Parties.**
- **whether the European Communities' approval procedures as established by Directive 90/220, Directive 2001/18 and Regulation 258/97, which provide for a product-by-product assessment requiring scientific consideration of various potential risks, are consistent with the European Communities' obligations under the WTO agreements. This was not raised by the Complaining Parties.**

– **the conclusions of the relevant EC scientific committees regarding the safety evaluation of specific biotech products. These were not challenged by the Complaining Parties, although they did challenge the scientific basis for some of the questions and objections made by various EC member States. In light of this, the Panel, in consultation with the Parties, sought advice from a number of scientific experts.**

Turning to the issues the Panel *did* examine, the Panel first considered whether the EC approval legislation under which the European Communities allegedly did not reach final decisions is properly assessed under the *SPS Agreement*. The Panel has found that the European Communities' procedures for the approval of GMOs set out in Directives 90/220 and 2001/18 are SPS measures within the meaning of the *SPS Agreement*. The potential risks to be examined in the context of these directives, particularly as described in the annexes to Directive 2001/18, are the types of risk covered by the *SPS Agreement*. Regarding the European Communities' procedures for the approval of novel foods and food ingredients set out in Regulation 258/97, the Panel has found that these are, in part, SPS measures within the scope of the *SPS Agreement*.

The Panel notes, however, that both the evidence provided by the European Communities and the advice provided to the Panel by the experts advising it indicate that many of the identified concerns are highly unlikely to occur in practice (*e.g.*, the transfer of antibiotic resistance from marker genes used in the production of some biotech plants to bacteria in the human gut). On the other hand, other identified concerns, such as those relating to the development of pesticide-resistance in target insects through exposure to pesticides (including those incorporated into biotech plants) have indeed been documented to occur, including with respect to non-biotech crops. We reiterate, however, that the right of the European Communities to consider these possible risks prior to giving approval for the consumption or planting of biotech plants has not been questioned by any of the Complaining Parties.

The Complaining Parties asserted that a moratorium on approvals was in effect in the European Communities between October 1998 and August 2003. Based on the evidence before it, the Panel has found that the European Communities applied a general *de facto* moratorium on approvals of biotech products between June 1999 and 29 August 2003, the date of establishment of this Panel. The Panel determined that the moratorium was not itself an SPS measure within the meaning of the *SPS Agreement*, but rather affected the operation and application of the EC approval procedures, which are set out in the relevant EC approval legislation and which we had found to be SPS measures. With respect to Directives 90/220 and 2001/18, the Panel has concluded that the general *de facto* moratorium resulted in a failure to complete individual approval procedures without undue delay, and hence gave rise to an inconsistency with Article 8 and Annex C of the *SPS Agreement*. With respect to Regulation 258/97, the Panel found that, to the extent the approval procedure addressed safety aspects within the scope of the *SPS Agreement*, the general *de facto* moratorium resulted in a failure to complete individual approval procedures without undue delay, and hence also gave rise to an inconsistency with Article 8 and Annex C of the *SPS Agreement*.

The Complaining Parties also claimed that, contrary to its WTO obligations, the European Communities failed to consider for final approval applications concerning certain specified biotech products for which the European Communities had commenced approval procedures. We examined the record of consideration of 27 applications identified by the Complaining Parties. We have found that there was undue delay in the completion of the approval procedure with respect to 24 of the 27 relevant products. We therefore concluded that, in relation to the approval procedures concerning

these 24 products, the European Communities has breached its obligations under Article 8 and Annex C of the *SPS Agreement.*

The Complaining Parties furthermore brought complaints against nine safeguard measures taken by certain EC member States. These safeguard measures are in the form of prohibitions imposed by an individual EC member State on a particular biotech product that has been formally approved for use within the European Communities. The safeguard measures challenged by the Complaining Parties have been taken by Austria, Belgium, France, Germany, Italy and Luxembourg. The Complaining Parties did not challenge the EC approval legislation, which provides for the conditional right of individual EC member States to impose SPS measures which differ from those of the European Communities as a whole. Instead, what the Complaining Parties challenged were the prohibitions imposed by the relevant member States on the basis of the aforementioned EC approval legislation. According to the Complaining Parties, the safeguard measures imposed by the relevant member States were inconsistent with the European Communities' WTO obligations.

We determined that the objectives identified by each member State for its safeguard measure(s) fall within the scope of the *SPS Agreement.* For each of the products at issue, the European Communities' relevant scientific committee had evaluated the potential risks to human health and/or the environment prior to the granting of Community-wide approval, and had provided a positive opinion. The relevant EC scientific committee subsequently also reviewed the arguments and the evidence submitted by the member State to justify the prohibition, and did not consider that such information called into question its earlier conclusions. The Panel thus considered that sufficient scientific evidence was available to permit a risk assessment as required by the *SPS Agreement.* Hence, in no case was the situation one in which the Panel had been persuaded that the relevant scientific evidence was insufficient to perform a risk assessment, such that the member State might have had recourse to a provisional measure under Article 5.7 of the *SPS Agreement.*

The Panel also considered whether any risk assessment had been provided by the relevant member States which would reasonably support the prohibition of the biotech products at issue. Although some of the member States did provide scientific studies, in no case did they provide an assessment of the risks to human health and/or the environment meeting the requirements of the *SPS Agreement.* The Panel likewise examined whether the risk assessments undertaken by the EC scientific committees could provide reasonable support for a prohibition of the biotech products at issue, but considered that this was not the case. In the light of this, the Panel has concluded that each of the safeguard measures taken by the relevant member States fails to meet the obligations of the European Communities under the *SPS Agreement.*

STRUCTURE OF THE PANEL'S CONCLUSIONS AND RECOMMENDATIONS.

As we have indicated at the beginning of the Findings section, consistent with the fact that we examined three legally distinct complaints, we have particularized for each of the three Complaining Parties (*i.e.*, the United States, Canada and Argentina) the conclusions we have reached and the recommendations we make, if any, in respect of their respective complaints. Accordingly, we provide three separate sets of conclusions and recommendations.

We further recall that the Complaining Parties are each challenging three identical categories of EC measures. The categories in question are:

- the alleged general EC moratorium on approvals of biotech products (hereafter the "general EC moratorium");
- various product-specific EC measures affecting the approval of specific biotech products (hereafter the "product-specific EC measures"); and
- various EC member State safeguard measures prohibiting the import and/or marketing of specific biotech products (hereafter the "EC member State safeguard measures").

COMPLAINT BY THE UNITED STATES (DS291): CONCLUSIONS AND RECOMMENDATIONS OF THE PANEL .

General EC moratorium.

For the reasons set forth in this Report, the Panel concludes, as a factual matter, that:

- The European Communities applied a general *de facto* moratorium on the approval of biotech products between June 1999 and August 2003, which is when this Panel was established.

For the reasons set forth in this Report, the Panel further concludes, as a legal matter, that:

- The European Communities has acted inconsistently with its obligations under Annex C(1)(a), first clause, of the *SPS Agreement* and, consequently, with its obligations under Article 8 of the *SPS Agreement* by applying a general *de facto* moratorium on approvals between June 1999 and August 2003.
- The United States has not established that the European Communities has acted inconsistently with its obligations under Annex C(1)(b) of the *SPS Agreement* by applying a general *de facto* moratorium on approvals between June 1999 and August 2003.
- The European Communities has not acted inconsistently with its obligations under Annex B(1) and Article 7 of the *SPS Agreement* in respect of the general *de facto* moratorium on approvals.
- The European Communities has not acted inconsistently with its obligations under Article 5.1 of the *SPS Agreement* by applying a general *de facto* moratorium on approvals between June 1999 and August 2003.
- The European Communities has not acted inconsistently with its obligations under Article 5.5 of the *SPS Agreement* by applying a general *de facto* moratorium on approvals between June 1999 and August 2003.
- The United States has not established that the European Communities has acted inconsistently with its obligations under Article 2.2 of the *SPS Agreement* by applying a general *de facto* moratorium on approvals between June 1999 and August 2003.
- The United States has not established that the European Communities has acted inconsistently with its obligations under Article 2.3 of the *SPS Agreement* by applying a general *de facto* moratorium on approvals between June 1999 and August 2003.

Article 3.8 of the DSU provides that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment". The European Communities failed to rebut this presumption. Therefore, to the extent the European Communities has acted inconsistently with its obligations under the *SPS Agreement*, it must be presumed to have nullified or impaired benefits accruing to the United States under that Agreement.

In the light of these conclusions, the Panel recommends that the Dispute Settlement Body request the European Communities to bring the general *de facto* moratorium on approvals into conformity with its obligations under the *SPS Agreement*, if, and to the extent that, that measure has not already ceased to exist.

Product-specific EC measures.

The Panel made findings in relation to twenty-five product-specific EC measures challenged by the United States (hereafter "the relevant product-specific measures").

For the reasons set forth in this Report, the Panel concludes that:

The European Communities has breached its obligations under Annex C(1)(a), first clause, of the *SPS Agreement* and, consequently, its obligations under Article 8 of the *SPS Agreement* in respect of the approval procedures concerning:

- **Falcon oilseed rape;**
- **MS8/RF3 oilseed rape;**
- **RR fodder beet;**
- **Bt-531 cotton;**
- **RR-1445 cotton;**
- **Liberator oilseed rape;**
- **Bt-11 maize (EC-69);**
- **RR oilseed rape (EC-70);**
- **BXN cotton;**
- **Bt-1507 maize (EC-74);**
- **Bt-1507 maize (EC-75);**
- **NK603 maize;**
- **GA21 maize (EC-78);**
- **MON810 x GA21 maize;**
- **RR sugar beet;**
- **GA21 maize (food);**
- **Bt-11 sweet maize (food);**
- **MON810 x GA21 maize (food);**
- **Bt-1507 maize (food);**
- **NK603 maize (food); and**
- **RR sugar beet (food).**

The United States has not established that the European Communities has breached its obligations under Annex C(1)(a), first clause, and Article 8 of the *SPS Agreement* in respect of the approval procedures concerning:

- **the Transgenic potato;**
- **LL soybeans (EC-71);**
- **LL oilseed rape; and**
- **LL soybeans (food).**

- The United States has not established that the relevant product-specific measures have resulted in the European Communities acting inconsistently with its obligations under Annex C(1)(b) and Article 8 of the *SPS Agreement*.
- The European Communities has not acted inconsistently with its obligations under Annex B(1) and Article 7 of the *SPS Agreement* in respect of any of the relevant product-specific measures.
- The European Communities has not acted inconsistently with its obligations under Article 5.1 of the *SPS Agreement* in respect of any of the relevant product-specific measures.
- The European Communities has not acted inconsistently with its obligations under Article 5.5 of the *SPS Agreement* in respect of any of the relevant product-specific measures.
- The United States has not established that the European Communities has acted inconsistently with its obligations under Article 2.2 of the *SPS Agreement* in respect of any of the relevant product-specific measures.

Article 3.8 of the DSU provides that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment". The European Communities failed to rebut this presumption. Therefore, to the extent the European Communities has acted inconsistently with its obligations under the *SPS Agreement* in respect of the relevant product-specific measures, it must be presumed to have nullified or impaired benefits accruing to the United States under that Agreement.

In the light of these conclusions, the Panel recommends that the Dispute Settlement Body request the European Communities to bring the relevant product-specific measures into conformity with its obligations under the *SPS Agreement.* These recommendations do not apply to those relevant product-specific measures that were withdrawn after the Panel was established or the product-specific measure affecting the approval of Bt-11 sweet maize (food), since the application concerning Bt-11 sweet maize (food) was definitively approved during the course of the Panel proceedings.

EC member State safeguard measures

The Panel made findings in relation to all nine member State safeguard measures challenged by the United States (hereafter "the relevant member State safeguard measures").

(a) Austria – T25 maize

In relation to the Austrian safeguard measure on T25 maize, and for the reasons set forth in this Report, the Panel concludes that:

- The Austrian safeguard measure on T25 maize is not based on a risk assessment as required by Article 5.1 of the *SPS Agreement*, and it is not consistent with the requirements of Article 5.7 of the *SPS Agreement*. Therefore, by maintaining the measure in question, the European Communities has acted inconsistently with its obligations under Article 5.1.
- By maintaining, inconsistently with Article 5.1 of the *SPS Agreement*, the Austrian safeguard measure on T25 maize, the European Communities has, by implication, also acted inconsistently with the second and third requirements in Article 2.2 of the *SPS Agreement*.

Austria - Bt-176 maize

In relation to the Austrian safeguard measure on Bt-176 maize, and for the reasons set forth in this Report, the Panel concludes that:

- The Austrian safeguard measure on Bt-176 maize is not based on a risk assessment as required by Article 5.1 of the *SPS Agreement*, and it is not consistent with the requirements of Article 5.7 of the *SPS Agreement*. Therefore, by maintaining the measure in question, the European Communities has acted inconsistently with its obligations under Article 5.1.
- By maintaining, inconsistently with Article 5.1 of the *SPS Agreement*, the Austrian safeguard measure on Bt-176 maize, the European Communities has, by implication, also acted inconsistently with the second and third requirements in Article 2.2 of the *SPS Agreement*.

Austria - MON810 maize

In relation to the Austrian safeguard measure on MON810 maize, and for the reasons set forth in this Report, the Panel concludes that:

- The Austrian safeguard measure on MON810 maize is not based on a risk assessment as required by Article 5.1 of the *SPS Agreement*, and it is not consistent with the requirements of Article 5.7 of the *SPS Agreement*. Therefore, by maintaining the measure in question, the European Communities has acted inconsistently with its obligations under Article 5.1.
- By maintaining, inconsistently with Article 5.1 of the *SPS Agreement*, the Austrian safeguard measure on MON810 maize, the European Communities has, by implication, also acted inconsistently with the second and third requirements in Article 2.2 of the *SPS Agreement*.

France - MS1/RF1 oilseed rape (EC-161)

In relation to the French safeguard measure on MS1/RF1 oilseed rape (EC-161), and for the reasons set forth in this Report, the Panel concludes that:

- The French safeguard measure on MS1/RF1 oilseed rape (EC-161) is not based on a risk assessment as required by Article 5.1 of the *SPS Agreement*, and it is not consistent with the requirements of Article 5.7 of the *SPS Agreement*. Therefore, by maintaining the measure in question, the European Communities has acted inconsistently with its obligations under Article 5.1.
- By maintaining, inconsistently with Article 5.1 of the *SPS Agreement*, the French safeguard measure on MS1/RF1 oilseed rape (EC-161), the European Communities has, by implication, also acted inconsistently with the second and third requirements in Article 2.2 of the *SPS Agreement*.

France - Topas oilseed rape

In relation to the French safeguard measure on Topas oilseed rape, and for the reasons set forth in this Report, the Panel concludes that:

- The French safeguard measure on Topas oilseed rape is not based on a risk assessment as required by Article 5.1 of the *SPS Agreement*, and it is not consistent with the requirements of Article 5.7 of the *SPS Agreement*. Therefore, by maintaining the measure in question, the European Communities has acted inconsistently with its obligations under Article 5.1.
- By maintaining, inconsistently with Article 5.1 of the *SPS Agreement*, the French safeguard measure on Topas oilseed rape, the European Communities has, by implication, also acted inconsistently with the second and third requirements in Article 2.2 of the *SPS Agreement*.

Germany – Bt-176 maize

In relation to the German safeguard measure on Bt-176 maize, and for the reasons set forth in this Report, the Panel concludes that:

- The German safeguard measure on Bt-176 maize is not based on a risk assessment as required by Article 5.1 of the *SPS Agreement*, and it is not consistent with the requirements of Article 5.7 of the *SPS Agreement*. Therefore, by maintaining the measure in question, the European Communities has acted inconsistently with its obligations under Article 5.1.
- By maintaining, inconsistently with Article 5.1 of the *SPS Agreement*, the German safeguard measure on Bt-176 maize, the European Communities has, by implication, also acted inconsistently with the second and third requirements in Article 2.2 of the *SPS Agreement*.

Greece - Topas oilseed rape

In relation to the Greek safeguard measure on Topas oilseed rape, and for the reasons set forth in this Report, the Panel concludes that:

- The Greek safeguard measure on Topas oilseed rape is not based on a risk assessment as required by Article 5.1 of the *SPS Agreement*, and it is not consistent with the requirements of Article 5.7 of the *SPS Agreement*. Therefore, by maintaining the measure in question, the European Communities has acted inconsistently with its obligations under Article 5.1.
- By maintaining, inconsistently with Article 5.1 of the *SPS Agreement*, the Greek safeguard measure on Topas oilseed rape, the European Communities has, by implication, also acted inconsistently with the second and third requirements in Article 2.2 of the *SPS Agreement*.
- There is no need to rule on the United States' claim under Article XI:1 of the GATT 1994.

Italy - Bt-11 maize (EC-163), MON810 maize, MON809 maize and T25 maize

In relation to the Italian safeguard measure on Bt-11 maize (EC-163), MON810 maize, MON809 maize and T25 maize, and for the reasons set forth in this Report, the Panel concludes that:

- The Italian safeguard measure on Bt-11 maize (EC-163), MON810 maize, MON809 maize and T25 maize is not based on a risk assessment as required by Article 5.1 of the *SPS Agreement*, and it is not consistent with the requirements of Article 5.7 of the *SPS Agreement*. Therefore, by maintaining the measure in question, the European Communities has acted inconsistently with its obligations under Article 5.1.
- By maintaining, inconsistently with Article 5.1 of the *SPS Agreement*, the Italian safeguard measure on Bt-11 maize (EC-163), MON810 maize, MON809 maize and T25 maize, the European Communities has, by implication, also acted inconsistently with the second and third requirements in Article 2.2 of the *SPS Agreement*.

Luxembourg – Bt-176 maize

In relation to Luxembourg's safeguard measure on Bt-176 maize, and for the reasons set forth in this Report, the Panel concludes that:

- Luxembourg's safeguard measure on Bt-176 maize is not based on a risk assessment as required by Article 5.1 of the *SPS Agreement*, and it is not consistent with the requirements of Article 5.7 of the *SPS Agreement*. Therefore, by maintaining the measure in question, the European Communities has acted inconsistently with its obligations under Article 5.1.
- By maintaining, inconsistently with Article 5.1 of the *SPS Agreement*, Luxembourg's safeguard measure on Bt-176 maize, the European Communities has, by implication, also acted inconsistently with the second and third requirements in Article 2.2 of the *SPS Agreement*.

Nullification or impairment of benefits and recommendations

Article 3.8 of the DSU provides that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment". The European Communities failed to rebut this presumption. Therefore, to the extent the European Communities has acted inconsistently with its obligations under the *SPS Agreement* in respect of the relevant member State safeguard measures, it must be presumed to have nullified or impaired benefits accruing to the United States under that Agreement.

In the light of these conclusions, the Panel recommends that the Dispute Settlement Body request the European Communities to bring the relevant member State safeguard measures into conformity with its obligations under the *SPS Agreement*.

European Communities – Selected Customs Matters.

AB-2006-4

Report of the Appellate Body

WT/DS315/AB/R (13 November 2006)

Introduction.

The United States and the European Communities each appeal certain issues of law and legal interpretations developed in the Panel Report, *European Communities – Selected Customs Matters* (the "Panel Report"). The Panel was established to consider a complaint by the United States concerning the European Communities' system of customs administration under Articles X:3(a) and X:3(b) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

Before the Panel, the United States claimed that the European Communities administers the following instruments of its customs law in a non-uniform manner, in violation of Article X:3 (a) of the GATT 1994:

- **Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code, including all annexes thereto, as amended (the "Community Customs Code");**
- **Commission Regulation (EEC) No. 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code, including all annexes thereto, as amended (the "Implementing Regulation");**
- **Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended (the "Common Customs Tariff");**
- **the Integrated Tariff of the European Communities established by virtue of Article 2 of Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, including all annexes thereto, as amended (the "TARIC"); and**
- **for each of the above laws and regulations, all amendments, "implementing measures and other related measures".**

The United States submitted that various instances of alleged non-uniform administration of European Communities customs law illustrate that the European Communities' system of customs administration as a whole is inconsistent with the requirement of uniform administration contained in Article X:3(a) of the GATT 1994. In addition, the United States claimed that the European

Communities does not provide for the prompt review and correction of administrative action relating to customs matters as required by Article X:3(b) of the GATT 1994.

In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 16 June 2006, the Panel concluded that its terms of reference authorized it to consider only "the manner of administration by the national customs authorities of the member States of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures in the areas of customs administration specifically identified in the United States' request for establishment of a panel." These areas of customs administration were "the classification and valuation of goods, procedures for the classification and valuation of goods, procedures for the entry and release of goods, procedures for auditing entry statements after goods are released into free circulation, penalties and procedures regarding the imposition of penalties for violation of customs rules and record-keeping requirements". The Panel held that it was "authorized to examine particular cases or instances of administration of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff and the TARIC and related measures in those areas of customs administration specifically identified in the United States' request".

The Panel found that it was "precluded from considering 'as such' challenges of the design and structure of the [European Communities'] system of customs administration as a whole, and also the design and structure of the [European Communities'] system in the areas of customs administration … specifically identified in the United States' request for the establishment of a panel." However, at the conclusion of its analysis of the United States' claim under Article X:3(a) of the GATT 1994, the Panel observed that, even if it were authorized by its terms of reference to make findings on the design and structure of the European Communities' system of customs administration "as such", the United States had not demonstrated that the design and structure of the European Communities' system of customs administration, including components thereof, necessarily results in a violation of Article X:3(a). According to the Panel, the United States merely referred to "a number of apparently random instances of alleged violation of Article X: 3(a) ..., without demonstrating ... that those examples are symptomatic and representative of underlying structural deficiencies in the [European Communities'] system of customs administration."

The Panel therefore recommended:

> **… that the Dispute Settlement Body request the European Communities to bring itself into conformity with respect to:**
>
> **(a) the administration of the Common Custom[s] Tariff regarding the administrative process leading to the tariff classification of blackout drapery lining;**
> **(b) the administration of the Common Customs Tariff regarding the tariff classification of liquid crystal display monitors with digital video interface;**
> **(c) the administration of Article 147(1) of the Implementing Regulation regarding the imposition by customs authorities in some member States of a form of prior approval with respect to the successive sales provision in the context of customs valuation.**

<u>Issues Raised in This Appeal.</u>

The following issues are raised in this appeal:

(a) with respect to the Panel's terms of reference:

(i) whether the Panel erred in finding that the "measure at issue" for the purposes of a claim under Article X:3(a) of the GATT 1994 must necessarily be "the manner of administration that is allegedly non-uniform, partial and/or unreasonable";

(ii) whether the Panel erred in finding that the specific measure at issue in this dispute is "the manner of administration ... of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures", and, furthermore, that it was confined to "the areas of customs administration specifically identified in the United States' request for establishment of a panel";

(iii) whether the Panel erred in finding that, due to the wording and content of the panel request, it was precluded from considering "as such" challenges of the design and structure of the European Communities' system of customs administration as a whole or overall; and

(iv) whether the Panel erred in its interpretation of the temporal scope of its terms of reference in respect of "steps and acts of administration that pre-date or post-date the establishment of a panel";

(b) with respect to Article X:3(a) of the GATT 1994:

(i) whether the Panel erred in finding that the term "administer" in Article X:3(a) of the GATT 1994 "relates to the application of laws and regulations, including administrative processes and their results, but not to laws and regulations as such", and whether, consequently, the Panel erred in finding that different penalty provisions and audit procedures found among the member States of the European Communities are not inconsistent with Article X:3(a) of the GATT 1994;

(ii) whether the Panel has made an interpretation to the effect that Article X:3(a) of the GATT 1994 requires uniformity of "administrative processes"; whether the Panel erred in finding, in paragraph 7.119 of the Panel Report, that the term "administer" relates to administrative processes; and whether the Panel erred in finding that the administrative process leading to the tariff classification of blackout drapery lining amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994, and that the European Communities has violated Article X:3(a) of the GATT 1994 with respect to the tariff classification of blackout drapery lining;

(iii) whether the Panel erred in finding that the European Communities has violated Article X:3(a) of the GATT 1994 with respect to the tariff classification of liquid crystal display flat monitors with a digital video interface;

(iv) whether the Panel erred in finding that the European Communities' administration of the "successive sales provision" amounts to a violation of Article X:3(a) of the GATT 1994 because some member States of the European Communities impose a "form of prior approval" requirement while others do not; and

(v) in the event that the Appellate Body concludes that the Panel erred in its identification of the specific measures at issue in this dispute, and in the event that the Appellate Body concludes that the United States was not precluded from challenging the European Communities' system of customs administration as a whole or overall, whether the Appellate Body is in a position to complete the analysis regarding this claim;

(c) with respect to Article X:3(b) of the GATT 1994:

(d) whether the Panel erred in finding that "Article X:3(b) [of the GATT 1994] does not necessarily mean that the decisions of the judicial, arbitral or administrative tribunals or procedures for the review and correction of administrative action relating to customs matters must govern the practice of *all* the agencies entrusted with administrative enforcement *throughout the territory* of a particular [WTO] Member"; and

(e) with respect to Article XXIV:12 of the GATT 1994:in the event that the conditions posited by the European Communities' appeal are fulfilled, whether the Panel erred in its interpretation of Article XXIV:12 of the GATT 1994.

Findings and Conclusions.

For the reasons set out in this Report, the Appellate Body:

(a) with respect to the Panel's terms of reference:

(i) reverses the Panel's finding, in paragraph 7.20 of the Panel Report, that the "measure at issue" for purposes of a claim under Article X:3(a) of the GATT 1994 must necessarily be "the manner of administration that is allegedly non-uniform, partial and/or unreasonable";

(ii) reverses the Panel's finding, in paragraphs 7.33 and 8.1(a)(i) of the Panel Report, that the specific measure at issue in this dispute is "the manner of administration ... of the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, the TARIC and related measures in the areas of customs administration specifically identified in the United States' request for establishment of a panel"; and finds, instead, that the specific measures at issue identified in the panel request are the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, and the TARIC, as administered collectively;

(iii) reverses the Panel's finding, in paragraphs 7.50, 7.64, and 8.1(a)(iii) of the Panel Report, that, due to the wording and content of the panel request, the United States was precluded from challenging the European Communities' system of customs administration as a whole or overall; and reverses also the Panel's finding, in paragraphs 7.63, 7.64, and 8.1(a)(iii) of the Panel Report, that the Panel was precluded from considering the United States' argument that the "design and structure" of the European Communities' system of customs administration necessarily result in a violation of Article X:3(a) of the GATT 1994; and

(iv) upholds, albeit for different reasons, the Panel's interpretation, in paragraph 7.37 of the Panel Report, that "the steps and acts of administration that pre-date or post-date the establishment of a panel may be relevant to determining whether or not a violation of Article X:3(a) of the GATT 1994 exists at the time of [panel] establishment";

(b) with respect to claims under Article X:3(a) of the GATT 1994:

(i) reverses the Panel's finding, in paragraph 7.119 of the Panel Report, that, without exception, Article X:3(a) of the GATT 1994 always relates to the application of laws and regulations, but not to laws and regulations as such; but upholds the Panel's conclusions, in paragraphs 7.434, 7.444, 8.1(d)(i), and 8.1(d)(ii) of the Panel Report, that substantive differences in penalty laws and audit procedures among the

member States of the European Communities alone do not constitute a violation of Article X:3(a) of the GATT 1994;

(ii) concludes that the Panel did not find that Article X:3(a) of the GATT 1994 requires uniformity of "administrative processes"; upholds the Panel's finding, in paragraph 7.119 of the Panel Report, that the term "administer" in Article X:3(a) of the GATT 1994 may include administrative processes that put into effect the legal instruments of the kind described in Article X:1 of the GATT 1994; but reverses the Panel's finding, in paragraphs 7.276 and 8.1(b)(iv) of the Panel Report, that the administrative process leading to the tariff classification of blackout drapery lining amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994, and that the European Communities has violated Article X:3(a) of the GATT 1994 with respect to the tariff classification of blackout drapery lining;

(iii) upholds the Panel's finding, in paragraphs 7.305 and 8.1(b)(v) of the Panel Report, that "[t]he tariff classification of liquid crystal display monitors with digital video interface amounts to non-uniform administration within the meaning of Article X:3(a) of the GATT 1994";

(iv) reverses the Panel's finding, in paragraphs 7.385 and 8.1(c)(ii) of the Panel Report, that "the European Communities does not administer its customs law concerning successive sales—in particular, Article 147(1) of the Implementing Regulation—in a uniform manner, in violation of Article X:3(a) of the GATT 1994"; and

(v) is unable to complete the analysis with respect to the United States' claim that the European Communities' system of customs administration as a whole or overall is not administered in a uniform manner, as required by Article X:3(a) of the GATT 1994;

(c) with respect to Article X:3(b) of the GATT 1994:
upholds the conclusion of the Panel, in paragraphs 7.539, 7.556, and 8.1(e) of the Panel Report, that "Article X:3(b) of the GATT 1994 does not necessarily mean that the decisions of the judicial, arbitral or administrative tribunals or procedures for the review and correction of administrative action relating to customs matters must govern the practice of *all* the agencies entrusted with administrative enforcement *throughout the territory* of a particular [WTO] Member"; and

(d) with respect to Article XXIV:12 of the GATT 1994:
finds that the conditions on which the European Communities' appeal is predicated are not satisfied, and therefore does not consider it.

The Appellate Body recommends that the DSB request the European Communities to bring its measures, which have been found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

USTR PRESS RELEASES OF WTO CASES (2001 – 2006).

(All press releases are from the USTR Press Release website – Index -- http://www.ustr.gov/Document_Library/Press_Releases/2006/Section_Index.html)

The Office of the United States Trade Representative

WTO Appellate Body Finds Against EU Customs Law Administration.

11/13/2006

http://www.ustr.gov/Document_Library/Press_Releases/2006/November/WTO_Appellate_Body_Finds_Against_EU_Customs_Law_Administration.html

WASHINGTON — The WTO Appellate Body issued a report today confirming that the European Union (EU) fails to administer in a uniform manner its rules on the customs classification of liquid crystal display monitors. The report upheld a June 16, 2006 finding by a WTO dispute settlement panel. Additionally, the Appellate Body agreed with the United States that that panel erred in declining to consider the broader question of whether the EU's system of customs administration as a whole is inconsistent with WTO rules requiring the uniform administration of customs laws.

In this dispute, the United States claimed that the administration of EU customs law by 25 different agencies (one for each of the EU's Member States), coupled with a lack of any procedures or mechanisms to reconcile the divergences that inevitably occur on important matters including classification and valuation, is a violation of the EU's obligation to administer its customs laws in a uniform manner.

Deputy U.S. Trade Representative John Veroneau made the following statement regarding the Appellate Body report:

"Today's Appellate Body report reinforces that the EU is subject to the same rules as other WTO Members. The EU's internal decisions about how to organize itself do not excuse it from or diminish its obligations to other WTO Members. Like every other WTO Member, the EU must administer its customs law uniformly across its territory. Today's report confirms the panel's finding that the EU does not do so when it comes to the classification of LCD monitors.

"We would have preferred the original panel to have made a broader finding about the EU's system as a whole. In that regard, we are pleased that in today's report, the Appellate Body reversed the panel's decision to limit its findings to particular instances of administration of EU customs law. The EU's administration of its rules on LCD monitors is indicative of how the system as a whole operates. Had the panel considered the EU system as a whole, it should have reached that conclusion.

"The United States welcomes the Appellate Body's report and looks forward to the EU's compliance with its findings."

Background.

The lack of uniform administration of EU customs law poses a significant barrier to trade, especially to the small- and medium-sized exporters that lack the resources to navigate a system that the original panel found to be "complicated and, at times, opaque and confusing." That barrier became more daunting when the EU grew from 15 to 25 members and will become even more so when it grows to 27 members.

In this dispute, the United States challenged: (1) the lack of uniform administration of EU customs law, and (2) the lack of an EU tribunal or other procedure for the prompt review and correction of customs administrative actions whose decisions apply throughout the EU. The United States argued that these features of the EU's customs law administration and review system are inconsistent with Articles X:3(a) and X:3(b) of the General Agreement on Tariffs and Trade 1994, respectively.

In its June 16, 2006 report, a dispute settlement panel agreed with the United States in part, finding the EU to be in breach of its Article X:3(a) obligation of uniform administration in three particular areas, including with respect to the classification of LCD monitors. However, the panel declined to reach the broader question of whether the EU's system as a whole is inconsistent with Article X:3(a). In August, the United States and the EU each appealed from different aspects of the panel report.

In today's report, the Appellate Body upheld the panel's finding that the EU is in breach of Article X:3(a) with respect to its administration of rules pertaining to the classification of LCD monitors.

Additionally, the Appellate Body found that the panel erred in declining to consider the broader question of whether the EU's system as a whole is inconsistent with Article X:3(a).

The Office of the United States Trade Representative

“Favorable Ruling in WTO Case on Agricultural Biotechnology.”

09/29/06

WASHINGTON - U.S. Trade Representative Susan C. Schwab and Agriculture Secretary Mike Johanns today announced that the World Trade Organization (WTO) has ruled in favor of the United States, Argentina, and Canada in their WTO case against the European Union (EU) over its illegal moratorium on approving agricultural biotech products and unjustified EU member - state bans of previously approved products.

"The WTO has ruled in favor of science-based policymaking over the unjustified, anti-biotech policies adopted in the EU," Ambassador Schwab said. "After eight years of legal wrangling and stalling by Europe, we are a step closer to clearing barriers faced by U.S. agricultural producers and expanding global use of promising advances in food production."

The United States brought a WTO challenge in May 2003, after five years of delays by the EU in complying with WTO rules as well as its own procedures and the recommendations of its own scientists. The WTO report issued today is the longest in the history of the WTO.

"Today’s decision affirms what the world’s farmers have known about biotechnology for many years," Johanns said. "Since the first biotechnology crops were commercialized in 1996, we’ve seen double-digit increases in their adoption every single year. Biotechnology crops not only are helping to meet the world’s food needs, they also are having a positive environmental impact on our soil and water resources. Farmers who grow biotechnology crops in 21 countries around the world, including 5 in the EU, stand to benefit from today's decision."

In addition to the EU's across-the-board moratorium on product approvals, the WTO case challenged product bans imposed by six EU Member States (Austria, France, Germany, Greece, Italy, and Luxembourg) on seven of the biotech crops approved by the EU prior to the adoption of the moratorium. In each case, the panel upheld the United States' claims that, in light of positive safety assessments issued by the EU's own scientists, the Member State bans were not supported by scientific evidence and were thus inconsistent with WTO rules.

Although the EU approved a handful of biotech applications following the initiation of the case in 2003, the EU has yet to lift the moratorium in its entirety. Some biotech product applications have been pending for 10 years or more, and applications for many commercially important products continue to face unjustified, politically-motivated delays.

"I urge the EU to fully comply with its WTO obligations, and consider all outstanding biotech product applications, and evaluate their scientific merits in accordance with the EU's own laws, without undue delay," Schwab added.

Despite the EU's moratorium, there is considerable support for agricultural biotechnology within the EU. The United States looks forward to working with European trading partners to enhance the availability of this technology to farmers and consumers throughout the world.

Agricultural biotechnology promotes economic development, and has delivered on its promise to feed a hungry world, increase product yields, reduce pesticide use, improve nutrition and disease prevention, enhance food security, and increase incomes of farmers—most of whom are in the developing world. Agricultural biotechnology is a continuation of the long tradition of agricultural innovation that has provided the basis for rising prosperity for the past millennium.

Numerous organizations, researchers and scientists have determined that biotech foods pose no threat to humans or the environment. These include the French Academy of Sciences, the 3,200 scientists who cosponsored a declaration on biotech foods, and numerous scientific studies – including a joint study conducted by seven national academies of science (the National Academies of Science of the United States, Brazil, China, India, and Mexico, plus the Royal Society of London and the Third World Academy of Sciences).

Worldwide use of biotech crops has continued to grow. About 222 million acres were planted with biotech crops in 2005, up from 200 million acres in 2004. Of this, over one-third was in developing countries. Biotech crops were grown by approximately 8.5 million farmers in the same year, with about 90 percent from developing countries.

Leading producers of biotech crops include the United States, with approximately 123 million acres under cultivation in 2005, followed by Argentina, with 42 million acres; Brazil, with 23 million acres: Canada, with 14 million acres; and China, with 8 million acres. Other countries growing biotech crops include India, Iran, Philippines, Australia, South Africa, Paraguay, Uruguay, Colombia, Honduras, Mexico, Czech Republic, Romania, Portugal, Spain, France, and Germany.

Background:

Since the late 1990s, the EU has pursued policies that undermine agricultural biotechnology and trade in biotech foods. First, six member states (Austria, France, Germany, Greece, Italy and Luxemburg) banned biotech crops approved by the EU, and the EU Commission refused to challenge the illegal bans. After October 1998, the EU adopted an across-the-board moratorium under which no biotech application was allowed to reach final approval. This moratorium has caused a growing portion of U.S. agricultural exports to be excluded from EU markets, and has unfairly cast concerns about biotech products around the world, particularly in developing countries.

In May 2003, the United States, Argentina, and Canada took the first step in the WTO dispute by requesting consultations with the EU. The consultations did not result in a resolution of the dispute. In August 2003, the United States, Argentina, and Canada requested the establishment of a dispute settlement panel. Over the three-year course of the dispute, the disputing parties submitted hundreds of pages of briefs and dozens of factual exhibits. The panel also called upon a slate of six independent scientific experts, who submitted hundreds of pages of materials and spent two days with the panel and the parties to opine on scientific issues related to the dispute. The result is a comprehensive panel report of over 1,000 pages in length, with additional hundreds of pages of annexes.

Under WTO rules, the panel report will be adopted by the WTO membership within sixty days, unless one or more of the disputing parties decides to initiate an appeal. If the report is appealed, the WTO Appellate Body will issue its report within approximately 90 days of the appeal.

The WTO Agreement on Sanitary and Phytosanitary Measures (SPS) recognizes that countries are entitled to regulate crops and food products to protect health and the environment. The WTO SPS Agreement requires, however, that members have sufficient scientific evidence for their SPS measures

and that they operate their approval procedures without "undue delay." Otherwise, there is a risk countries may without justification use such regulations to thwart trade in safe, wholesome, and nutritious products.

Before 1999, the EU approved nine agriculture biotech products for planting or import. It then adopted a moratorium under which no applications were allowed to reach a final decision. The WTO Panel report issued today upholds the claims of the United States, Argentina and Canada that the EU had adopted a moratorium on approvals from 1999 through August 2003 (when the case was initiated); that the moratorium was not justified by any valid scientific or regulatory concerns; and thus that the moratorium violated the EU's WTO obligations to consider product applications without "undue delay."

Office of the United States Trade Representative.

Signing of U.S.-Canada Agreement on Softwood Lumber Trade.

09/12/2006

This is a great day – a day that is a long time in the making – and which many people understandably thought would never come.

With this signing and implementation of this landmark agreement, we hope to bring to a close over 20 years of litigation – and the market instability and political tension that have often accompanied it.

To reach this agreement, both sides had to compromise and make hard choices - and there is still much work to be done to bring the agreement into force. But once it is operational, this will be a good agreement for the United States, for Canada, and for the relationship between our two countries.

Canada is the United States' largest trading partner, and it is vital that we keep that relationship strong and growing. Even while this dispute was ongoing, over 96% of our trade with Canada was dispute-free. After this agreement is implemented, over 99% of our trade will be dispute free.

For those who would criticize this agreement, I ask them to consider the alternatives. Without this agreement, we would see a continuation of litigation – either through continuation of the existing anti-dumping and countervailing duty orders or through the filing of another round of cases. The duties collected as a result of those cases could be substantially higher than those applied under the settlement and would be susceptible to great volatility. Since 2002, the combined duty margins on softwood lumber have ranged from 11% to 27%. If this agreement had been in place over the last ten years, there would have been unrestricted trade for over half the time.

In place of costly litigation, we will create a predictable and stable market; strengthen the competitiveness of the North American lumber industry; provide a pathway to resolve the policy questions underlying this dispute; bring a little more harmony among neighbors; and provide financial assistance to worthy causes.

With this agreement, we will have a formal channel – outside the super-heated environment of litigation – to discuss ways to resolve our differences once and for all. Under the terms of the agreement, we will establish a bi-national working group to discuss policies that could eventually result in the elimination of border measures. The commission is expected to produce a report within 18 months after the agreement is signed. We have never had that before under any previous lumber agreement.

With this agreement, almost half a billion dollars will be used to advance low income housing initiatives and disaster relief, to provide community assistance to timber-reliant communities, and to assist in the development of forest management practices that will promote sustainable forestry. Another $50 million will be disbursed to a bi-national industry council, which will work to build an atmosphere of trust and cooperation, while promoting the integration and strengthening of the industry.

The United States Government is fully committed to this endeavor. We fully expect that this agreement will have a duration of at least seven to nine years. In fact, it is our sincere hope that the processes that will be established under the agreement will lead to a permanent solution to a problem that has too long been a distraction in our relationship. We have an historic opportunity and we need to grab it.

I want to thank the leaders of our two great countries – President Bush and Prime Minister Harper – for their leadership and their unwavering commitment to finding a solution to this longstanding irritant.

I also want to thank my Canadian colleagues and counterparts, Ambassador Michael Wilson and Minister David Emerson, for their tremendous efforts in concluding this agreement. Their steadfast support has been, and will continue to be, absolutely critical to the success of this undertaking.

Finally, I want to thank the U.S. negotiating team from USTR and the Department of Commerce, which has put in long hours over many months to negotiate this agreement.

We can all be proud of this tremendous achievement. Let us stay committed to its success.

Office of the United State Trade Representative.

U.S. Files WTO Case Against China Over Treatment of U.S. Auto Parts.

03/30/2006

WASHINGTON – U.S. Trade Representative Rob Portman announced that the United States requested WTO dispute settlement consultations with China today due to its unfair treatment of U.S. auto parts.

"As a mature trading partner, China should be held accountable for its actions and be required to live up to its responsibilities," Portman said.

"China's regulations on imported auto parts appear to violate its WTO obligations. While the United States has raised this issue repeatedly and sought repeal of these measures, the problem has not yet been resolved," Portman added. "We hope the filing of our request for consultations will lead to a speedy resolution of this issue."

The U.S. is joined in this WTO action by the European Union. The United States and the EU will continue their close coordination in seeking to resolve this dispute with China.

"As noted in our top-to-bottom review of U.S.-China trade policy, we will not hesitate to pursue our legal options when negotiations are not productive. As also indicated in the review, we seek to enhance cooperation with our trading partners in promoting China's accountability and reform. Today's actions are consistent with these commitments," Portman added.

China's taxes on imported auto parts discourage automobile manufacturers in China from using imported auto parts in the assembly of vehicles. China's WTO commitments limit its tariffs on imported auto parts to rates that are significantly below China's tariffs on finished vehicles. However,

China recently implemented regulations that impose a tax on imported auto parts equal to the tariff on complete automobiles, if the final assembled vehicle fails to meet certain local content requirements. Effectively, China's regulations discriminate against U.S. and third country auto parts in favor of Chinese-manufactured parts.

Increasing access to China's auto market was a key issue in China's accession to the WTO. In its WTO accession agreement, China expressly committed to eliminate all local content requirements and to lower and bind its tariffs on auto parts. China's new regulations, however, appear to contradict these obligations.

China's auto market has grown rapidly in recent years, becoming the world's second largest auto market, behind only the United States.

Background.

Under China's regulations governing the importation of auto parts, all vehicle manufacturers in China that use imported parts must register with China customs and provide specific information about each vehicle it assembles, including a list of the imported and domestic parts to be used, and the value and supplier of each part. If the number or value of imported parts in the assembled vehicle exceed specified thresholds, the regulations assess each of the imported parts a charge equal to the tariff on complete automobiles (typically 28%) rather than the tariff applicable to auto parts (typically 10-14%).

The regulations appear designed to encourage manufacturers in China to increase the amount and value of Chinese parts they use in the assembly process – at the expense of parts from the United States and elsewhere. The regulations also provide an incentive for auto parts producers to relocate manufacturing facilities to China.

The United States maintains these regulations impose a tax on U.S. auto parts beyond that allowed by WTO rules, and result in discrimination against U.S. auto parts. As such, China appears to be acting inconsistently with several WTO provisions including Articles II and III of the General Agreement on Tariffs and Trade 1994 and Article 2 of the Agreement on Trade-Related Investment Measures, as well as specific commitments made by China in its WTO accession agreement.

The United States brought the only previous WTO case against China. That dispute, involving China's tax rebate on semiconductors, was resolved during the consultation phase. A second dispute, involving China's antidumping duties on kraft linerboard, was resolved on the day the United States was to initiate the dispute, following notice to China that the dispute would be filed.

Consultations are the first step in a WTO dispute. Under WTO rules, parties that do not resolve an issue through consultations may refer the matter to a WTO dispute settlement panel.

Office of the United State Trade Representative.

Remarks by Ambassador Karan K. Bhatia -- Shanghai Institute of Foreign Trade

Shanghai, China

March 21, 2006

…. Today, I would like to talk with you about that relationship. About how growing U.S.-China trade and investment linkages have benefited both countries. About challenges that we face in that relationship – most significantly, the challenge posed by protectionism in both the United States and China. And finally, about steps our governments can take to deepen our cooperation on bilateral and global economic issues.

…. There are those who have asked me whether a more vigorous enforcement effort will upset the bilateral relationship, or even lead to a trade war? My answer is no. Trade wars arise when you don't have dispute settlement mechanisms. An active dispute agenda should not strain our relationship with China, any more than disputes with other major trading partners strains those relationships.

I would look at it this way -- active participation in dispute settlement is reflective of active and mature engagement in the world economy and in building and maintaining the multilateral trading system.

The EU has been sued 63 times and the US 86 times since the WTO was created. Brazil has brought 16 suits since 2000 alone – Korea 10. In many ways, China has been an anomaly in terms of its isolation from the WTO dispute settlement process. China, the growing economic colossus of Asia, has been the defendant in exactly one WTO case. That case – brought by the United States -- challenged China's imposition of a discriminatory semiconductor VAT. It settled before going to a panel.

I suspect that this will change. In the future, China, as an important player in the international trading system will more frequently be a party in WTO cases – either as a defendant or complainant.

We should remember that dispute settlement was actually intended to de-politicize disputes. Resorting to a quasi-judicial forum to resolve legal disputes, as we do in WTO dispute

settlement – is just another tool to address difficult trade issues not a weapon in a trade war. Making use of this mechanisms that all WTO members have agreed to ought not get in the way of other areas of cooperation – economic-, diplomatic-, security- related or otherwise.

Trade frictions arise even among the closest of partners. In a mature international relationship, those frictions are dealt with on their own terms, while the broader relationship continues to flourish. What is important is that we use all of the bilateral and multilateral means available to solve problems on our bilateral trade agenda.

I am optimistic about the U.S.-China relationship. Our economies are growing increasingly interdependent every day. We meet more frequently with our Chinese counterparts and I believe that both sides understand the importance of making this relationship work. But I am realistic about the challenges we face. China's growing impact on the United States and the rest of the global economy means that it is now being held to a higher standard – that of a mature trading nation. Entering this new phase of our relationship requires that we approach our bilateral dialogue with even greater ambition about the progress we must make on bilateral issues. China should also embrace the new responsibilities it has as a leading player in the international economy.

The United States has played a constructive role in the supporting China's integration into the global economy and in its accession to the WTO. We will continue to do so. We look forward to overcoming new challenges and creating even stronger commercial and political ties in the years to come.

If this is to be the Pacific century, both China and the United States, as Pacific economic powers, will play important roles. We are firm in the belief that, if China continues on its course of economic reform and liberalization, all the world's trading nations will benefit from China's transformation. Thank you.

Office of the United States Trade Representative.

U.S. Wins Mexico Beverage Tax Dispute -- WTO Appellate Body Upholds Panel

03/06/2006

WASHINGTON - US Trade Representative Rob Portman announced today that the WTO Appellate Body has found in favor of the United States in its challenge of Mexico's discriminatory beverage tax. Under the tax, soft drinks made with imported sweeteners, such as high-fructose corn syrup (HFCS) and beet sugar, are subject to a 20 percent tax on their sale and distribution. Beverages made with Mexican cane sugar are tax-exempt.

"This is a good result for our farmers and producers, who seek a level playing field," said Ambassador Portman. "The Appellate Body has confirmed that Mexico's beverage tax is discriminatory and breaks WTO rules. It is clear that Mexico must eliminate this tax and restore fairness for our U.S. corn growers and refiners. We hope Mexico sees this decision as we do, as an opportunity to work together to quickly resolve all outstanding sweetener trade issues between us."

With the Appellate Body report, the WTO has now confirmed that Mexico's beverage tax and reporting requirements discriminate against U.S. imports of HFCS, and that this discrimination is not justified under WTO rules nor does the NAFTA provide Mexico a justification to discriminate against U.S. exports.

Background

Mexico imposed the beverage tax on January 1, 2002. The beverage tax levies a 20 percent tax on soft drinks and other beverages, as well as on syrups and other products that can be diluted to produce soft drinks and other beverages ("soft drinks and syrups"). The beverage tax further imposes a 20 percent tax on services used to transfer soft drinks and syrups (e.g., distribution services). In addition,

the beverage tax subjects taxed products to several bookkeeping and reporting requirements. The beverage tax only applies to soft drinks and syrups that use any sweetener other than cane sugar, such as HFCS or beet sugar. Soft drinks and syrups sweetened exclusively with cane sugar are tax-exempt.

In Mexico, cane sugar is almost exclusively a domestic product, whereas before the tax, HFCS accounted for 99 percent of Mexico's sweetener imports. Thus, by taxing soft drinks and syrups made with HFCS, but not those made with cane sugar, Mexico imposed a tax designed to discriminate against imports.

The beverage tax had an immediate effect on HFCS. Prior to its imposition, soft drink bottlers were the principal consumers of HFCS in Mexico and were increasingly substituting HFCS as a cost-effective alternative to cane sugar. The beverage tax reversed this trend as application of the beverage tax made the use of HFCS in soft drinks and syrups cost-prohibitive.

At the request of the United States, the WTO established the panel on July 6, 2004. Before the WTO panel, the United States claimed that the beverage tax is inconsistent with Mexico's WTO obligations under Articles III:2 and III:4 of the General Agreement on Tariffs and Trade 1994. The United States challenged the tax as applied on soft drinks and syrups, as well as on HFCS and beet sugar used to make soft drinks and syrups. The panel found in favor of the United States on all counts. The panel report was circulated to Members and the public on October 7, 2005. Mexico did not appeal the panel's findings that its beverage tax is discriminatory and contrary to WTO rules that prohibit higher taxes on, and require no less favorable treatment for, imported products as compared to domestic products.

The NAFTA calls for duties that remain on a handful of products, including sugar, to be eliminated by 2008.

The United States and Mexico worked together last year to restart bilateral trade in sweeteners, with separate announcements made in September 2005 to allow imports of 250,000 metric tons of Mexican sugar into the United States and imports of 250,000 metric tons of HFCS into Mexico. Although Mexico's tax remains in place pending compliance with the WTO ruling, some bottlers are able to use these U.S. HFCS exports without being subject to the tax.

The Office of the United States Trade Representative.

Agricultural Biotechnology and the WTO.

02/07/2006

"Today, news reports have stated the World Trade Organization (WTO) has preliminarily found the European Union has a de facto moratorium on agricultural biotechnology products that is inconsistent with WTO rules. The facts on agricultural biotechnology are clear and compelling. It is a safe and beneficial technology that is improving food security and helping to reduce poverty worldwide," said U.S. Trade Representative Rob Portman. "We believe agricultural biotechnology products should be provided a timely, transparent and scientific review by the European Union, and that is why Canada, Argentina and the United States brought the case in the first place."

"The continuing adoption of agricultural biotechnology worldwide is evidence it provides tremendous benefits to farmers and rural communities. Global biotechnology acreage has increased more than 50 fold in the first decade of commercialization, with more than one billion acres planted," said U.S. Agriculture Secretary Mike Johanns. "More than 8.5 million farmers in 21 countries, including five EU nations, are reducing pesticide use, receiving higher yields and preventing erosion by planting biotech varieties. Ninety percent of these farmers are in developing countries, adding to rural incomes, promoting development and preserving our environment."

The Office of the United States Trade Representative.

Congress Approves Legislation Repealing Cotton Subsidy Program.

02/1/06

WASHINGTON – Today, the U.S. House of Representatives approved legislation that will repeal a support program for cotton known as "Step 2." The next step is for the President to sign the measure into law.

"Repeal of this program addresses two important trade priorities. It implements findings in the WTO dispute brought by Brazil, and it fulfills commitments made at the recent Hong Kong Ministerial to eliminate export subsidies for cotton by 2006," Portman said. "These are important objectives, and I commend the Congress for working with the Administration to address these critical issues."

BACKGROUND.

The Deficit Reduction Omnibus Reconciliation Act of 2005, S. 1932, repeals the Step 2 program effective August 1, 2006 and implements recommendations and rulings of the WTO in the dispute brought by Brazil against certain U.S. agricultural programs, principally related to cotton. Repeal of the Step 2 program terminates export subsidies and import substitution subsidies cited by the WTO. It also addresses a WTO finding regarding suppression of world cotton prices.

This legislative action adds to the significant implementation efforts that the Administration undertook in July 2005, when it put in place administrative measures to implement the findings in the Cotton dispute with respect to export credit guarantees.

Repeal of the Step 2 program is also consistent with the development goals of the Doha Development agenda, which calls for developed countries to eliminate all forms of export subsidies for cotton in 2006. It responds to concerns raised by African and other trading partners and fulfills the commitments made at the Hong Kong Ministerial in December 2005.

The U.S. Senate approved identical legislation at the end of 2005. The next step is for the President to sign the bill into law.

The Office of the United States Trade Representative.

Congress Acts -- Byrd Repeal Brings U.S. into Compliance with WTO Ruling.

02/01/2006

WASHINGTON – Today, U.S. Trade Representative Rob Portman lauded action by the Congress to repeal the so-called Byrd Amendment – a step which will bring the U.S. into compliance with a WTO ruling.

"The United States is committed to living up to its WTO obligations. We are very pleased that both the House and Senate have now taken the necessary steps to repeal the Byrd Amendment," Portman said.

"I want to thank House Speaker Dennis Hastert, Majority Leader Bill Frist, Ways and Means Chairman Bill Thomas, Senate Finance Committee Chairman Chuck Grassley and Majority Whip Roy Blunt for their leadership in advancing this issue."

"Special thanks goes to Chairman Thomas for his leadership in including repeal in legislation that initiated in the Ways and Means Committee," Portman added.

Background:

Under the Continued Dumping and Subsidy Offset Act of 2000 (the "Byrd Amendment"), antidumping and countervailing duties are distributed to the U.S. producers who support a petition for import relief. Prior to the Byrd Amendment, these duties were paid into the U.S. Treasury. In January 2003, in a challenge brought by 11 WTO Members, the WTO found that the Byrd Amendment breached the WTO Antidumping and Subsidies Agreements and the GATT 1994. The WTO granted the U.S until the end of 2003 to comply.

At the end of 2004, the WTO authorized eight WTO Members to impose retaliation against the United States. The total amount authorized varied year to year in proportion to the amount of duties distributed and, at present, is $110 million for all eight Members. To date, four of these Members (including Canada, the EU, Japan, and Mexico) have imposed retaliation. Repeal will restore these duties to the Treasury, but will not affect the assessment of the duties against unfairly traded imports or will it affect the U.S. vigorous enforcement of the underlying U.S. trade remedy laws.

Under the repeal legislation, duties on entry of goods made and filed on or after October 1, 2007, will no longer be distributed to U.S. producers.

The Office of the United States Trade Representative.

WTO Panel Report Affirms US Determination Regarding Canadian Lumber.

11/15/2005

WASHINGTON – A World Trade Organization (WTO) dispute settlement panel today rejected a Canadian challenge to a U.S. determination that Canadian lumber is threatening to injure the U.S. lumber industry. The panel found that the United States did not breach WTO rules when the U.S. International Trade Commission (ITC) determined that the U.S. lumber industry is threatened with material injury by reason of dumped and subsidized imports from Canada. United States Trade Representative Rob Portman said the report was an important affirmation that the United States applies its trade remedy laws in a WTO-consistent manner.

"Today's findings confirm that U.S. duties on Canadian lumber to counter the threat of material injury to the U.S. industry were properly imposed under international trade rules," Portman said. "At the same time, we continue to believe that more litigation is not the right approach. Instead we believe that it is in the interest of both the United States and Canada to reach a permanent solution to the long-standing differences over softwood lumber. We hope that today's report will encourage Canada to resume efforts to reach a mutually acceptable negotiated solution."

Today's report resulted from a dispute initiated by Canada in February of this year. Canada alleged that the ITC's determination did not comply with earlier WTO rulings on a previous ITC lumber determination. The report issued today rejects Canada's challenge in its entirety.

Background:

This dispute concerns Canada's challenge to a U.S. measure taken to comply with a prior WTO panel report. The original report found that certain aspects of the ITC's threat of injury determination concerning softwood lumber imports from Canada were inconsistent with U.S. obligations under the WTO Antidumping and Subsidies Agreements. To implement the original panel's recommendation that the United States come into compliance with its WTO obligations, the ITC undertook a four-month "section 129" proceeding in which it gathered additional evidence, held a public hearing, provided parties with three opportunities to submit written briefs and comments, and undertook additional analysis.

At the conclusion of its section 129 proceeding, the ITC issued a new determination on November 24, 2004, in which it found that the U.S. lumber industry is threatened with material injury by reason of imports of dumped and subsidized softwood lumber from Canada. On December 13, 2004, the antidumping and countervailing duty orders on softwood lumber from Canada were amended to reflect the issuance of the ITC's determination. On December 20, 2004, notice of the amendment of the orders was published in the Federal Register.

The WTO challenge that led to today's panel report was initiated by Canada on February 14, 2005, in a request pursuant to Article 21.5 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes. On February 25, 2005, the WTO Dispute Settlement Body referred the matter to the panel that heard the original dispute.

Canada's principal argument was that the ITC's threat of injury determination was not supported by evidence and analysis such that an objective and unbiased investigating authority could have made that determination. The panel rejected that argument in its entirety.

The Office of the United States Trade Representative.

USTR Pursues WTO Process to Probe IPR Enforcement in China.

10/26/2005

GENEVA – US Trade Representative Rob Portman announced that the United States has initiated a special process under World Trade Organization (WTO) rules today to obtain information on China's intellectual property enforcement efforts. Japan and Switzerland joined the United States in submitting similar requests.

"The United States is deeply concerned by the violations of intellectual property rights in China," said U.S. Trade Representative Portman. "The development of intellectual property is one of the driving forces of U.S. economic competitiveness, and we will utilize all tools at our disposal to ensure that U.S. intellectual property rights are protected."

"Based on all available information, piracy and counterfeiting remain rampant in China despite years of engagement on this issue. If China believes that it is doing enough to protect intellectual property, then it should view this process as a chance to prove its case," Portman added. "Our goal is to get detailed information that will help pinpoint exactly where the enforcement system is breaking down so we can decide appropriate next steps."

The United States is utilizing a process established under Article 63.3 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), which, among other things, allows WTO Members to request information pertaining to judicial decisions or administrative rulings in the area of intellectual property rights (IPR) that affect their rights under the TRIPS Agreement. The U.S. anticipates a response from China in approximately three months.

The request will be made available on USTR's website at www.ustr.gov.

Background.

As indicated in last year's Out of Cycle Review (OCR) of China, published in USTR's April 29, 2005, Special 301 Report, industry sources believe that China's inadequate IPR enforcement is resulting in infringement levels of approximately 90 percent or above for virtually every form of intellectual property. USTR observed at that time that "lack of transparent information on IPR infringement levels and enforcement activities in China continues to be an acute problem." The Special 301 Report noted expressions of concern by several industry groups about the Chinese Government's unwillingness to provide sufficiently detailed enforcement information. The OCR results also noted that "when criminal prosecutions are pursued, a lack of transparency makes it difficult to ascertain whether they resulted in convictions and, if so, what penalties were imposed." As a consequence, USTR announced its intent to invoke Article 63.3 of the TRIPS Agreement.

The U.S. request seeks to obtain a more complete picture of China's intellectual property enforcement efforts since 2001. The U.S. transparency request calls upon the Chinese government to make available detailed information concerning the application of criminal, administrative, and civil remedies for infringement cases that affect U.S. right holders.

China's promise to "substantially reduce IPR infringement" during bilateral talks in April 2004 has yielded mixed results. Recent commitments made during July's bilateral talks have proven promising. Data collected from the Article 63.3 transparency request will help to evaluate China's progress implementing its commitments to substantially reduce counterfeiting and piracy.

The Office of the United States Trade Representative.

WTO Panel Finds Tax Discriminatory and Contrary to WTO Rules.

10/07/05

WASHINGTON – U.S. Trade Representative Rob Portman applauded a World Trade Organization (WTO) panel decision issued today siding with the United States in its case against Mexico's beverage tax. Under the tax, soft drinks made with imported sweeteners, such as high-fructose corn syrup (HFCS) and beet sugar, are subject to a 20 percent tax on their sale and distribution. Beverages made with Mexican cane sugar are tax-exempt. The beverage tax resulted in an immediate drop in U.S. exports of HFCS to Mexico. As of 2004, U.S. exports of HFCS to Mexico remained at less than six percent of their pre-tax levels.

"This is an important win for our industry. The WTO panel could not have been clearer: Mexico's beverage tax is discriminatory and contrary to WTO rules," said Portman. "Mexico needs to eliminate this tax as soon as possible, and in doing so, I urge Mexico not to merely substitute one barrier to HFCS for another. Mexico must echo the United States' commitment to free trade for all goods as the implementation of the final NAFTA duty reductions quickly approaches. We hope the recent announcement by Mexico to provide additional duty-free access for HFCS is a step in that direction."

The WTO panel report sided with the United States on all major issues in the dispute. Specifically, the panel agreed that the beverage tax discriminates against U.S. products because it taxes the distribution and sale of beverages that use HFCS and beet sugar but does not tax beverages that use Mexican cane sugar. The panel concluded that such discrimination is contrary to WTO rules – in particular, those rules that prohibit higher taxes on, and require no less favorable treatment for, imported products as compared to directly competitive or like domestic products. The panel's findings cover both beverages and the sweeteners HFCS and beet sugar.

The WTO panel also agreed with the United States that several bookkeeping and reporting requirements associated with collection of the beverage tax afford less favorable treatment to HFCS and beet sugar as compared to Mexican cane sugar and are, therefore, also contrary to WTO rules.

In the course of the dispute, the WTO panel rejected Mexico's request for it to decline jurisdiction in favor of a North American Free Trade Agreement (NAFTA) dispute settlement panel. The panel concluded that WTO panels may not decline to exercise jurisdiction over disputes properly brought before them. The panel also rejected Mexico's defense that, although discriminatory, its beverage tax is nonetheless justified as necessary to secure compliance with what, in Mexico's view, are U.S. obligations under the NAFTA. As the United States explained before the WTO panel, although it shares Mexico's desire to resolve differences over sweeteners, WTO dispute settlement is not the appropriate forum to resolve a disagreement under the NAFTA. The United States did, however, reiterate its commitment to a negotiated solution to the NAFTA sweeteners dispute and continues to work hard to achieve that.

Background.

Mexico imposed the beverage tax on January 1, 2002. The beverage tax levies a 20 percent tax on soft drinks and other beverages, as well as on syrups and other products that can be diluted to produce soft drinks and other beverages ("soft drinks and syrups"). The beverage tax further imposes a 20 percent tax on services used to transfer soft drinks and syrups (e.g., distribution services). In addition, the beverage tax subjects taxed products to several bookkeeping and reporting requirements. The beverage tax only applies to soft drinks and syrups that use any sweetener other than cane sugar, such as HFCS or beet sugar. Soft drinks and syrups sweetened exclusively with cane sugar are tax-exempt.

In Mexico, cane sugar is almost exclusively a domestic product, whereas before the tax, HFCS accounted for 99 percent of Mexico's sweetener imports. Thus, by taxing soft drinks and syrups

made with HFCS, but not those made with cane sugar, Mexico imposed a tax designed to discriminate against imports.

The beverage tax had an immediate effect on HFCS. Prior to its imposition, soft drink bottlers were the principal consumers of HFCS in Mexico and were increasingly substituting HFCS as a cost-effective alternative to cane sugar. The beverage tax reversed this trend as application of the beverage tax made the use of HFCS in soft drinks and syrups cost-prohibitive.

At the request of the United States, the WTO established the panel on July 6, 2004. Before the WTO panel, the United States claimed that the beverage tax is inconsistent with Mexico's WTO obligations under Articles III:2 and III:4 of the General Agreement on Tariffs and Trade 1994. The United States challenged the tax as applied on soft drinks and syrups, as well as on HFCS and beet sugar used to make soft drinks and syrups. The panel found in favor of the United States on all counts, including rejecting Mexico's defense that the beverage tax is justified as necessary to secure compliance with the NAFTA.

The NAFTA calls for duties that remain on a handful of products, including sugar, to be eliminated by 2008.

The Office of the United States Trade Representative.

United States Succeeds in Removing Japan's Barriers to U.S. Apples.

8/31/2005

Washington -- United States Trade Representative Rob Portman and Secretary of Agriculture Mike Johanns announced today that the United States has succeeded in having Japan finally remove its unjustified restrictions on the import of U.S. apples. Japan's actions resulted from a dispute won by the United States in the World Trade Organization. The United States and Japan jointly informed the WTO today that Japan's steps end this decades-long dispute.

"We are very pleased that Japan has eliminated all unjustified import restrictions related to fire blight disease on U.S. apples," stated Ambassador Portman. "Not only will Japan's decision allow U.S. apple growers an opportunity to export to a new market, but it is also a decision we look to other countries to follow as well."

"Japan's compliance with the final WTO panel finding on the fire blight case represents a clear victory for the U.S. apple industry and for the international trading system," said Agriculture Secretary Mike Johanns. "Resolution of this issue is another clear indication that the WTO process works for America's farmers and ranchers."

On August 25, 2005, Japan issued revised regulations eliminating unnecessary and unjustified measures on U.S. apples resulting from concerns about fire blight, a disease that affects apple trees, but is not found on mature, harvested fruit. Japan eliminated its prohibition of shipping mature fruit from orchards with any fire blight, mandatory orchard inspections, orchard buffer zones and various packing facility requirements. Replacing these measures is a requirement to sample export fruit to

ensure they are mature and certify that shipments are free of fire blight disease. Japan also updated the regulations to allow California apples to be exported to Japan. The new regulations were effective as of August 25, 2005. The U.S. Department of Agriculture is now finalizing operational procedures for the above-mentioned inspection and certification.

Background:

Japan provides important export opportunities for U.S. apples. However, U.S. apples have effectively been banned from the Japanese market for over twenty years in large part due to Japan's scientifically-unjustifiable fire blight restrictions. Fire blight is a disease unique to fruit trees of the *Rosaceae* family, resulting in symptoms such as infected flowers and shoots that droop, wither, and die, becoming dry and darkened in color, infected shoots that wither, darken, and die with the potential death of the host plant. The disease, however, is not transmitted on mature, symptomless apple fruit, which is the only kind of apple fruit that the United States exports.

The United States won in earlier WTO proceedings against the Japanese restrictions. Japan=s restrictions on exported U.S. apples included a 10-meter orchard buffer zone, orchard inspections, and chlorine treatment of exported fruit. The United States argued that these restrictions were maintained without sufficient science and not based on a risk assessment, and were therefore inconsistent with Japan=s obligations under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. The WTO agreed with the U.S. position, in several panel and the Appellate Body reports, including most recently in July 2005 in a WTO compliance review panel proceeding, that restricting exported apple fruit to mature fruit would be sufficient to prevent any hypothetical spread of fire blight.

The Office of the United States Trade Representative.

Information on Open Panel Meetings in WTO Hormones Dispute.

8/12/05

The Office of the United States Trade Representative (USTR) wishes to notify the public that the World Trade Organization (WTO) dispute settlement panels in the *Hormones* disputes (WT/DS320 and WT/DS321) have agreed to the request of the United States, the European Communities and Canada to open their substantive meetings with the parties to the public.

The proceedings, to be held on September 12-15, 2005, will be broadcast via closed circuit television to a separate viewing room at WTO Headquarters in Geneva, Switzerland. The WTO Secretariat has set aside 400 seats for the public, and interested parties may reserve seats on a first-come, first-served basis by filling out and returning to the WTO a form found on the WTO website:

http://www.wto.org/english/tratop_e/dispu_e/public_hearing_e.htm

by midnight (Geneva time) August 26, 2005. All applications will be handled exclusively by the WTO, and further details on the hearing may be found on the WTO website.

This decision marks the first time in the history of the WTO that panel meetings will be made public. The United States has advocated taking this step for years, including by asking its counterparts in every dispute whether they would agree to open meetings in those disputes. The United States is pleased that Canada and the European Communities agreed to do so in the *Hormones* disputes.

For more information about this dispute, see the WTO website at

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds320_e.htm

The Office of the United States Trade Representative.

United States Wins WTO Semiconductor Case -- In Far Reaching Report, WTO Appellate Body Reverses Prior Panel Decision.

06/27/05

WASHINGTON – U.S. Trade Representative Rob Portman announced today a major WTO litigation win for the United States, as the WTO Appellate Body reversed a WTO panel and sided with the United States in a dispute involving subsidies provided by the Government of Korea to Hynix, a Korean manufacturer of memory semiconductors. In today's report, the Appellate Body agreed with the United States that a WTO panel was incorrect in concluding that U.S. countervailing duties on Hynix semiconductors were improper. U.S. countervailing duty rates of 44 percent ad valorem will remain in place.

"This is an important turnaround for U.S. high-tech manufacturers, as well as the international trading system," said USTR Rob Portman. "The international trading system is built on fairness, and the Korean government unfairly subsidized a Korean company. The Appellate Body report will help to ensure that governments play by the rules. Governments shouldn't be able to give unfair subsidies by pressuring banks to provide non-commercial loans. This is another example of how the Administration, day-in and day-out, is working aggressively to use U.S. trade laws to level the playing field and, when needed, to defend our actions at the WTO."

"We believe today's decision will strengthen the ability of U.S. companies to compete against Korean firms on an equal footing in Korea and around the world," added Portman

The U.S. companies involved were Micron, with operations in Idaho, Utah, Virginia and Texas, and Infineon, with operations in Virginia.

The Appellate Body agreed with the United States that the WTO panel committed multiple errors in reviewing the U.S. determination that the Government of Korea subsidized Hynix by pressuring private creditors to provide financial assistance to the company. These panel errors included a failure to examine the record evidence in its totality; a refusal to consider evidence that was on the record of the underlying investigation and that was cited by the United States; and a key finding by the panel that was not supported by evidence on the record of the underlying investigation. Cumulatively, these errors amounted to a failure on the part of the panel to apply the correct standard of review. According to the Appellate Body, "the Panel essentially 'second-guessed' the investigating authority's analysis of the evidence and thus overstepped the bounds of its review."

Under WTO rules, Appellate Body reports are not subject to further appeal.

Background.

This dispute involves determinations by the U.S. Department of Commerce and the U.S. International Trade Commission (USITC) in the countervailing duty investigation on dynamic random access memory semiconductors (DRAMs) from Korea. In its determination, Commerce found that the Korean government directed creditors to bail out Hynix, a financially troubled Korean company that, at the time of the determination, was the number three producer of DRAMs in the world. As a result, Commerce also found that the assistance provided to Hynix under this government-directed bail-out constituted subsidies. The USITC subsequently found that imports of subsidized Hynix DRAMs caused injury to the U.S. DRAMs industry. As a result of these two determinations, on August 11, 2003, Commerce published a countervailing duty order requiring the imposition of "countervailing duties" of 44 percent ad valorem.

The purpose of a countervailing duty investigation is to determine whether subsidized imports cause or threaten injury to a competing U.S. industry. These investigations typically are conducted when a U.S. industry submits a petition, along with supporting evidence, that alleges the existence of injurious subsidization. The U.S. Department of Commerce is responsible for determining whether imports are subsidized, while the U.S. International Trade Commission (USITC) is responsible for determining whether subsidized imports cause or threaten injury. If both agencies make affirmative determinations, Commerce typically publishes a countervailing duty order, which requires the imposition of a special duty – known as a "countervailing duty" – to offset the amount of subsidization found to exist. The countervailing duty is in addition to normal customs duties.

On June 30, 2003, Korea first requested WTO consultations with the United States. Subsequently, Korea requested the establishment of a panel, alleging that both the Commerce and USITC determinations were inconsistent with WTO rules. A WTO dispute settlement panel was established on January 23, 2004. The panel circulated its final report on February 21, 2005.

With respect to Korea's challenge to the USITC determination of injury, with one exception the panel agreed with the United States on all of the issues. The exception involved one minor aspect of the injury determination where the panel found that the USITC had not adequately explained its analysis. The United States did not appeal this panel finding. Under WTO rules, the United States will be allowed a "reasonable period of time" in which to take whatever action is necessary. The precise amount of time for such implementing action typically is determined either through agreement of the parties – in this case, the United States and Korea – or through WTO arbitration. In the meantime, imports of Hynix DRAMS will continue to be subject to countervailing duties.

With respect to Korea's challenge to Commerce's determination of subsidization, the panel essentially found that Commerce's findings were not supported by sufficient evidence. The United States appealed the panel's finding, alleging that it was the product of numerous legal errors.

The Appellate Body report helps ensure that governments cannot subsidize covertly by pressuring private companies to extend credit or make investments on non-commercial terms. The panel report, if it had been allowed to stand, would have made it very difficult to ever prove that a government engaged in such covert subsidization.

Under WTO rules, the Appellate Body report and the panel report, as modified by the Appellate Body report, will be formally adopted by the WTO Dispute Settlement Body within 30 days; i.e., by July 27.

The Office of the United States Trade Representative.

United States Takes Next Step in Airbus WTO Litigation.

5/3/2005

WASHINGTON - In light of the European Commission's unwillingness to halt new subsidies for large civil aircraft, and with EU Member States preparing to commit $1.7 billion in new risk-free launch aid subsidies for Airbus, the United States announced today that it will file a request for the establishment of a World Trade Organization (WTO) dispute settlement panel to resolve the dispute. The panel request will be filed on Tuesday, May 31.

"For almost a year, the United States has tried to convince the EU to negotiate an end to subsidies for large civil aircraft," said U.S. Trade Representative Rob Portman. "So we were pleased when, on January 11th of this year, the EU agreed to a standstill on launch aid while we negotiated an end to subsidies. Unfortunately, at this point, the EU is no longer willing to hold off on launch aid, and has only proposed to reduce subsidies, not end them."

"We continue to prefer a negotiated solution, and we would rather not have to go back to the WTO. But the EU's insistence on moving forward with new launch aid is forcing our hand," added Portman.

By requesting the panel, the United States is providing time for the EU to reconsider its plans to provide new subsidies and recommit to the agreed January 11th U.S.-EU agreement for negotiations. This would include an immediate halt to any further steps toward providing new launch aid and a recommitment that the purpose of the negotiations is to end new subsidies for Large Civil Aircraft (LCA), and not merely to reduce them.

"We still believe that a bilateral negotiated solution is possible," said Portman, who noted that out of the 100 concluded WTO cases involving the U.S. since the WTO was founded, more than a third were satisfactorily resolved following negotiation. "But the negotiations won't succeed unless the EU recommits to ending subsidies."

The United States believes this dispute must be managed in a constructive manner and not be allowed to spill over into other issues. Seeking a decision from a neutral WTO panel is the best way to accomplish this goal, as has been the case in other high profile disputes (e.g., biotech, steel safeguards) in which the United States and the EU were able to continue to work on shared goals as litigation proceeded.

Background:

The WTO Case Against Airbus

The U.S. case alleges that the launch aid for the A350, the A380, and earlier aircraft and other government support to Airbus qualifies as subsidies under the Agreement on Subsidies and Countervailing Measures (SCM) and that the subsidies are "actionable" because they cause "adverse effects," or "prohibited" because they are export-contingent, or both.

The first step in the WTO process is to file a request for consultations. The United States took that step on October 6, 2004. The United States and the EU held WTO consultations on November 4, 2004, but the consultations failed to resolve the dispute. On Tuesday, the United States will take the next step by requesting the formation of a WTO dispute settlement panel.

Subsidies to Airbus

Airbus S.A.S. ("Airbus") was established in 1970 as a European consortium of French, German, and later, Spanish and U.K. companies. In 2001, Airbus formally became a single integrated company. The European Aeronautic Defence and Space Company ("EADS") and BAE SYSTEMS of the U.K. transferred all of their Airbus-related assets to the newly incorporated company and became 80

percent and 20 percent, respectively, owners of the company. The operating results of Airbus are fully consolidated in the EADS balance sheet.

Over its 35 year history, Airbus has benefited from massive amounts of EU member state and EU subsidies that have enabled the company to create a full product line of aircraft and gain a 50 percent share of LCA sales and a 60 percent share of the global order book. Every major Airbus aircraft model was financed, in whole or in part, with EU government subsidies taking the form of "launch aid" - financing with no or low rates of interest, and repayment tied to sales of the aircraft. If the sales of a particular model are less than expected, Airbus does not have to repay the remainder of the financing. EU governments have forgiven Airbus debt; provided equity infusions; provided dedicated infrastructure support; and provided substantial amounts of research and development funds for civil aircraft projects.

Since 1985, the United States has been involved in several major rounds of negotiations with the Airbus partner governments and the Commission with the objective of achieving greater disciplines over the subsidies provided to Airbus.

In July 1992 the two sides negotiated a bilateral agreement limiting government support for LCA programs. The agreement included a prohibition of future production support and a limitation on the share of government support for the development of new aircraft programs to 33 percent of the project's total development costs.

Although the United States expected the 1992 agreement to lead to a progressive reduction of subsidies, it became instead an excuse for EU governments to continue subsidizing Airbus. The $3.7 billion in launch aid that EU governments committed for the new Airbus A380 was the largest amount of funds committed for a single project. The EU provided further loans and infrastructure that has pushed the total amount of A380 subsidies to approximately $6.5 billion. Airbus is now preparing to launch another competitor (A350) to the recently-launched Boeing 787, and it has requested $1.7 billion for that aircraft as well, even though it has stated publicly that it could easily finance the project itself.

In 1995, the WTO Subsidies Agreement entered into force. The agreement applies in full to subsidies for LCA. Therefore, if a Member provides a subsidy that is inconsistent with the agreement's terms, it is subject to challenge at the WTO.

In 1997, the EC conditioned approval of the merger of Boeing and McDonnell Douglas on a commitment by Boeing to license to Airbus any "government-funded patent" that could be used in

the manufacture or sale of LCA. Airbus has no similar commitment to share the fruits of government-funded technology with Boeing. The United States has sought to include a mutual commitment of this kind in a new bilateral agreement.

Efforts to Negotiate a New Bilateral Agreement

The Administration's current effort to end the subsidization of Airbus began early last year, when it became apparent that EU Member States were considering subsidies for the A350. U.S. and EU officials had extensive conversations in the late spring and early summer, and two sets of meetings in July and then again in September, as the United States sought an EU agreement to negotiate an end to subsidies. President Bush instructed USTR to pursue all options to end the subsidization of Airbus, including the filing of a WTO case, if need be. The U.S. industry fully supported this approach.

Unfortunately, the EU was not willing to agree to the goal of ending new subsidies, much less on how to achieve this goal. Therefore, on October 6, 2004, the United States initiated the first stage of dispute settlement proceedings at the WTO by requesting consultations with the EU. The EU responded by requesting consultations on alleged U.S. subsidies to Boeing. The United States also exercised its right to terminate the 1992 Agreement at that time.

The United States held WTO consultations with the EU in November, but did not resolve its concerns. Then, on January 11, 2005, when the United States was on the verge of requesting the formation of a dispute settlement panel, the two sides reached agreement on a framework for negotiating an end to subsidies. The framework included a 90-day time frame for the negotiations. It also included a common goal of ending subsidies, as defined by the WTO Subsidies Agreement. The agreement applied equally to the United States and the EU.

In March of this year, the EU introduced a new set of conditions for the negotiations and turned away from the agreed objective of ending subsidies. They began to focus instead on merely "reducing" subsidies, with the possibility of eliminating them at some point in the future. The EU appears to have changed its position because certain EU Member States want to continue providing launch aid subsidies to Airbus, in particular for the Airbus A350.

Earlier this month, Airbus confirmed that it has applied to all four governments for A350 launch aid, and that it is seeking a decision by mid-June. According to the British press, "Whitehall insiders" have stated that the U.K. government will announce a $700 million commitment of launch aid at the Paris Air Show, which will be held June 9-13. Officials of the European Commission have stated that launch aid is permissible, in their view, and that it is up to the Member States to decide whether to

provide it. On May 24, a French government official stated that "[t]he French state has given its financial support to the A380 programme and we expect to continue in this vein . . . ."

While the United States remains committed to resolving this matter through the negotiation of a new bilateral agreement, we have concluded that filing a WTO panel request at this time is necessary to ensure that, one way or another, the playing field is leveled. The WTO offers an agreed multilateral forum for resolving trade disputes according to agreed rules.

The Office of the United States Trade Representative.

U.S. Internet Gambling Restrictions -- U.S. Wins Key Issues in WTO Dispute.

04/7/2005

WASHINGTON - The United States won an important victory today when the World Trade Organization (WTO) Appellate Body sided with the United States on key issues in a challenge to U.S. laws on internet gambling.

"This win confirms what we knew from the start – WTO Members are entitled to maintain restrictions on internet gambling," said Acting U.S. Trade Representative Peter F. Allgeier. "We are pleased that the Appellate Body has agreed with our position that the U.S. gambling laws at issue here protect public order and public morals. By reversing key aspects of a deeply flawed panel report, the Appellate Body has affirmed that WTO Members can protect the public from organized crime and other dangers associated with Internet gambling. This is also a victory for the federal and state law enforcement officers and regulators who protect the public from illegal gambling and its associated risks of money laundering and organized crime."

"U.S. restrictions on internet gambling can be maintained," Allgeier said. "This report essentially says that if we clarify U.S. internet gambling restrictions in certain ways, we'll be fine."

The Appellate Body found that the concerns addressed by the three U.S. federal gambling laws at issue in this dispute "fall within the scope of 'public morals' and/or 'public order'" under an

exception to WTO rules for trade in services. It merely found that, for this exception to apply, the United States needs to clarify one narrow issue concerning internet gambling on horse racing. USTR will be exploring possible avenues for addressing this finding. USTR will not ask Congress to weaken U.S. restrictions on internet gambling.

The next step in the process is for the WTO's Dispute Settlement Body to formally adopt the panel and Appellate Body reports within 30 days. There is no further appeal.

Background.

This dispute concerns Antigua's allegation that U.S. state and federal laws prohibiting the cross-border supply of gambling services (e.g., Internet and telephone gambling) are inconsistent with U.S. obligations and our schedule of specific commitments under the General Agreement on Trade in Services ("GATS"). Antigua argued that the United States violated the market access provisions of the GATS by barring supply of gambling services on a cross-border basis – such as supply of gambling services by Internet from Antigua-based websites.

The Panel released a final report to the parties on May 25, 2004. The parties suspended the panel proceedings for settlement negotiations from June through October 2004. The final panel report was made public on November 10, 2004.

In today's report, the Appellate Body reversed key aspects of the panel's finding that U.S. federal laws did not meet the requirements for application of WTO exceptions for "public morals" and "public order." As a result, the Appellate Body found that U.S. laws qualify for these exceptions, except that the United States must clarify a narrow issue relating to Internet gambling on horse racing. The Appellate Body also found that Antigua failed to prove that any of the state laws at issue were inconsistent with WTO rules. However, the Appellate Body found that the United States made a GATS market access commitment for gambling services during the Uruguay Round.

The Office of the United States Trade Representative.

United States Wins "Food Name" Case in WTO Against EU -- WTO Says EU System Discriminates Against U.S. Producers and Products.

03/15/2005

WASHINGTON – Acting United States Trade Representative Peter F. Allgeier praised a World Trade Organization (WTO) panel decision issued today siding with the U.S. in its case against the European Union regarding geographic food names known as "geographical indications." Geographical indications, or "GIs", are protected geographic names that have a particular association with a food product, such as Idaho potatoes or Florida oranges.

In its report made public today, the WTO panel agreed with the U.S. assertion that Europe's regulation for protecting "GIs" discriminates against U.S. products and producers and is therefore contrary to WTO rules. The panel also agreed with the United States that Europe could not, consistent with WTO rules, deny U.S. trademark owners their rights. The panel stated that any exceptions to trademark rights for the use of registered GIs were narrow, and, for instance, limited to the actual GI name as registered.

"We're very pleased with this decision. It's a clear win for American farmers and food processors. For years, Europe effectively had a 'Do Not Apply' sign directed at foreign producers. We believed

that, under WTO rules, U.S. farmers, ranchers, and other food producers should have the same access to protection for 'geographical indications' as European food producers, and that the European system discriminated against us. Today, the WTO issued a crystal clear ruling that agreed with our view that Europe failed to provide Americans fair access," said Allgeier. "We also welcome the panel's findings that protecting GIs need not and should not harm the rights of trademark owners. These findings are important to the rights of U.S. companies protecting their trademarks in Europe."

Allgeier added that although there are more than 600 registered GIs in Europe (not counting those for wine and spirits), none are from non-EU countries. He also noted that USTR has worked with House Agriculture Committee Chairman Bob Goodlatte (R-VA) and his staff on the issue of GIs.

Background

Protection of Geographical Indications

"Geographical indications" (GIs) indicate the geographic origin of a product, where the product has some attribute or reputation associated with that origin. Examples could include Parma ham, Roquefort cheese, Florida oranges, Vidalia onions, or Idaho potatoes. The WTO TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights) defines GIs as "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographic origin."

"Protection" of GIs can take many forms, but generally consists of ensuring that consumers are not misled as to the geographic origin of the good.

The United States has a robust system for protecting geographical indications, primarily through rights provided to private rightholders under the U.S. trademark system. This system gives access to GI protection on a non-discriminatory basis and in a manner that fully protects the rights of trademark owners.

By contrast, the EC has a special regulatory regime for geographical indications, separate and apart from its trademark system, which depends in significant part on government intervention. It is this GI regime that the United States challenged in this dispute.

Separate from this dispute, there are on-going discussions in the context of the Doha round of WTO negotiations. The EC has advocated expanding GI obligations under the TRIPS Agreement. This panel has found, however, that the EC has not complied with its current TRIPS obligations. From the U.S. perspective, current TRIPS Agreement obligations are sufficient, and a priority should be placed instead on Members meeting current obligations.

Claims

At issue is an EU regulation on the protection of GIs for agricultural products and foodstuffs (but not including wine or spirits, which are subject to a separate regulatory system). The United States challenged the EU GI Regulation on two primary grounds: (1) discrimination against U.S. GIs (national treatment) and (2) failure to protect U.S. trademarks.

First, with respect to national treatment, although the EU GI Regulation creates a system for the EU-wide registration and protection of GIs, the United States was concerned that the Regulation imposed significant barriers to registration and protection for non-EU persons and non-EU products. Under the EU system of protection, companies are prohibited from using words in connection with their products that even "evoke" the name of a registered GI, unless they are one of the authorized users of the GI. The U.S. concern was that, for instance, while producers of Parma ham in Italy can stop others from using the name Parma or similar names in the EU market, the GI Regulation would not permit U.S. producers to do the same with respect to their products. The United States alleged that this aspect of the GI Regulation was inconsistent with the EU's national treatment obligations under the TRIPS Agreement (with respect to protection of intellectual property rights of non-EU nationals) and under the GATT 1994 (with respect to treatment of non-EU goods).

Second, the United States was concerned that the EU GI Regulation would not permit trademark owners to enforce their trademarks – that is, they would not be able to stop the confusing uses of similar GIs, which is one of their rights under the WTO TRIPS Agreement. The specific concern was the use of linguistic variations of GIs, where those linguistic variations are confusingly similar to European trademarks of U.S. companies and are used to market the European GI product, causing consumer confusion. The panel agreed with the United States that this would present concerns under the TRIPS Agreement, and found that the GI Regulation could only protect GI names as registered, and not linguistic variations of the GIs. This is an important principle for U.S. trademark owners. This means, for example, that companies such as Anheuser-Busch, which owns valid trademarks for "Budweiser" and "Bud" in Europe, can stop confusing uses of translations or linguistic variations of GIs. With this understanding, the panel found this aspect of the GI Regulation to be consistent with the TRIPS Agreement.

Procedural history

The United States requested WTO dispute consultations on the EU GI Regulation in June 1999. On August 18, 2003, the United States requested the establishment of a panel, and panelists were appointed on February 23, 2004. The panel issued a confidential draft interim report on November 19, 2004, and a final report to the Parties on December 21, 2004. Today that report was made public by the WTO.

The Office of the United States Trade Representative.

USTR Zoellick Thanks Congress For Repealing the 1916 Act.

11/19/2004

WASHINGTON - U.S. Trade Representative Robert B. Zoellick thanked Congress for repealing Section 801 of the Revenue Act of 1916 ("the 1916 Act") within the larger Miscellaneous Tariff Bill that was approved today.

The 1916 Act is a little-used provision for addressing underpriced foreign products. Its repeal was necessary to bring the United States into compliance by a World Trade Organization ruling. This will not affect our ability to enforce our trade remedy laws.

"I want to thank Congress for repealing the 1916 Act so that the United States can meet its international trade obligations. In particular, I want to thank House Ways and Means Committee Chairman Bill Thomas and Senate Finance Committee Chairman Chuck Grassley, Ways and Means Ranking Member Charlie Rangel and Finance Committee Ranking Member Max Baucus, Senate Judiciary Chairman Orrin Hatch and House Judiciary Chairman Jim Sensenbrenner, and Senate Judiciary Ranking Member Patrick Leahy for their leadership and perseverance, as well as House and Senate leaders from both sides of the aisle," Zoellick said. "We recognize the difficulty in making changes in this area. By bringing the United States into compliance with our international obligations,

the fundamental concerns that prompted some of our trading partners to bring this action have been addressed."

The Office of the United States Trade Representative.

USTR Zoellick Thanks Congress For Passing FSC-ETI Bill.

10/14/2005

WASHINGTON – U.S. Trade Representative Robert B. Zoellick today thanked Congress for removing the Foreign Sales Corporation/Extra-Territorial Income (FSC-ETI) tax provisions of the tax code, within the larger tax measure that was approved over the weekend and on Monday.

The ending of the FSC-ETI provision was necessary to bring the United States into compliance with its international trade obligations, after the ruling in the World Trade Organization (WTO).

"I want to thank Congress for removing these FSC-ETI provisions of the tax code so that the United States can meet its international trade obligations. In particular, I want to thank House Ways and Means Committee Chairman Bill Thomas and Senate Finance Committee Chairman Chuck Grassley, Ways and Means Ranking Member Charlie Rangel and Finance Committee Ranking Member Max Baucus for their leadership and perseverance, as well as House and Senate leaders from both sides of the aisle," Zoellick said. "We recognize the difficulty and complexity of making tax code changes, and by bringing the United States into compliance with our international obligations, we believe the concerns that prompted the EU to bring this action in 1997 have been addressed satisfactorily. We urge Europe to quickly move to end their tariffs on U.S. exports, so that trade can resume to the mutual benefit of both sides of the Atlantic."

The European Union has been levying an extra tariff on U.S. exports to Europe since last March, hurting American manufacturers and exporters. Starting at five percent, the tariff has been increasing at one percent each month since then. It is currently at 12%.

The Office of the United States Trade Representative.

U.S. Files WTO Case Against EU Over Unfair Airbus Subsidies.

10/06/2004

WASHINGTON – U.S. Trade Representative Robert B. Zoellick announced that in order to level the playing field for American workers and companies, the United States today would file a World Trade Organization (WTO) dispute settlement case against the European Union (EU) regarding billions of dollars in unfair subsidies provided to Airbus by European governments.

"This is about fair competition and a level playing field. Since its creation thirty-five years ago, some Europeans have justified subsidies to Airbus as necessary to support an 'infant' industry. If that rationalization were ever valid, its time has long passed. Airbus now sells more large civil aircraft than Boeing," said Zoellick.

The United States and Europe share a trillion dollar economic relationship, and have worked closely on many trade fronts in recent years, most importantly on mutual efforts to advance trade liberalization efforts in the Doha negotiations. Both parties recognize the appropriateness of using the WTO process to resolve trade disputes. The WTO was created for just such purposes. In recent years, the United States and Europe have each brought about the same number of WTO disputes against the other.

In recent months, the United States has been urging the European Commission (EC) to negotiate a new agreement to replace the 1992 U.S.-E.U. Agreement on Large Civil Aircraft. The agreement places limits on certain government support, including limiting it to one-third the costs of developing a new aircraft.

"We urged the EU to agree that neither of us should provide new subsidies to aircraft manufacturers. We offered to simplify our task by using the subsidy definition that the EU and the United States had already agreed to in the WTO. We even were willing to accept subsidies in the pipeline – but then draw the line. That's a fair offer," said Zoellick. "But the EU and Airbus appear to want to buy more time for more subsidies for more planes. That isn't fair and it violates international trade rules. Since we could not agree, the United States decided to pursue resolution through the agreed procedures of the multilateral trading system, by bringing a WTO case before an international dispute resolution panel."

Boeing is the leading U.S. producer of airplanes, and Airbus is its main competitor. When the 1992 agreement was negotiated, Airbus accounted for only about 30 percent of the global market. It now represents more than 50 percent of this market. Clearly, the 1992 agreement has outlived its usefulness.

"The 1992 Agreement was negotiated after the United States had won a case against the European subsidies to Airbus and was pursuing another case within the GATT system that preceded the WTO dispute settlement procedures," Zoellick went on to note. "The United States remains interested in an agreement that ends all new subsidies. So as this case proceeds, we remain open to negotiating a new accord – as long as it ends the new subsidies."

Consistent with today's decision to move forward with a WTO case, the United States also exercised its right, as provided by the 1992 Agreement's terms, to terminate that agreement.

"American farmers, workers, and businesses can compete against anyone, as long as there is a level playing field. Terminating this agreement reinforces our belief that now is the time to end subsidies, ideally through a new agreement. We remain open to addressing Europe's concerns with regard to government support they believe Boeing receives. It is in the interests of both Europe and the United States to find a durable solution to this long-standing problem," Zoellick said.

Background:

The WTO Case Against Airbus

The U.S. case alleges that launch aid and other government support to Airbus qualifies as a subsidy under the Agreement on Subsidies and Countervailing Measures (SCM) and that such subsidies are "actionable" because they cause adverse effects or are "prohibited" because they are export-contingent, or both.

The 1992 Agreement does not preclude the United States or the European Commission from bringing a WTO case. The terms and obligations under the 1992 bilateral Agreement are separate and distinct from the terms and obligations of the 1994 SCM Agreement. Compliance with one is not a defense against claims of non-compliance with the other.

The first step in the WTO process is to file a Request for Consultations. The United States is taking this step today. This begins a period of no less than 60 days for the parties to consult in an effort to resolve the matter. If after 60 days the parties are unable to do so, the United States would be authorized to request that a WTO panel be established to make findings on this matter.

Termination of the 1992 Agreement

Consistent with the United States' view that now is the time to end new subsidies and its decision to file a WTO case, the United States today is also exercising its right, as provided by the 1992 agreement's terms, to terminate that agreement.

Subsidies to Airbus

Airbus S.A.S. ("Airbus") was established in 1970 as a European consortium of French, German, and later, Spanish and U.K. companies. In 2001, Airbus formally became a single integrated company. The European Aeronautic Defence and Space Company ("EADS") and BAE SYSTEMS of the U.K. transferred all of their Airbus-related assets to the newly incorporated company and became 80

percent and 20 percent, respectively, owners of the company. The operating results of Airbus are fully consolidated in the EADS balance sheet.

Over its 35 year history, Airbus has benefited from massive amounts of EU member state and EU subsidies that have enabled the company to create a full product line of aircraft and gain a 50 percent share of large commercial aircraft ("LCA") sales and a 60 percent share of the global order book. Every major Airbus aircraft model was financed, in whole or in part, with EU government subsidies taking the form of "launch aid" – financing with no or low rates of interest, and repayment tied to sales of the aircraft. If the sales of a particular model are less than expected, Airbus does not have to repay the remainder of the financing. EU governments have forgiven Airbus debt; provided equity infusions; provided dedicated infrastructure support; and provided substantial amounts of research and development funds for civil aircraft projects.

Since 1985, the United States has been involved in several major rounds of negotiations with the Airbus partner governments and the Commission with the objective of achieving greater disciplines over the subsidies provided to Airbus. In 1989 and 1991 the United States brought two cases at the GATT challenging Airbus subsidies. The first case challenged a German program that offset adverse exchange rate fluctuations on sales of Airbus aircraft, and the second, broader case challenged overall subsidies to the Airbus consortium. The first case ended in a victory for the United States after a GATT panel determined that the exchange rate scheme constituted a prohibited export subsidy. The EC blocked adoption of the panel report, which was permitted before the creation of the WTO, but Germany subsequently withdrew the scheme.

The United States withdrew the second case in July 1992 after the two sides negotiated a bilateral agreement limiting government support for large civil aircraft programs. The agreement included a prohibition of future production support and a limitation on the share of government support for the development of new aircraft programs to 33 percent of the project's total development costs.

After 12 years, the United States believes the 1992 agreement has outlived its usefulness and needs to be terminated. Expected to lead to a progressive reduction of subsidies, the 1992 agreement has instead become an excuse for EU governments to continue subsidizing Airbus. The $3.2 billion in launch aid that the EU governments have committed for the new Airbus A380 is the largest amount of funds committed for a single project. The EU has provided further loans and infrastructure that has pushed the total amount of A380 subsidies to approximately $6.5 billion. Airbus is now contemplating the launch of another competitor (A350) to the recently-launched Boeing 7E7, and has indicated its intentions to request subsidies for that aircraft as well.

In addition, Airbus' market share has increased markedly over the agreement's lifetime. Its share of the market had already increased from 16 percent in 1988 to 30 percent in 1990, prior to the

agreement's signing; it reached 50 percent in 1999. In the meantime, McDonnell Douglas' market share dropped precipitously, culminating with the firm's purchase by Boeing in 1997. Airbus's success in gaining additional market share is exemplified by the goals it has set for itself over its lifetime: In 1975, Airbus aimed to gain a 30 percent share of the world aerospace market. By 1994, it had declared that nothing less than 50 percent would do. It has exceeded that goal.

In 1997, the EC conditioned approval of the merger of Boeing and McDonnell Douglas on a commitment by Boeing to license to Airbus any "government-funded patent" that could be used in the manufacture or sale of large civil aircraft. Airbus has no similar commitment to share the fruits of government-funded technology with Boeing. The United States has sought to include a mutual commitment of this kind in a new bilateral agreement.

In 1999, a WTO panel reviewing a complaint by Brazil found that Canadian aircraft financing with launch aid-type terms was a prohibited export subsidy. Another panel, reviewing a case brought by Canada, found that Brazil's interest rate subsidies to its aircraft manufacturer were also an export subsidy.

<u>Efforts to Negotiate a New Bilateral Agreement</u>

The last major USG effort to address subsidies to Airbus was in 1999 – 2000, when the United States sought to head off subsidized financing for the A380. The considerations at that time included a possible WTO case. For its own business reasons, however, Boeing did not support such a course. As a consequence, the Clinton Administration did not pursue a WTO case at that time.

Matters changed significantly this year as talk surfaced of new subsidies for a new Airbus plane. Subsequently, USTR Zoellick had several conversations with EU Trade Commissioner Lamy in late Spring and early summer regarding this matter. USTR and EC trade officials met in July and more recently in September with the goal of securing a commitment to end new subsidies.

In August, President Bush instructed USTR Zoellick to pursue all options to end the subsidization of Airbus, including the filing of a WTO case, if need be. USTR has sought to end the subsidies through the negotiation of a new bilateral agreement. The EC has been unwilling to agree on the goal of ending all new subsidies, much less on how to achieve this goal.

USTR Zoellick met with Commissioner Lamy on September 30 to discuss this matter. The EC remains opposed to the goal of ending new subsidies for large civil aircraft.

While the United States remains committed to resolving this matter through the negotiation of a new bilateral agreement, we have concluded that filing a WTO case at this time is necessary to ensure that, one way or another, the playing field is leveled. The WTO offers an agreed multilateral forum for resolving trade disputes according to agreed rules.

The Office of the United States Trade Representative.

WTO Panel Issues Mixed Verdict in Cotton Case.

09/08/2004

WASHINGTON - U.S. Trade Representative Robert B. Zoellick said today a World Trade Organization (WTO) panel has issued a mixed verdict in a dispute brought by Brazil challenging several types of U.S. agricultural support measures, including support for cotton farmers. The United States has announced its intention to appeal aspects of today's report. The process is lengthy, and there will be no immediate impact on US farm programs.

In the panel proceedings, the United States successfully defended U.S. decoupled income support payments – such as direct payments under the 2002 farm legislation – as not causing "serious prejudice" to Brazil's interests. Specifically, the panel agreed with the United States that income support provided to U.S. cotton farmers and others that is fully decoupled from production and prices – that is, a recipient does not have to produce cotton to get the payment and can choose to produce nothing at all – has not suppressed or depressed world cotton prices.

"We welcome the panel's findings that U.S. decoupled income support payments have not caused 'serious prejudice' under WTO rules. This report confirms that reforms in our 1996 farm legislation and continued in 2002 have worked and that fully decoupled payments do not cause WTO-inconsistent effects by distorting production or trade," said Zoellick.

"U.S. farmers and ranchers are among the most efficient in the world," said Agriculture Secretary Ann M. Veneman. "U.S. farm programs were designed to be fully compliant with our WTO obligations. We will strongly defend the U.S. position and work to ensure a level playing field for U.S. producers."

Many critics have claimed that even decoupled payments spur agricultural production and drive down prices. However, the panel rejected Brazil's arguments, essentially siding with the overwhelming body of agricultural economics literature showing that these payments have no more than minimal effects. The report should dispel concerns that all U.S. support payments distort production and trade.

The panel also sided with the United States in rejecting several of Brazil's other claims. For example:

- **the panel found that Brazil had failed to show that U.S. domestic support programs caused an increase in U.S. world market share for upland cotton,**
- **the panel also found that certain U.S. export credit guarantees were consistent with U.S. WTO obligations,**
- **finally, and most importantly in terms of future implications of this ruling, the Panel declined to find that U.S. domestic support programs threatened to cause, or per se cause, serious prejudice to Brazil's interests from 2003-2007.**

However, the panel did side with Brazil on some of its claims that some U.S. farm payments cause adverse effects to Brazil and that other U.S. measures are prohibited, including export credit guarantees for some agricultural commodities.

"We strongly disagree with some aspects of the panel report, which we will be appealing. The facts do not show that U.S. farm programs have distorted trade and caused low cotton prices. Moreover, some aspects of the panel report belong in negotiation and not litigation, namely in the Doha Development Agenda negotiations. We believe the Appellate Body will agree," continued Zoellick.

The United States believes that the best way to address any distortions in world agricultural markets is through the WTO agriculture negotiations. Multilateral commitments to reduce tariffs and subsidies will increase role of market forces globally and is the only way to address core issues.

The United States has been a leader in the Doha Round of trade negotiations, including playing a key role in July on a framework agreement for the agriculture negotiations. This framework builds on the U.S. comprehensive proposal in 2002 to reform all trade-distorting measures in agriculture. The U.S. objective is to create new market access opportunities for all countries by achieving specific reform commitments in each of the areas of export subsidies, trade-distorting domestic support and market access in all countries.

Background.

Brazil challenged numerous U.S. agricultural programs as being WTO-inconsistent and as not being protected by the "Peace Clause".

Brazil's principal claims were that:

(1) U.S. domestic support for cotton causes "serious prejudice" to Brazilian interests by depressing or suppressing world cotton prices and unfairly expanding or maintaining U.S. world market share,

(2) U.S. export credit guarantees for all commodities confer export subsidies (the United States has no allowable export subsidies for most agricultural products),

(3) Step 2 payments for cotton are both prohibited export subsidies and prohibited import substitution subsidies; and

(4) FSC/ETI tax benefits are prohibited export subsidies.

The WTO panel report is a long and complicated document, and the panel made findings that side with Brazil on certain of its claims in this dispute and other findings that side with the United States:

- **The panel found that the "Peace Clause" in the WTO Agreement on Agriculture did not apply to a number of U.S. measures, including (1) domestic support measures and (2) export credit guarantees for "unscheduled commodities" and rice (a "scheduled commodity"). Therefore, Brazil could proceed with certain of its challenges.**
- **The panel found that export credit guarantees for "unscheduled commodities" (such as cotton and soybeans) and for rice are prohibited export subsidies. However, the panel also**

found that Brazil had not demonstrated that the guarantees for other "scheduled commodities" exceeded U.S. WTO reduction commitments and therefore breached the Peace Clause. Further, Brazil had not demonstrated that the programs threaten to lead to circumvention of U.S. WTO reduction commitments for other "scheduled commodities" and for "unscheduled commodities" not currently receiving guarantees.

- **Some U.S. domestic support programs (i.e., marketing loan, counter-cyclical, market loss assistance, and Step 2 payments) were found to cause significant suppression of cotton prices in the world market in marketing years 1999-2002 causing serious prejudice to Brazil's interests.**
- **However, the panel found that other U.S. domestic support programs (i.e., production flexibility contract payments, direct payments, and crop insurance payments) did not cause serious prejudice to Brazil's interests because Brazil failed to show that these programs caused significant price suppression.**
- **The panel also found that Brazil failed to show that any U.S. program caused an increase in U.S. world market share for upland cotton constituting serious prejudice.**
- **The panel did not reach Brazil's claim that U.S. domestic support programs threatened to cause serious prejudice to Brazil's interests in marketing years 2003-2007. The panel declined to find that U.S. domestic support programs per se cause serious prejudice in those years.**
- **The panel also found that Brazil had failed to establish that FSC/ETI tax benefits for cotton exporters were prohibited export subsidies.**
- **Finally, the panel found that Step 2 payments to exporters of cotton are prohibited export subsidies, not protected by the Peace Clause, and Step 2 payments to domestic users are prohibited import substitution subsidies because they were only made for U.S. cotton.**

Definitions.

Peace Clause - Article 13 of the WTO Agreement on Agriculture is commonly referred to as the Peace Clause. Generally, as long as a WTO Member is meeting the criteria set out in Article 13, such as domestic support and export subsidy reduction commitments, other WTO Members are prohibited during the implementation period of the Agreement from challenging those domestic support or export subsidy measures through the WTO dispute settlement process.

Unscheduled commodities - products for which the United States is not permitted to provide export subsidies because they are not set out in the export subsidy part of the final U.S. WTO schedule which the United States filed in 1994. "Scheduled commodities" are set out in the U.S. schedule, and the United States is permitted to provide export subsidies up to the scheduled level. Besides rice, U.S. "scheduled commodities" are wheat, skim milk powder, coarse grains, butter, bovine meat, other milk products, poultry meat, vegetable oils, live dairy cattle, cheese, eggs, and pigmeat.

The Office of the United States Trade Representative.

U.S. and China Resolve WTO Dispute Regarding China's Tax on Semiconductors --

Resolution of Trade Spat Provides Real Results To U.S. High Tech Manufacturers.

07/08/2004

WASHINGTON – The United States and China have agreed on a resolution to their dispute at the World Trade Organization (WTO) regarding China's tax refund policy for integrated circuits. The resolution will ensure full market access and national treatment for U.S. integrated circuits in China, the world's fastest growing semiconductor market and an export market worth over $2 billion to American manufacturers and workers. Today's agreement resolves the first WTO case filed against China by any WTO Member.

Effective immediately, China will not certify any new semiconductor products or manufacturers for eligibility for VAT refunds. China will no longer offer VAT refunds that favor semiconductors designed in China. And, by April 1 of next year, China will stop providing VAT refunds on Chinese-produced semiconductors to current beneficiaries. Under China's tax policy, U.S. exporters of integrated circuits to China paid up to five times as much tax as local Chinese manufacturers. These policies disadvantaged U.S. manufacturers as well as U.S. firms that design integrated circuits.

"America is the global innovator. American ingenuity has spurred far-reaching gains in human achievement, and we need to ensure that there is a level playing field so that our innovators and manufacturers continue to lead the world," said U.S. Trade Representative, Robert B. Zoellick. "These are real, concrete results. Today's agreement complements our successful resolution of the wireless internet encryption issue in late April, and will ensure that our high-tech firms have full access to one of our fastest growing markets. Day in and day out, we are working hard to enforce trade rules, deliver real results to American workers and ensure that there is a level playing field for American exporters."

China is the world's third largest consumer of integrated circuits, with a market value of approximately $19 billion. Although imports currently represent approximately 80 percent of China's market, its semiconductor industry is expanding rapidly, with substantial investment from foreign firms. China's VAT refund policy not only discriminated against U.S. products directly, but also has distorted international investment in the integrated circuit sector. China is a substantial market for semiconductors produced in U.S. factories: U.S. exports of integrated circuits to China were $2.02 billion in 2003.

The agreement, once implemented, will resolve the case that the United States initiated at the WTO on March 18, 2004, and is the culmination of several rounds of discussions between negotiators and legal experts from the two countries. The United States and China held formal consultations in Geneva -- which included delegations from third parties Japan, the European Communities, and Mexico -- as well as meetings in Washington and Beijing.

Background:

U.S. exports of integrated circuits to China are subject to a 17 percent value-added tax (VAT). However, China has taxed domestic products significantly less, by allowing firms producing integrated circuits in China to obtain a partial refund of the 17 percent VAT. As a result of the refund policy, the effective VAT rate on domestic products can be as low as 3 percent. China also has allowed for a partial refund of VAT paid on integrated circuits designed in China but manufactured abroad.

An integrated circuit or semiconductor is an electronic device that can be switched to conduct or block electric currents. Most semiconductor devices are made from silicon, although other materials, such as gallium arsenide, can also be used. Virtually all electronics used today -- from antilock brakes in automobiles to satellite systems and computer applications -- incorporate semiconductors.

One of the guiding principles of the WTO is that countries and consumers benefit most when products have fair and equal access to markets without regard to their national origin. Policies that discriminate against products on the basis of national origin distort both purchasing and investment decisions to the detriment of everyone. While WTO rules permit countries to provide certain types of assistance to domestic industries, they prohibit WTO Members from supporting their industries by discriminating against foreign products.

If consultations had not resolved the dispute, the United States would have had the right to request that a WTO dispute settlement panel be established to consider the issue.

The United States and China will notify the agreement next week to the WTO in Geneva.

The Office of the United States Trade Representative.

U.S. and Mexico Reach Agreement to Resolve Telecom Dispute.

06/01/2004

Washington, D.C. and Mexico City - The United States and Mexico reached an agreement today to resolve their ongoing WTO dispute over international telecommunications services. The agreement implements recommendations included in the WTO panel report released on April 2, 2004 and formally adopted today.

The main features of the agreement notified to the WTO Dispute Settlement Body are:

- **Mexico will remove the provisions of Mexican Law relating to the proportional return system, uniform tariff system, and the requirement that the carrier with the greatest proportion of outgoing traffic to a country negotiate the settlement rate on behalf of all Mexican carriers for that country. Both countries believe that the elimination of these provisions will allow the competitive commercial negotiations of international settlement rates.**
- **Mexico will allow the introduction of resale-based international telecommunication services in Mexico by 2005, in a manner consistent with Mexican law.**

- **The United States recognizes that Mexico will continue to restrict International Simple Resale (use of leased lines to carry cross-border calls) to prevent the unauthorized carriage of telecommunications traffic.**

The annual volume of traffic between the two countries is over six billion minutes, representing services worth over two billion dollars.

Background:

In order to place a telephone call from one country into another, carriers must generally connect into the second country's telecommunications network. This is commonly done by either paying a carrier in the other country for assistance in completing the call, or by leasing a telephone line in the other country and routing calls over that leased line (commonly referred to as "ISR"). In February 2002, the United States requested a WTO panel to address restrictions imposed by Mexico on international telecommunications services between the two countries. In a report released in April 2004, the panel recommended that Mexico remove certain restrictions on the commercial negotiation of international settlement rates, but concluded that Mexico should be allowed to maintain restrictions on ISR. The panel also concluded that Mexico should allow the resale of international services from Mexico to other countries.

The Office of the United States Trade Representative.

U.S. and Korea Resolve Major Trade Dispute in Telecom Sector.

04/24/2004

WASHINGTON - U.S. Trade Representative Robert B. Zoellick announced today that, after intensive negotiations, the United States and Korea resolved a long-standing trade dispute that threatened to shut U.S. firms out of an important part of the Korean telecommunications market.

"This week marks a number of key trade successes for the United States high tech industry," said Zoellick. "China took a significant step in embracing technology neutrality in its telecom policy. Based on the deal we reached with Korea, American telecommunications companies can now be assured of unimpeded access to this important market. American businesses and workers will continue to provide cutting-edge products and services to the growing Asian market."

"Telecom is an integral part of the infrastructure of the modern global economy, and U.S. workers and businesses lead the way in products and services. It's wrong for countries to mandate exclusive standards that have the effect of shutting us out," said Zoellick. "The United States will continue to aggressively seek resolution of this and other similar issues throughout Asia and the world."

The dispute with Korea arose more than two years ago when the United States Government learned that the Korean Government had launched the development of the "Wireless Internet Platform for Interoperability" (WIPI) which it intended to promulgate as a mandatory standard in the Korean market. As originally envisioned, WIPI would have been the exclusive technology for downloading content from the Internet onto cell phones, thereby shutting out competing systems, including a U.S. system that already had over seven million Korean subscribers and is expected to generate hundreds of millions of dollars over the next five years.

The United States and Korea have now agreed to ensure that competing U.S. systems can continue to operate and grow in this important market. Resolution of the issue comes after a series of bilateral consultations and meetings between senior officials in Washington and Seoul that have been intensified over the last several months. This success comes on the heels of the decision by the Chinese government this week to delay indefinitely an exclusive wireless networking standard (WAPI encryption standard proposal), to engage with international standards-setting bodies on wireless issues, and to adopt a policy of technology neutrality for licensing new cellular services ("3G" services).

Looking ahead, the U.S. Government hopes that resolution of this issue can provide momentum for resolution of another telecommunications standards issue of importance to U.S. companies, namely Korea's plan to mandate an exclusive domestic transmission standard for a new service - portable broadband wireless internet. The U.S. Government is a strong proponent of the principle that telecommunications carriers should have maximum flexibility in the technology they choose, unencumbered by government interference.

Background.

The issues addressed this week relate to technology standards employed in the wireless equipment and services.

WIPI (Wireless Internet Platform for Interoperability) is a standard developed in Korea designed to enable cellular phone customers to download software applications (games, productivity tools, e-mail programs) onto their cell phones. WIPI is a new technology that competes with several other established software platforms.

WAPI is an encryption standard developed in China designed to make wireless local networks (e.g. WiFI "hotspots") more secure for users. International standards organizations are working to develop an open standard to address security issues relating to wireless local area networks.

3G (third-generation) mobile services are cellular services designed for both voice and high-speed data transmission, enabling users to access services such as the Internet from a cell phone or laptop, in a mobile environment. There are several competing standards that are considered 3G.

The Office of the United States Trade Representative.

U.S. Wins Key Issues in WTO Wheat Dispute With Canada.

04/06/2004

WASHINGTON - U.S. Trade Representative Robert B. Zoellick announced today that a World Trade Organization (WTO) panel has agreed with the United States that Canada's grain distribution system is unfair and violates Canada's WTO obligations. This result is consistent with a long history of WTO rulings that additional regulatory hurdles cannot be placed only on foreign products. The panel accepted the U.S. claims that Canada's grain handling system and Canada's rail transportation measure known as the "rail revenue cap" discriminate against foreign grain.

"This is a win for American farmers. The WTO found that Canada unfairly discriminates against American wheat and grains," Zoellick said. "In matters involving dairy, lumber, and now wheat, the United States has successfully prevailed at the WTO on key issues concerning unfair Canadian practices."

The panel found against the United States with respect to the unfair practices of the Canadian Wheat Board. The panel found that WTO rules do not prevent state trading enterprises like the Canadian Wheat Board from using their monopolistic privileges to the disadvantage of commercial actors.

"The finding regarding the Canadian Wheat Board demonstrates the need to strengthen rules on state trading enterprises in the WTO," Zoellick said. "The United States will continue through the WTO negotiations to aggressively pursue reform of the WTO rules in an effort to create an effective regime to address the unfair monopolistic practices of state trading enterprises like the Canadian Wheat Board.

" In the last six months, the Canadian Wheat Board announced that it overpaid Canadian farmers for their 2002 wheat crop by $65 million. The Government of Canada will pay the Canadian Wheat Board to make up this shortfall. Although not a part of the WTO case, it is an example of one of the many special privileges granted to the Canadian Wheat Board by the Canadian Government that makes it difficult for private sector actors to compete on a level playing field with the Canadian Wheat Board.

The WTO panel sided with the United States on most of the claims in this dispute.

Specifically, the panel found that:

(1) Canada's mandatory authorization requirements for foreign grain entering Canadian grain elevators violate national treatment principles.

(2) Canada's "rail revenue cap," which may result in lower rail transportation rates for the Canadian Wheat Board than for imported grain, also violates national treatment principles.

(3) Canada's prohibition on mixing foreign grain with Eastern Canadian grain also violates national treatment principles.

The panel did not find that the Canadian Wheat Board export regime violates Canada's obligations under GATT Article XVII governing the behavior of state trading enterprises.

Both the United States and Canada each may appeal the report. The United States is currently reviewing its options regarding appeal. If neither party appeals, the report could be adopted by the WTO.

Background.

The United States filed this dispute against Canada in the World Trade Organization (WTO) challenging the unfair and burdensome requirements that the Canadian grain handling system places on imported grain, including U.S. grain, and certain discriminatory aspects of the rail transportation system in Canada. The dispute also challenges monopolistic wheat trading practices of the Canadian Wheat Board (CWB). The United States believes that these unfair practices put American farmers at a disadvantage and undermine the integrity of the international trading system.

This WTO challenge followed from a Section 301 investigation completed in February 2002. At the conclusion of the investigation, the Administration set forth an aggressive four-prong program to seek relief for American wheat farmers from the unfair trading practices of the Canadian Wheat Board and the Canadian Government. One of these initiatives was the filing of this WTO challenge.

The other parts of the Administration's action plan included support for U.S. industry's antidumping and countervailing duty petitions related to imports of durum wheat and hard red spring wheat from Canada. In October 2003 the Commerce Department imposed antidumping and countervailing duties on Canadian hard red spring wheat. USTR also has worked to identify impediments to U.S. wheat entering Canada. The part of the WTO dispute regarding Canada's grain handling and rail transportation systems is a direct result of that investigation. Finally, through the WTO negotiations, the United States has aggressively pursued permanent reform of monopolistic export state trading enterprises such as the Canadian Wheat Board. The United States has made solid progress in those negotiations, gaining international support for the U.S. proposal on export state trading enterprises.

The Office of the United States Trade Representative.

U.S. Wins Telecommunications Case against Mexico in WTO.

3/12/2004

WASHINGTON - U.S. Trade Representative Robert B. Zoellick announced today that a World Trade Organization (WTO) panel has agreed with the United States that Mexico's current regime for international telecommunications violates Mexico's WTO obligations. Mexico's international telecommunications rules require U.S. carriers to connect with Mexican telecommunications providers in order to complete calls from the United States to Mexico (known as "interconnection") and grants Mexico's dominant carrier, Telmex, the exclusive authority to negotiate the rate for connecting calls into Mexico.

About 80% of all cross-border calls between the United States and Mexico originate in the United States, where price competition between U.S. carriers has lead to much lower rates for consumers. Given the high volume of calls from the United States to Mexico (second only to calls to Canada), U.S. carriers have estimated that Mexico's artificially high interconnection charges have resulted in excess payments by U.S. companies and consumers of well over $1 billion since 2000.

"Mexico has provided a single, dominant company with a government mandate to set excessive rates for international calls to Mexico," Zoellick said. "Today's decision is an important victory for

American consumers and for the telecommunications industry, and provides an excellent example of how WTO disciplines can provide concrete benefits to American consumers and businesses. The successful implementation of this decision will lead to lower costs for American and Mexican families with family and friends across the border and eliminate unnecessary costs for businesses and telecommunications providers."

The WTO panel sided with the United States on most of the major claims in this dispute. Specifically, the panel found that:

(1) Mexico breached its commitment to ensure that U.S. carriers can connect their international calls to Mexico's major supplier, Telmex, at cost-based rates.

(2) Mexico breached its obligation to maintain appropriate measures to prevent its dominant carrier from engaging in anti-competitive practices, by granting Telmex the exclusive authority to negotiate the rate that all Mexican carriers charge U.S. companies to complete calls originating in the United States.

(3) Mexico breached its obligations under the WTO Services Agreement, the GATS, by failing to ensure that U.S. carriers operating within Mexico can lease lines from Mexican carriers (and thereby provide services on a resale basis). The panel concluded, however, that Mexico may prohibit U.S. carriers from using leased lines in Mexico to complete calls originating in the United States.

Background.

In order to place a telephone call from the United States into another country, U.S. carriers must generally connect into that country's telecommunications network. This is commonly done by either interconnecting with a foreign carrier and then paying the carrier for its assistance in completing the call, or by leasing a telephone line in other country and routing calls over that leased line. Mexico prohibited U.S. carriers from leasing lines to bring calls directly into the domestic network and granted Telmex the exclusive authority to negotiate interconnection rates for cross-border traffic on behalf of all Mexican carriers. The elimination of all competition within Mexico for international interconnection resulted in rates significantly above cost and significantly above the rates charged in countries with a competitive telecommunications market.

The United States has had concerns regarding Mexico's implementation of its telecommunications commitments for several years. The United States held formal WTO consultations with Mexico in October 2000, and again in January 2001. These consultations were able to achieve significant

progress with respect to Mexico's domestic telecom market including a reduction in domestic interconnection rates and measures to regulate Telmex as a dominant carrier. Mexico, however, failed to address U.S. concerns with Mexico's anti-competitive International Long Distance Rules. As a result, the United States requested a WTO panel in February 2002 to address the outstanding international long-distance issues, including the above cost interconnection rate that Telmex charges U.S. carriers. The panel was established on April 17, 2002.

Under WTO rules, both Mexico and the United States have the opportunity to appeal today's report. If the decision is not appealed, it will be adopted by the WTO, with the recommendation that Mexico comply with the decision. If Mexico fails to comply with the decision, the United States will be allowed to take retaliatory measures.

The Office of the United States Trade Representative.

WTO Upholds U.S. Antidumping Determination.

12/15/2003

WASHINGTON - The Office of the U.S. Trade Representative announced today that the World Trade Organization (WTO) Appellate Body upheld a previous WTO panel report that stated the United States had acted consistently with its WTO obligations in a case involving the application of US trade remedy laws to Japanese corrosion-resistant carbon steel flat products. Japan had appealed the panel report, which addressed a determination by the U.S. Department of Commerce to leave in place an antidumping duty order on these Japanese steel products as a result of a "sunset review."

Such reviews are part of the process of administering the U.S. antidumping duty law. The United States remains committed to using its trade remedy laws to maintain a level playing field.

The Appellate Body findings are significant because they allow the United States to keep in place the antidumping duty order on these Japanese steel products. The Appellate Body agreed with the United States that Commerce had relied upon sufficient evidence in this particular sunset review, and did not disturb the Panel's finding that Commerce had properly conducted the review.

The Appellate Body, however, reversed the Panel's conclusion that Commerce's Sunset Policy Bulletin, which provides guidance on Commerce's conduct of sunset reviews, can only be challenged with respect to its application in a particular sunset review. This finding did not, however, affect the Appellate Body's main finding that the United States may maintain the antidumping duty order at issue. Further, Japan did not challenge those aspects of an earlier panel report that confirmed that US laws and regulations governing sunset reviews comply with the WTO Antidumping Agreement.

Japan also did not challenge any aspects of the panel report related to the US International Trade Commission's separate determination that revocation of the order would be likely to lead to a continuation or recurrence of injury.

Background.

Every five years, the U.S. antidumping duty law requires that the Commerce Department conduct a "sunset review" to examine whether dumping is likely to continue or recur if the duties are removed. The USITC must conduct a "sunset review" to examine whether revocation of the order is likely to lead to continuation or recurrence of injury to the U.S. industry within the reasonably foreseeable future. In the case involving Japanese steel, the Commerce Department and the USITC determined that dumping and injury were likely to continue or recur absent the order. Therefore, the United States kept the duties in place.

On January 30, 2002, Japan requested WTO dispute settlement consultations with the United States regarding the U.S. system of sunset reviews. Consultations were unsuccessful, and a panel was established on May 22, 2002. In a report circulated on August 14, 2003, the panel found that the United States' action was wholly consistent with its international obligations under the WTO.

On September 15, 2003, Japan appealed five of the panel's findings. The Appellate Body rejected several of Japan's claims, and concluded that the United States had not violated the WTO Antidumping Agreement.

The Panel and Appellate Body reports are expected to be adopted by the WTO Dispute Settlement Body in January, 2004.

The Office of the United States Trade Representative.

Statement by USTR Zoellick on Termination of Steel Safeguards.

12/04/2003

One and a half years ago, the President acted to provide America's steel industry and workers an opportunity to respond to increased competition from a surge in imports due in part to global overproduction. The industry has used that breathing space well, to the benefit of many families and communities around the country.

Trade is an important engine of economic growth and job creation. To help very open economies like ours adjust to rapid and sharp changes, we sometimes provide temporary safeguards from imports. Such relief is an accepted principle of global trade rules.

In March 2002, after a 9-month investigation, the independent US International Trade Commission found that 10 steel industry products had been injured by a surge in imports that warranted relief. Based on that finding, the President decided that America=s steel industry needed this breathing space.

The industry was facing tremendous pressures, thousands of jobs were at stake, and many steel firms were in or facing bankruptcy. The industry had been seeking help following a rush of low-priced imports in the aftermath of the Asian financial crisis. This President acted.

The President imposed temporary safeguards "to help give America=s steel industry and its workers the chance to adapt to the large influx of foreign steel." To do so, he exercised his authority under Section 203 of the 1974 Trade Act.

The safeguards consisted principally of tariffs ranging from 8 to 30 percent on the ten categories of steel products identified by the ITC. In order to minimize the impact of these tariffs on U.S. consumers, some steel products were excluded. In addition, exports from our free trade partners and most exports from developing countries were excluded.

In September of this year, the ITC provided a follow-up report: a mid-term assessment of the impact of the safeguard. That assessment provided an important basis for the President's deliberations on whether to maintain, modify, or terminate the safeguard.

There are three key elements that informed the President's review. First, as the ITC's analysis clearly demonstrated, the safeguard worked. It provided the steel industry with the breathing space it needed to regain its competitiveness. Jobs have been saved. Steel businesses have been given another chance to compete.

Since the safeguard has been in place:

- **The industry has undergone major restructuring and consolidation**
  - **More than half of steel production capacity is owned by firms that merged or restructured, and they cut about 4 million tons of inefficient capacity.**
- **Overall productivity has increased sharply**
  - **The ITC found that in the safeguard's first year, productivity increased 12.5% for critical flat-rolled products and by 5.5% to 26% for the range of products.**
- **Prices have stabilized**

- And prices today are about 15-30% higher than in February 2002, the month before the safeguard.

- **Workers' pensions have been saved and taken off steel industry books**

- The U.S. Pension Benefit Guarantee Corporation has assumed the guaranteed pension underfunding of 14 steel producers, totaling $8.2 billion.

- **Profitability has returned**

- After losing nearly $5 billion in the 24 months before the safeguard was initiated, the flatrolled industry posted profits of $400 million during the first twelve months of the relief.

- Financial markets are reflecting growing optimism for the steel market. U.S. Steel Corp. stock is currently at a 52-week high. Through November 21, the S&P index of steel stocks rose 24.4%, as compared with a 13.9% increase for the S&P 500.

- **U.S. steel exports are at historic levels, too**

- Through August, exports are 49% above the prior year, accounting for 8.4% of total US shipments.

The safeguard definitely provided the industry and workers with needed breathing space. To its credit, much of the industry has used this time well. The bulk of restructuring that was necessary to make the industry more competitive has taken place.

Second, not only is the industry today much stronger than it was 21 months ago, the economic circumstances justifying the safeguard have changed:

- **Imports are no longer depressing U.S. prices**

- On an annualized basis, imports to date are at their lowest levels in a decade, even with the exclusions to the safeguard.

- **Demand in Asia and Russia has rebounded**

- China's steel consumption has increased 22% a year since 2001.

- **Changes in relative prices have lowered import pressures and increased export opportunities.**
-

Last but importantly, safeguards unavoidably impose some additional costs on consumers. The aim, of course, is for the benefits of the safeguard to outweigh the costs.

Fortunately, as the ITC report demonstrated, the costs to the U.S. economy imposed by the safeguards were limited. Now, the purpose of the mid-term review has been to determine whether economic circumstances have changed such that the costs of maintaining the safeguard outweigh the benefits.

In the first 21 months of the safeguard, the benefits to the industry outweighed the marginal costs to consumers. Going forward, however, this is not the case. For these reasons, the President has concluded that the safeguard has done its job and can now be lifted. We will continue use of our steel import licensing and monitoring system so that we can identify potential import surges quickly in order to respond.

The President has worked hard with the Congress and other countries around the world to open markets for products and services from American businesses, farmers, workers -- and to help consumers stretch their hard-earned dollars further.

At the same time, he has recognized that we need to help Americans adjust to change -- through safeguards like this one, worker retraining, and better education. Safeguards are not supposed to be permanent; they provide a helping hand in extraordinary circumstances.

We are pleased with the steps the industry has taken to make the most of the breathing space provided by the safeguard, and we look forward to working with them and other U.S. businesses to continue to grow the economy, create jobs, and expand opportunity.

The Office of the United States Trade Representative.

U.S. Wins WTO Appeal on Japan's Apple Restrictions.

12/1/2003

WASHINGTON - U.S. Trade Representative Robert B. Zoellick announced today that the World Trade Organization (WTO) Appellate Body has upheld earlier panel findings that Japan's import restrictions on U.S. apples are not justified and are in breach of Japan's WTO obligations. Japan imposes severe restrictions on imported U.S. apples, allegedly to protect Japanese plants from fire blight, a plant disease. The United States, however, showed that there is no scientific evidence that mature apple fruit can transmit fire blight, and the panel and Appellate Body agreed.

"I am very pleased that the Appellate Body confirmed that Japan's restrictions on U.S. apples violate WTO rules. This is very important for gaining meaningful access to Japan's market," said Zoellick. "We are committed to ensuring a level playing field for apples and other U.S. agricultural goods. Our farmers grow the world's finest agricultural products, and this WTO decision sets an important standard that will help us to keep markets open for U.S. agricultural exports."

"U.S. apple growers have suffered from Japan's unjustified import requirements, which were imposed with no scientifically sound justification," said Agriculture Secretary Ann M. Veneman. "This ruling reinforces one of the WTO's basic rules - health and safety requirements must be based on sound science. The U.S. victory in this case brings us one step closer to improved market access for

U.S. apple growers in Japan and will help us fight similar trade barriers in markets throughout the world."

"American farmers expect our trading partners to implement trade rules fairly, and that means using rules based on science," added Zoellick. "We've seen others around the world block our exports with non-science based barriers, such as in Europe with beef and biotech products, and so this decision will help us in our efforts to make sure American farmers are treated fairly."

U.S. farmers send more than $390 million worth of world-class apples abroad every year, in particular from Washington State and Oregon. However, Japan's severe fire blight restrictions have essentially blocked our apples from reaching Japanese consumers; for example, U.S. apple exports to Japan were limited to only $377,000 in 2001. Removal of Japan's WTO-inconsistent import barriers would give a boost to U.S. apple farmers by providing the opportunity to increase U.S. exports.

The WTO Appellate Body sided with the United States on all of its major claims in this dispute. Specifically, the Appellate Body:

- **upheld panel findings that Japan had acted inconsistently with its WTO obligations by maintaining its import restrictions on U.S. apples without sufficient scientific evidence; and**
- **upheld panel findings that Japan had acted inconsistently with its obligation to base the import restrictions on a risk assessment.**

Background.

Japan claimed that its restrictions on imports of U.S. apples were necessary to prevent introduction of fire blight (a disease that affects plants but not humans) into Japan. However, as the United States pointed out to Japan repeatedly over more than a decade of bilateral talks, there has never been any scientific evidence that mature apple fruit transmit fire blight. Billions of apples have been exported worldwide, most of the time without any restrictions against fire blight. Nonetheless, as the WTO panel found, there is no scientific evidence that such apples have ever transmitted the disease.

On March 1, 2002, the United States requested WTO dispute settlement consultations with Japan on its fire blight restrictions on imported U.S. apples. Consultations were unsuccessful, and a panel was

established on June 3, 2002. The panel issued its report on July 15, 2003, agreeing with the United States on all of its major claims. Japan appealed on August 28, 2003.

The United States alleged that Japan's fire blight restrictions were inconsistent with various provisions of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, including Japan's obligation not to maintain import restrictions without sufficient scientific evidence and its obligation to base any import restrictions on a risk assessment. In today's report, the Appellate Body upheld the panel findings against Japan.

The Office of the United States Trade Representative.

United States Wins Textile Case Against India in WTO.

06/20/2003

WASHINGTON - U.S. Trade Representative Robert B. Zoellick announced today that a World Trade Organization (WTO) panel has upheld U.S. laws on determining the country of origin of textile and apparel products in a dispute brought by India challenging these rules. Rules of origin are used to determine the country of origin of imported goods. The panel concluded that the U.S. laws are consistent with U.S. WTO obligations, rejecting all of India's challenges.

"This is an important victory for American trade laws and American textile trade. Detailed U.S. rules of origin for textiles help make sure that everyone plays by the rules, and we are very pleased that the panel rejected India's complaints," said Zoellick. "Today's report reaffirms that U.S. rules are consistent with our WTO commitments, and it shows that countries do have flexibility under the WTO to develop accurate rules of origin. The Administration is fully committed to enforcing fair, predictable rules that ensure fair trade."

The panel findings are significant because they uphold rules of origin that ensure that textile and apparel products imported into the United States accurately reflect their country of origin, and not where minor finishing operations take place.

The WTO panel rejected each of India's arguments. Specifically, the panel:

- **rejected India's argument that the U.S. rules of origin improperly differentiate between textile and apparel products and other industrial products;**
- **rejected India's argument that the U.S. rules were adopted to protect the U.S. textile industry from competition;**
- **rejected India's argument that the U.S. rules of origin distort, disrupt and restrict international trade; and,**
- **rejected India's argument that the U.S. rules are administered in a discriminatory manner.**
- **Instead, the panel agreed with the United States that the rules of origin are entirely consistent with U.S. obligations under the WTO Agreement on Rules of Origin.**

Background.

Section 334 of the Uruguay Round Agreements Act of 1996, the so-called "Breaux-Cardin rules," established statutory rules of origin applicable to textile and apparel products based on standards set out in the law. Section 405 of the Trade and Development Act of 2002 amended Section 334 by providing further rules of origin for specific products. On January 11, 2002, India requested WTO dispute settlement consultations with the United States regarding Section 334 and Section 405. Consultations were unsuccessful, and a panel was established on June 24, 2002.

India alleged that Sections 334 and 405 were inconsistent with various provisions of the WTO Agreement on Rules of Origin. In today's report, the panel rejected all of these claims.

India will have an opportunity to appeal today's report.

The Office of the United States Trade Representative.

U.S. & Others File WTO Case Against EU Moratorium on Biotech Foods & Crops.

05/13/2003

WASHINGTON - U.S. Trade Representative Robert B. Zoellick and Agriculture Secretary Ann M. Veneman today announced the United States, Argentina, Canada, and Egypt will file a World Trade Organization (WTO) case against the European Union (EU) over its illegal five-year moratorium on approving agricultural biotech products. Other countries expressing support for this case by joining it as third parties include: Australia, Chile, Colombia, El Salvador, Honduras, Mexico, New Zealand, Peru and Uruguay.

Joining Zoellick and Veneman at the Washington announcement were Dr. C.S. Prakash (organizer of a pro-agricultural biotech declaration signed by 20 Nobel Laureates and over 3,200 scientists); T.J. Buthelezi, a small farmer of biotech crops from South Africa; Dr. Diran Makinde, DVM, Ph.D., Dean of the School of Agriculture, University of Venda for Science and Technology, South Africa; Dr. Ariel Alvarez-Morales, Principal Scientist, Department of Plant Genetic Engineering, Center for Research and Advanced Studies, Irapuato, Mexico; and, representatives from countries participating in the case.

"The EU's moratorium violates WTO rules. People around the world have been eating biotech food for years. Biotech food helps nourish the world's hungry population, offers tremendous opportunities

for better health and nutrition and protects the environment by reducing soil erosion and pesticide use," said Zoellick. "We've waited patiently for five years for the EU to follow the WTO rules and the recommendations of the European Commission, so as to respect safety findings based on careful science. The EU's persistent resistance to abiding by its WTO obligations has perpetuated a trade barrier unwarranted by the EC's own scientific analysis, which impedes the global use of a technology that could be of great benefit to farmers and consumers around the world."

"With this case, we are fighting for the interests of American agriculture. This case is about playing by the rules negotiated in good faith. The European Union has failed to comply with its WTO obligations," said Veneman. "Biotechnology is helping farmers increase yields, lower pesticide use, improve soil conservation and water pollution and help reduce hunger and poverty around the world. Farmers here and elsewhere must be assured that their crops won't be unfairly rejected simply because they were produced using biotechnology. The EU actions threaten to deny the full development of a technology that holds enormous potential benefits to both producers and consumers worldwide, while also providing a very significant means to combat hunger and malnutrition that afflict hundreds of millions of people across the developing world."

"The U.S. and the EU have a large and important economic relationship, and disputes such as this, while very important, make up only one part of that relationship. The United States will continue to work with the EU to manage this and other disputes in an appropriate way, and we look forward to advancing our shared objectives in the Doha global trade negotiations and other fora," Zoellick added.

The WTO agreement on sanitary and phytosanitary measures (SPS) recognizes that countries are entitled to regulate crops and food products to protect health and the environment. The WTO SPS agreement requires, however, that members have "sufficient scientific evidence" for such measures, and that they operate their approval procedures without "undue delay." Otherwise, there is a risk countries may without justification use such regulations to thwart trade in safe, wholesome, and nutritious products.

Before 1999, the EU approved nine agriculture biotech products for planting or import. It then suspended consideration of all new applications for approval, and has offered no scientific evidence for this moratorium on new approvals. As EU Environment Commissioner Margot Wallstrom said almost three years ago (July 13, 2000): "We have already waited too long to act. The moratorium is illegal and not justified...the value of biotechnology is poorly appreciated in Europe."

Agricultural biotechnology is a continuation of the long tradition of agricultural innovation that has provided the basis for rising prosperity for the past millennium. Humankind has historically

progressed in boosting agricultural productivity, quality and choices by harnessing science to develop new forms of crops.

More than 145 million acres (58 million hectares) of biotech crops were grown in the world in 2002 (check figure). Worldwide, about 45% of soy, 11% of corn, 20% of cotton and 11% of rapeseed are biotech crops. In the United States, 75% of soy, 34% of corn and 71% of cotton are biotech crops.

Numerous organizations, researchers and scientists have determined that biotech foods pose no threat to humans or the environment. Examples include the French Academy of Medicine and Pharmacy, and the French Academy of Sciences, the 3,200 scientists who cosponsored a declaration on biotech foods and numerous scientific studies including a joint study conducted by the seven national academies of science (the National Academies of Science of the United States, Brazil, China, India, and Mexico, plus the Royal Society of London and the Third World Academy of Sciences).

Background.

In October 1998, the EU stopped approving any new agriculture biotech products for planting or import. This moratorium had no effect on any previously-approved products, such as corn and soy, which are still used and are available in member countries, but it froze the approval process in the EU. No biotech product has ever been rejected for approval in the EU.

Since the late 1990's, the EU has pursued policies that undermine agricultural biotechnology and trade in biotech foods. First, six member states (Austria, France, Germany, Italy, Greece & Luxemburg) banned modified crops approved by the EU, and the Commission refused to challenge the illegal bans. In 1998, member states began blocking all new biotech applications. This approval moratorium is causing a growing portion of U.S. agricultural exports to be excluded from EU markets and unfairly casting concerns about biotech products around the world, particularly in developing countries.

The first step in a WTO dispute, which the United States and other countries are taking today, is to request and conduct consultations in the next 60 days. WTO procedures are designed to encourage parties to resolve their differences. If at the end of the 60 days, no resolution has been achieved, then the U.S. and the cooperating countries may seek the formation of a dispute settlement panel to hear arguments. Dispute settlement procedures, including appeal, typically take a total of 18 months.

The Office of the United States Trade Representative.

USTR Statement on WTO Report on Dumping Act.

01/16/2003

Statement from the Office of the United States Trade Representative in response to the report of the WTO Appellate Body released today in the dispute concerning the U.S. "Continued Dumping and Subsidy Offset Act of 2000:"

"We welcome the findings in today's report that the Act is consistent with the WTO requirements for the initiation of anti-dumping or countervailing duty investigations. We are still reviewing that report, but we note that since the dispute did not involve the underlying U.S. anti-dumping and countervailing duty laws, the United States will continue to vigorously enforce those laws to ensure that U.S. industries, farmers, and workers are not forced to compete with unfairly traded imports. We are however disappointed with the Appellate Body's findings concerning the funds disbursed under the Act.

The United States has been a leader in supporting rules-based dispute settlement in the WTO. Therefore, in this case as in others, the United States will seek to comply with its WTO obligations. We are reviewing the report to assess the best compliance options, and will discuss these with the Ways and Means and Finance Committees, and all other interested members of Congress."

Background.

The Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA") was enacted in October 2000 as part of a Fiscal Year 2001 agriculture appropriations bill. As it was considered for the first time as part an appropriations bill, it was not approved by the Senate Finance and House Ways and Means Committees.

On September 10, 2001, a WTO dispute settlement panel was established at the request of Australia, Brazil, Canada, Chile, the European Union, India, Indonesia, Japan, Korea, Mexico and Thailand to examine the consistency of the CDSOA with U.S. WTO obligations under the WTO Anti-dumping Agreement and the WTO Subsidies Agreement. The panel found against the United States on three of the five principal claims asserted by the complaining parties.

The United States appealed the panel's adverse findings to the WTO Appellate Body on October 18, 2002. Under WTO rules, the WTO Dispute Settlement Body ("DSB") will adopt its recommendations and rulings in the dispute within 30 days. The United States will seek agreement with the 11 complaining parties on the reasonable period of time for the United States to comply with the DSB recommendations and rulings."

The Office of the United States Trade Representative.

U.S. Wins in WTO Challenge to Canadian Dairy Subsidies.

12/20/2002

WASHINGTON - The United States won an important victory today when a World Trade Organization (WTO) Appellate Body decided that Canada continues to provide illegal subsidies to its dairy industry, even after revising its practices due to previous losses. This is the second time the WTO has decided against Canada's illegal dairy export subsidies.

"Canada has been unfairly subsidizing its dairy industry for years and American dairy farmers have been suffering because of it," said U.S. Trade Representative Robert B. Zoellick. "We are pleased that the Appellate Body has agreed with our position that Canada's dairy export practices constitute an illegal export subsidy. This is an important victory for American dairy farmers and processors and U.S. agriculture in general. The Appellate Body's decision resolves this longstanding dispute and establishes an important precedent regarding what constitutes an export subsidy. Canada now needs to comply with its WTO obligations and end its unfair subsidies."

"This is an important example that the WTO trade dispute resolution system works," said Agriculture Secretary Ann M. Veneman. "We urge the Canadians to move quickly into compliance with the decision issued by the WTO so that U.S. farmers can have access to these markets."

The Appellate Body found that Canada's "commercial export milk" scheme provides an export subsidy, in the form of discounted milk, to Canadian businesses that process cheese and other dairy products. The WTO findings establish an important precedent that will help prevent other countries from adopting similar export subsidy schemes harmful to U.S. agricultural industries.

The United States government calculates that Canadian dairy export subsidies result in lost sales to American farmers and dairy processors of up to $35 million per year.

The next step in the process is for the WTO's Dispute Settlement Body to formally adopt the Appellate Body's report in January. There is no further appeal.

Background:

As part of its Uruguay Round WTO obligations, Canada agreed to specific limits on export subsidies for dairy products. In 1995, Canada replaced its subsidy payments on all dairy exports,which were financed by a levy on dairy producers, with a new system. However, this system let Canadian processors buy lower-priced milk and use it to make cheese and other dairy products for export. Canada claimed the new system was no longer an export subsidy.

In 1997, the National Milk Producers Federation, the U.S. Dairy Export Council and the International Dairy Foods Association asked the Office of the U.S. Trade Representative to challenge Canada's dairy trade practices as inconsistent with its WTO obligations on export subsidies. After bilateral consultations, the U.S. referred its complaint to a WTO dispute settlement panel in February 1998. New Zealand joined the U.S. challenge to Canada's export subsidies.

In 1999, a WTO panel and the Appellate Body found that Canada's special milk class system, which provides discounted milk for export, was indeed an export subsidy. The WTO panel and the Appellate Body also found that Canada was violating its WTO Agreement on Agriculture by shipping more subsidized dairy exports than it had agreed to.

In response to the panel and Appellate Body reports, Canada introduced its "commercial export milk" scheme. The United States and New Zealand charged that Canada's new system still did not

bring Canada's export subsidy system into conformity with its WTO obligations. In January 2001, the United States and New Zealand asked that a new WTO dispute settlement panel review the new Canadian system. That panel agreed in July 2001 that Canada's new system continued to provide an export subsidy in the form of discounted milk to Canadian dairy processors.

Canada appealed the panel's findings. In December 2001, the Appellate Body said it could not reach a decision because it didn't have enough information. The United States and New Zealand then requested another WTO panel to review the additional information requested by the Appellate Body. In July 2002, the panel concluded that Canada was continuing to provide illegal export subsidies to Canadian dairy processors with the discounted milk. Today's Appellate Body report affirms that panel's findings.

The Office of the United States Trade Representative.

United States Files WTO Case on Monopolistic Canadian Wheat Board.

12/17/2002

WASHINGTON - U.S. Trade Representative Robert B. Zoellick announced today that the United States will file a case against Canada in the World Trade Organization (WTO) over the wheat trading practices of the monopolistic Canadian Wheat Board (CWB).

In addition, the United States is challenging as unfair and burdensome Canada's requirements to segregate imported grain in the Canadian grain handling system, along with Canada's discriminatory policy that affects U.S. grain access to Canada's rail transportation system. This WTO case continues the Administration's aggressive pursuit of ensuring a fair trading system for American farmers.

"The Canadian Wheat Board is a monopoly, and its special benefits and privileges put American wheat farmers at a disadvantage and undermine the integrity of the international trading system," Zoellick said. "American wheat farmers are the most competitive in the world. This Administration is committed to opening markets around the world and to fighting aggressively to see that American farmers are treated fairly."

"The U.S. WTO proposal calls for the elimination of the monopoly powers of state trade enterprises such as the Canadian Wheat Board," said Agriculture Secretary Ann M. Veneman. "The action today highlights this Administration's commitment to ensuring a fair and open market for U.S. wheat farmers."

Under WTO rules, the first step in a WTO dispute is for both parties to hold formal meetings. The United States will ask for consultations with the Canadians on Dec. 17, 2002, to discuss whether the CWB abides by global trade rules for state trading enterprises. In addition, the US will seek to end Canada's discriminatory policies of segregating wheat and on access to the Canadian rail transportation systems.

On Feb. 15, 2002, Zoellick released an Affirmative Finding after an investigation under section 301 of the Trade Act of 1974. In the Finding, Zoellick described the multiple avenues USTR would take to seek relief for American wheat farmers from the unfair trading practices of the CWB, a government state trading enterprise. In April 2001, U.S. Chief Agriculture Negotiator Allen F. Johnson went to North Dakota to hear directly from wheat farmers on the CWB's unfair competition.

There are four prongs to the February plan, which the Administration is pursuing aggressively.

First, by requesting consultations, USTR is initiating dispute settlement proceedings against the CWB and the Canadian government in the WTO. The consultation process is intended to encourage countries to settle disputes. Canada has 30 days to agree to consult with the United States. If U.S. concerns are not addressed through consultations, the United States can ask the WTO to form a dispute settlement panel.

Second, the Administration committed to work with the U.S. industry to examine the possibility of filing antidumping and countervailing duty petitions. The North Dakota Wheat Commission filed petitions on Sept. 13, 2002, and the Department of Commerce initiated antidumping and countervailing duty investigations on Oct. 23, 2002.

Third, USTR indicated it would work to identify impediments to U.S. wheat entering Canada. The specific part of the U.S. WTO case regarding Canada's segregation and rail transportation systems for grain is a direct result of that investigation.

Fourth, the U.S. committed to seek reform in global trade negotiations in the WTO agriculture negotiations. The United States has aggressively pursued permanent reform of monopolistic export state trading enterprises, such as the CWB. The agriculture negotiations are part of the Doha Development Agenda that was launched in November 2001. The United States successfully put export competition, including reform of state trading enterprises, as the first agenda item for the agriculture negotiations last June. At that time, the United States proposed eliminating export monopolies which would allow any producer, distributor, or processor to export agricultural products. The United States also proposed ending special financial privileges which are granted to state traders and expanding their WTO transparency obligations. In subsequent meetings of the WTO agriculture negotiations, the United States continues to build a coalition of other WTO member countries who support this position.

The North Dakota Wheat Commission and the broader U.S. wheat industry support the Administration's decision to file a WTO case on the wheat trading practices of the CWB.

The Office of the United States Trade Representative.

WTO Appellate Body Upholds Key Provisions of Anti-Subsidy Law in Steel Case.

11/28/2002

WASHINGTON - The Office of the United States Trade Representative announced today that the Appellate Body of the World Trade Organization (WTO) upheld key provisions of a U.S. trade law that provides a remedy against unfairly subsidized imports. In a case involving subsidized German steel, the Appellate Body found that the U.S. trade laws were consistent with U.S. WTO obligations, rejecting a challenge by the European Union (EU).

U.S. trade laws are the most comprehensive in the world, and play a key role in making sure American workers, businesses, and farmers can compete on a level playing field, said U.S. Trade Representative Robert B. Zoellick. This is a victory not only for the United States, but for the multilateral trading system. With today's report, the Appellate Body has done what it should - interpret the WTO agreements as written.

The provisions at issue involve so-called sunset reviews. In a sunset review, which is a procedure required by the WTO Subsidies Agreement, authorities review an outstanding countervailing duty order every five years to determine whether the imposition of special countervailing duties remains necessary to counteract subsidized imports that cause harm to a competing U.S. industry. In

challenging the U.S. countervailing duty remedy, the EU alleged that certain aspects of the U.S. sunset review regime were inconsistent with the requirements of the Subsidies Agreement.

The Appellate Body report involved a review of an earlier WTO panel report in a dispute arising out of a U.S. sunset review of a countervailing duty order on imported corrosion-resistant carbon steel products from Germany. Although today's report primarily addressed the EU challenges to the U.S. countervailing duty law itself, the earlier panel report had found that one aspect of the sunset review on German steel was inconsistent with the Subsidies Agreement. The United States did not appeal this particular finding to the Appellate Body.

Background:

The WTO Appellate Body report released today arose out of a sunset review conducted by the U.S. Department of Commerce (Commerce) of the 1993 countervailing duty order on corrosion-resistant carbon steel products from Germany. In August, 2000, Commerce issued a final sunset review determination to the effect that revocation of the order would likely lead to a continuation or recurrence of subsidization. In December, 2000, the U.S. International Trade Commission (ITC) determined that revocation of the order would likely lead to a continuation or recurrence of material injury to the U.S. industry concerned. In light of these two findings, Commerce determined to leave the order in place.

On November 10, 2000, the EU requested dispute settlement consultations, and on August 8, 2001, the EU requested the establishment of a WTO dispute settlement panel. The EU challenged the specific Commerce determination, as well as certain aspects of the sunset review provisions of the U.S. countervailing duty law. The WTO panel circulated its final report on July 3, 2002. Although the report largely favored the United States, the panel did find against the United States on a few issues. Accordingly, the United States appealed, and the EU subsequently filed a cross-appeal with respect to the issues on which it lost.

Taking the Appellate Body and panel reports together, the following findings were made:

- **The Appellate Body affirmed the panel's finding that the U.S. system of automatically self-initiating sunset reviews is WTO-consistent. The EU claim to the contrary, if accepted, would have imposed an additional burden on U.S. industries seeking relief from subsidized imports.**
- **The Appellate Body reversed the panel and found that the standard used in sunset reviews by Commerce for purposes of determining when subsidies are de minimis - and, thus, non-**

actionable - was not WTO-inconsistent. Here, too, the EU claim, if accepted, would have weakened the remedy against subsidized imports.

- **The Appellate Body affirmed the panel's finding that the U.S. countervailing duty law is not inconsistent with an authority's obligation under the Subsidies Agreement to determine the likelihood of continuation or recurrence of subsidization in a sunset review.**
- **The Appellate Body affirmed the panel's finding that certain EU claims were not properly before the panel. These claims involved the EU's allegations that with respect to the U.S. countervailing duty law in general, and the sunset review on German steel in particular, interested parties are not given ample opportunity to submit evidence, as required by the Subsidies Agreement.**
- **The EU did not appeal the panel's finding that the EU claim concerning the U.S. expedited sunset review procedure was not properly before the panel.**

The Office of the United States Trade Representative.

WTO Adopts Report Upholding U.S. Position on Canadian Lumber Subsidies.

11/01/2002

WASHINGTON - The World Trade Organization (WTO) today officially adopted findings from a recent panel report granting the United States victory on a key issue in the ongoing softwood lumber dispute between the United States and Canada. The report confirms that the Canadian provinces' sale of timber from public lands can constitute a subsidy under the WTO Subsidies Agreement.

The WTO panel also agreed with the United States that U.S. laws governing reviews of countervailing duty orders are fully consistent with the WTO Subsidies Agreement. However, the panel found against the United States on the U.S. methodology for calculating the amount of the subsidy. The United States is pursuing that issue in another WTO case.

We're pleased that the WTO affirmed the longstanding U.S. position that Canada's timber sales from government land constitute a subsidy, said U.S. Trade Representative Robert B. Zoellick. While we strongly believe that the WTO erred on the calculation methodology, we are vigorously defending that methodology in another WTO case.

In response to the WTO findings, U.S. Commerce Secretary Don Evans said, "We are committed to defending our lumber industry from unfair trading practices and we strongly object to the panel's flawed ruling on the way we determined the amount of subsidies. We are confident that our calculations are consistent with WTO rules."

The WTO panel report is a victory for the United States on two fundamental issues:

- **Canadian provinces' sale of timber from public lands can constitute a subsidy under the WTO Subsidies Agreement; and**
- **U.S. laws governing reviews of countervailing duty orders are fully consistent with the WTO Subsidies Agreement.**

These findings will be key parts of U.S. arguments in a separate WTO proceeding dealing with Canadian lumber.

The U.S. trade action challenged by the Canadians in the WTO report adopted today involved the preliminary imposition of countervailing duties, a special duty that the WTO allows importing countries to impose to remedy the injury caused by imported goods that have been subsidized by foreign governments. The report relates only to preliminary countervailing duties, which have already been refunded to Canadian lumber producers because of a U.S. law unrelated to this WTO case. Those preliminary duties amounted to almost $1 billion.

The WTO report does not affect the final countervailing duties that are currently in place, which are subject to a separate WTO proceeding. The United States will strongly argue in that proceeding that the incorrect findings in today's report should be disregarded.

The United States believes the WTO panel erred in rejecting the use of comparable U.S. prices as a benchmark for measuring whether government timber prices in Canada are below market value, and amount to a subsidy benefit. The United States concluded that there were no market determined prices in Canada because of the overwhelming dominance of government timber prices. The WTO panel concluded that investigating authorities may never, under any circumstances, use prices outside the country under investigation as a benchmark, even if that country has monopoly power and effectively controls all prices in its domestic market.

As the United States noted at the WTO today, the panel's rejection of U.S. price benchmarks means that whenever a government subsidizes its domestic industry so that it dominates the entire market, the complaining country cannot fully offset the subsidy.

The WTO report released today has no impact on any of the other cases. The United States will continue to vigorously defend its trade laws, including in challenges that Canada has raised in separate WTO and NAFTA cases related to other aspects of the U.S. softwood lumber determinations.

Background.

The WTO panel report that was adopted today addresses only the August 9, 2001 U.S. preliminary countervailing duty determination. Canada requested WTO consultations regarding the preliminary countervailing duty determination on August 21, 2001. The WTO panel was established on December 5, 2001, and the final report was released to the public on September 27, 2002. In addition to this WTO proceeding, Canada has also contested the U.S. decision on final countervailing duties that was announced in May 2002. That proceeding is now underway.

The Office of the United States Trade Representative.

WTO Panel Upholds Key Parts of U.S. Actions on Softwood Lumber.

09/27/2002

WASHINGTON - The Office of the United States Trade Representative announced today that a World Trade Organization (WTO) panel upheld key parts of U.S. actions in the ongoing softwood lumber dispute with Canada, agreeing with the United States that the Canadian provinces' sale of timber from public lands can constitute a subsidy under the WTO Subsidies Agreement.

The U.S. trade actions involved the imposition of countervailing duties, a special duty that the WTO allows importing countries to impose to remedy the injury caused by imported goods that have been subsidized by foreign governments. The WTO panel also agreed with the United States that U.S. laws governing reviews of countervailing duty orders are fully consistent with the WTO Subsidies Agreement.

"Although we do not agree with all of the panel's conclusions, its reasoning on the most important issue of natural resource subsidies is a clear victory for the United States," said U.S. Trade Representative Robert B. Zoellick. "Canada has long argued that its natural resource subsidies do not fall within the disciplines of the WTO and therefore cannot be subject to countervailing duties under any circumstances. The WTO has conclusively rejected the Canadian argument."

"U.S. trade laws are the most comprehensive, transparent, and effective laws in the world," said Zoellick, "Today's report does not change the United States' fundamental interest in finding a durable solution to 20 years of softwood lumber litigation. The United States remains prepared to offer Canadian lumber producers unfettered access to the U.S. market if the provinces implement market-based pricing for sales of timber from public lands."

The panel found against the United States on other issues, including the U.S. methodology for calculating the amount of the subsidy and the critical circumstances determination (a determination of an import surge justifying retroactive duties). However, today's findings will have no practical effect on the final countervailing duties that are currently in place. Moreover, the case has been entirely bypassed by events because the report only relates to the original preliminary countervailing duties, which have already been refunded to Canadian lumber producers. These preliminary duties amounted to almost $1 billion.

In addition, the report's findings are moot with regard to the United States' critical circumstances determination. The U.S. investigation that Canada complained about continued to unfold while this WTO case was being argued, and the United States already independently resolved this issue in Canada's favor.

Canada's WTO and NAFTA challenges to other aspects of the U.S. softwood lumber determinations are ongoing. The WTO report released today has no impact on any of the other cases. The United States will continue to vigorously defend its trade laws, and the actions it takes pursuant to those trade laws, in all venues.

Background.

The WTO panel report that was released today only addresses the United States' August 9, 2001 preliminary countervailing duty determination. Canada requested WTO consultations regarding the preliminary countervailing duty determination on August 21, 2001. The WTO panel was established on December 5, 2001. In addition to this WTO proceeding, Canada has also contested the United State's final countervailing determination at the WTO. That proceeding is now underway.

In its report, the panel made the following findings:

- **The panel agreed with the United States that the Canadian provincial governments' sale to lumber producers of timber from public lands constitutes a "financial contribution" by the government that can give rise to a subsidy under the terms of the WTO Subsidies Agreement.**
- **The panel also agreed with the United States that the provisions of U.S. law governing expedited and administrative reviews of final countervailing duty orders are consistent with U.S. obligations under the WTO Subsidies Agreement. The panel rejected Canada's argument that U.S. laws preclude company-specific reviews in cases, like this one, where, because of the large number of exporters, the Commerce Department calculates a country-wide rate rather than company-specific rates.**
- **The panel found against the United States with respect to the particular methodology used to calculate the amount of the subsidy. In its preliminary determination, the U.S. used prices for comparable standing timber in contiguous U.S. states as the benchmark to measure whether the government timber prices in Canada are below market, i.e., provide a subsidy benefit. The panel found that this methodology is inconsistent with the WTO Subsidies Agreement. The panel also found that the U.S. improperly assumed that the subsidy provided to timber harvesters passed through arm's-length sales to downstream users of timber.**
- **Finally, the panel found against the United States with respect to the retroactive imposition of provisional remedies based on its preliminary determination that "critical circumstances" exist in this case. A critical circumstances finding triggers a special remedy, allowed under the WTO Subsidies Agreement, for injury resulting from import surges occurring before countervailing duties are normally imposed. This remedy allows duties to be imposed on imports that enter during the 90-day period before the publication of a preliminary determination. The Panel found that, under the WTO Subsidies Agreement, this remedy cannot be applied until a final determination is made.**

Both parties may appeal today's report. The United States will review the report in full before making a decision on appeal.

The timeline of the U.S. softwood lumber determinations is as follows:

April 2, 2001 - The U.S. lumber industry filed antidumping and countervailing duty petitions with the Commerce Department and the ITC.

April 23, 2001 - Antidumping and countervailing duty investigations were initiated, covering a period of investigation from April 1, 2000 through March 31, 2001.

May 18, 2001 - The ITC issued its preliminary determination that the U.S. softwood lumber industry is threatened with material injury as a result of dumped and subsidized softwood lumber from Canada.

August 9, 2001 - The Commerce Department made an affirmative preliminary determination that the provincial governments' sales to lumber producers of timber on public lands at below market prices constitute a countervailable subsidy to Canadian lumber producers. As a result of that determination, Canadian softwood lumber imports were subject to bond or cash deposit requirements based on a net preliminary countervailable subsidy rate of 19.31 percent. As part of its preliminary determination, the Department also made an affirmative preliminary finding that critical circumstances existed based on evidence that lumber producers received prohibited export subsidies and that there were massive imports of the subject merchandise over a relatively short period of time. As a result of the critical circumstances determination, the bond/cash deposit requirements were applied to imports that entered 90 days prior to the publication of the preliminary determination.

October 30, 2001 - The Commerce Department made an affirmative preliminary determination that softwood lumber is being sold, or is likely to be sold, in the United States at less than fair value, i.e., dumped. As a result of that determination, Canadian softwood lumber imports became subject to additional bond/cash deposit requirements based on preliminary antidumping rates ranging from 5.94 to 19.24 percent.

March 22, 2002 - The Commerce Department announced its final countervailing duty determination, finding a final countervailing duty rate of 19.34 percent. As part of its final countervailing duty determination, the Department made a final negative critical circumstances determination, i.e., it made a final determination that critical circumstances did not exist in this case, and it refunded all of the bonds and cash deposits that were posted pursuant to the preliminary critical circumstances determination. The Commerce Department also announced its final determination in the companion dumping investigation on March 22, finding final antidumping duty rates ranging from 2.26 to 15.83 percent.

April 26, 2002 - The Department reduced the final rates due to clerical errors. The amended final countervailing duty rate is 18.79 percent (down from 19.34 percent) and the amended final antidumping rates range from 2.18 percent to 12.44 percent (down from 2.26 to 15.83 percent).

May 2, 2002 - The ITC announced its final determination that the U.S. industry is threatened with material injury as a result of dumped and subsidized softwood lumber from Canada. Because the ITC

found a threat of injury, as opposed to actual present injury, all bonds and cash deposits that were posted pursuant to the preliminary antidumping and countervailing duty determinations were refunded to Canadian producers. The preliminary duties amounted to almost $1 billion.

May 22, 2002 - The Commerce Department published antidumping and countervailing duty orders on softwood lumber from Canada and instructed the Customs Service to begin collecting cash deposits for countervailing duties at the rate of 18.79 percent and for antidumping duties at rates ranging from 2.18 percent to 12.44 percent. The total duties thus average 27.22 percent.

The Office of the United States Trade Representative.

U.S. and Other Trade Partners Present Positions and

Proposals to PreventUnauthorized Use of Geographic Names.

09/20/2002

WASHINGTON - During World Trade Organization (WTO) negotiations today, the United States joined other trade partners in proposing a voluntary notification system to further facilitate existing protections for geographic names for wines and spirits, such as wine from California's Napa Valley, from unauthorized use. In separate discussions earlier this week on rules to protect geographic indications for other products, the United States joined Argentina, Australia, Canada, Guatemala, and other trade partners in affirming that current trade rules provide adequate rights and effective protections for property owners.

"I'm pleased that so many other key WTO Members have joined us in this proposal to facilitate existing protection for geographic names for wines and spirits with an efficient and flexible system," U.S. Trade Representative Robert B. Zoellick said. "Like copyrights, patents, and trademarks, geographic indications play an important role in protecting distinctive and specialized wine and spirits products and ensure that consumers have consistent quality."

Geographic names or "indications" (GIs) are considered intellectual property, like trademarks, and their unauthorized use is currently prohibited. Global trade rules (Trade Related Aspects of Intellectual Property, or the TRIPS Agreement) provide for two types of geographic indications, one for wines and spirits, and one for other all other types of GIs. The Doha Development Agenda (the current series of ongoing multilateral trade negotiations) requires negotiations on a notification system for geographic indications for wines and spirits to be completed by September 2003.

With respect to the separate discussions earlier in the week, Zoellick said, "For GIs other than wines and spirits, the Doha mandate does not call for negotiations. We believe the current system works well, and we share the concerns of many in the developing world that we don't need to burden everyone with a large and costly new framework, as some have suggested."

Joint Proposal on GIs for wine and spirits:

The joint proposal for wines and spirits builds on the strengths of the international framework that currently protects such terms, and, if adopted, would fulfill the mandate of the Doha Development Agenda set by WTO Ministers last November to establish improvements and complete negotiations by September, 2003. Joining the United States were Argentina, Australia, Canada, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Japan, Namibia, New Zealand, the Philippines, and Taiwan.

Some WTO Members, such as the European Union, have made an alternative proposal which may greatly burden the multilateral trading system by expanding international bureaucracies and imposing complicated procedures.

"The developing world played a key role in making Doha a success and making their priorities everyone's priorities. The developing world is concerned about the over-expansion of global trade rules that will burden them with excessive red tape," added Zoellick. "The United States and many WTO Members, including those in the developing world, believe the current system can be improved without creating a massively bureaucratic, expensive, and inefficient system, and our proposal reflects that approach."

The joint proposal on wines and spirits has the following elements:

- **Provides a non-burdensome, low-cost, and effective system for notification, and protection of the geographical indications for wines and spirits that are recognized in the national systems of individual WTO Members. Members would notify their respective registered or recognized geographic indications to the WTO, which would provide all other WTO Members with a complete compilation of GIs.**
- **Facilitates the existing protection for wine and spirit geographical indications under TRIPS without imposing new substantive obligations on Members. This is in contrast to proposals tabled by other Members which would impose new obligations and would prejudice existing rights provided by the Agreement. In the U.S.-supported proposal, consistent with intellectual property/trademark regimes, the burden of enforcement would remain on the right holder, not on governments.**
- **Recognizes the special needs of certain developing and least developed countries. The proposed system is consistent with the TRIPS Agreement, is voluntary and will only place obligations on those Members choosing to participate in the system.**
- **Maintains the WTO's commitment to full transparency, by making the information generated by the system available to all Members.**
- **Follows the clear mandate of the TRIPS Agreement which stipulates that WTO Members are free to determine their own appropriate method of implementing the Agreement within their own legal system, the proposal does not require WTO Members to change their domestic systems for protection of geographical indications.**

The European Community and Hungary have also made proposals. However, in contrast to the proposal led by the United States, these proposals would impose new obligations on all Members, even those that would prefer not to be involved in the system, would require Members to analyze and raise objections to hundreds of wine and spirit names within an 18-month period or be required to protect these terms, and would take away existing flexibility under the Agreement allowing the long-standing use of common names.

These proposals demonstrate further the United States' leadership and cooperation within the WTO on the issue of geographical indications. In 1999, Canada, Chile, Japan and the United States tabled the first proposal for a notification and registration system that complied with the TRIPS Agreement mandate in Article 23.4. The proposal announced today reflects comments made by a number of Members to improve the structure of the 1999 text, but the fundamental elements of the 1999 proposal are maintained.

Ministers, in paragraph 18 of the Doha Ministerial Declaration, directed the TRIPS Council to complete, by the Fifth Ministerial Conference, the negotiations ongoing in the TRIPS Council pursuant to Article 23.4, on the establishment of a multilateral system of notification and registration for geographical indications for wines and spirits. Article 23.4 states: "In order to facilitate the

protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system."

U.S. supported joint paper for GI's other than wines and spirits:

Some WTO Members are proposing to alter international standards on GIs for products other than wine or spirits. These proposals may impose significant new costs on WTO Members, especially developing and least developed Members, which will far outweigh any potential benefits.

"Geographic terms are an important part of the intellectual property system and are often a key part of a product's value. The current global trade framework utilizes the domestic laws of individual WTO Members and provides efficient and effective protection for geographic terms," said Zoellick. "The United States and other WTO Members strongly believe that before Members advocate burdening developing and least-developed Members with excessive new obligations, they should first strive to fully realize the existing protections available under global trade rules."

"We need to make sure that we maintain the right balance - protecting against unauthorized use of geographic terms, without upsetting the current efficient and non-burdensome system," Zoellick added.

Joining the United States and Guatemala in the paper were Argentina, Australia, Canada, Chile, the Dominican Republic, El Salvador, Guatemala, New Zealand, Paraguay, the Philippines, and Taiwan.

Some proposals from other WTO Members could result in developing nations having to fund and operate large regulatory systems to protect global GIs for products other than wine or spirits, mostly from the developed world, in exchange for supposed added protection for relatively few names of interest for developing Members.

The joint paper submitted Wednesday in the WTO TRIPS Council identifies numerous reasons why additional protection for geographical indications for products is unnecessary given the strong protection already provided to geographical indications for these products under TRIPS. The joint paper also details how the costs associated with increasing protection would far outweigh the benefits, particularly for developing and least-developed countries.

In the United States, geographical indications such as "Stilton" for cheese, "Parma" for ham, and "Roquefort" for cheese, already receive TRIPS protection as "certification marks" administered under U.S. trademark law. The owners of these GIs have successfully used this protection to prevent unauthorized uses of their GIs in the U.S.

Thus, the French GI "Roquefort," which identifies an indigenous cheese from France, can be asserted to prevent unauthorized use of the term "Roquefort" (or a similar term) for any cheese - or related product - that falsely suggests a connection to the "Roquefort" cheese from France.

Unfortunately, not all WTO Members have implemented the level of protection provided under the TRIPS Agreement, including some of the Members (such as the European Union) that are demanding new negotiations to increase protection. Implementing the existing protection available under the Agreement would not only ensures protection for the geographical indications used by their own producers but also the geographical indications of other WTO Members.

The Office of the United States Trade Representative.

WTO Panel Sets Amount of FSC Sanctions.

08/3/2002

WASHINGTON - The European Union is entitled to impose $4.043 billion in trade sanctions as a result of the Foreign Sales Corporation provisions of U.S. tax law, according to a World Trade Organization (WTO) ruling released today.

The United States contended that sanctions should have been limited to $1 billion based on the actual impact of the FSC provisions on EU commercial interests.

"I'm disappointed that the arbitrator did not accept the lower figure put forward by the United States. We believe that $1 billion is much more accurate," said United States Trade Representative Robert B. Zoellick. "Nevertheless, the key point, as the President has said, is that the Executive branch will work with Congress to fully comply with our WTO obligations. I believe that today's findings will ultimately be rendered moot by U.S. compliance with the WTO's recommendations and rulings in this dispute."

The FSC provisions have been the subject of contention between the EU and the United States for several years. The WTO found that the U.S. provision was inconsistent with WTO obligations in a March 2000 ruling. The United States passed a new law in November 2000 to comply with U.S. obligations, but the EU challenged this measure. In January this year, the WTO found that the new law still does not comply with U.S. WTO obligations.

The U.S. Congress is working on new tax legislation aimed at bringing U.S. law into compliance with WTO obligations and, at the same time, enhancing the competitiveness of U.S. firms. The House Ways & Means Committee has held several rounds of hearings on this matter, and Chairman Thomas has introduced a bill. Zoellick recently testified before the Senate Finance Committee on the FSC issue, along with Deputy Treasury Secretary Kenneth W. Dam.

"One of the ironies of this case," said Zoellick, "is that when the dust has settled, we hope to find that the competitiveness of U.S. firms has been strengthened, rather than diminished."

Under WTO rules, the WTO Dispute Settlement Body must provide its formal approval before the EU can actually impose trade sanctions. However, there is no deadline by which the EU must submit such a request, and EU officials previously have indicated that they would refrain from imposing sanctions so long as the United States is making progress on eliminating the FSC subsidy.

The U.S. submissions in this proceeding are available on USTR's Web site.

Background.

On March 20, 2000, the WTO ruled that the FSC provisions of U.S. tax law provided an export subsidy that is inconsistent with WTO obligations. In order to comply with these rulings, the United States passed the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 ("ETI Act") on Nov. 15, 2000. Two days later, the EU commenced a WTO dispute, alleging that the ETI Act failed to eliminate the problems that the WTO had found with the FSC provisions. On the same day, the EU also requested authority from the WTO to impose trade sanctions on $4.043 billion worth of U.S. exports. On Nov. 27, 2000, the United States and EU entered into a WTO arbitration proceeding, alleging that the amount of sanctions requested by the EU was excessive under WTO standards. This arbitration was suspended pending the outcome of the EU's challenge of the ETI Act under WTO rules.

On Jan. 29, 2002, the WTO ruled that the ETI Act was inconsistent with WTO obligations. As a result of an earlier agreement with the EU, the arbitration then automatically resumed.

The arbitration proceeding consisted of written submissions and an oral hearing. The United States argued that under established WTO principles, the amount of any sanctions awarded to the EU had to be based on the trade impact of the U.S. subsidy on the EU. The United States estimated that this amount is roughly $1 billion per year. The EU claimed that because it could have requested as much as $13.5 billion in sanctions, the arbitrator should accept its request for $4.043 billion.

The Office of the United States Trade Representative.

WTO Panel Upholds Sections of U.S. Antidumping & Countervailing Duty Laws.

06/08/2002

WASHINGTON – The Office of the United States Trade Representative announced today that the World Trade Organization (WTO) has completed a final report upholding key sections of the U.S. antidumping and countervailing duty laws. The WTO found that certain U.S. laws used in AD/CVD cases – the "facts available" provisions – do not breach WTO rules.

The U.S. facts available provisions allow the United States to complete antidumping and countervailing duty investigations when foreign companies refuse or otherwise fail to provide necessary information. Antidumping and countervailing duty laws are used to combat unfair foreign trade practices that cause injury to U.S. industries.

"We welcome the WTO's finding that these key sections of our antidumping and countervailing duty laws are consistent with WTO rules," said U.S. Trade Representative Robert B. Zoellick. "While we do not agree with all of the panel's conclusions, its reasoning will protect our ability to use these important components of U.S. trade remedy laws in the future."

The WTO report arose from a challenge by India to the U.S. antidumping order on Indian steel plate. India had claimed that the procedures used in this case were inconsistent with WTO rules. The panel agreed with the United States that key parts of the overall U.S. AD/CVD laws did not breach any of the WTO rules that India had cited.

In addition to its challenge to the legal provisions as such and the overall facts available "practice," India had also contested the application of those provisions during the challenged antidumping investigation, and the treatment of India under the "developing country" section of WTO antidumping rules.

To summarize, the panel found that:

- **The U.S. legal provisions governing the use of "facts available" are consistent with WTO rules.**
- **The facts available "practice" is not a "measure" that can be challenged at the WTO.**
- **The United States acted consistently with the developing country provision of the Antidumping Agreement.**
- **The panel disagreed, however, with the application of the facts available provisions in the specific antidumping investigation. The panel found that the U.S. did not provide a legally sufficient justification for its decision to disregard certain data from the Indian producer and instead to rely entirely on the facts available to establish the producer's antidumping margin.**

Background.

The U.S. facts available provisions, sections 776(a), 782(d), and 782(e) of the Tariff Act of 1930, as amended, allow the United States to complete antidumping and countervailing duty investigations when companies refuse or otherwise fail to provide necessary information. The United States was unable to obtain usable information from the Indian respondent company and used the facts available provisions to calculate an antidumping margin for the company during the antidumping investigation of steel plate from India. The WTO report upheld the U.S. statute.

The United States imposed an antidumping order on Indian steel plate imports on February 10, 2000. India requested WTO consultations on October 4, 2000. The WTO panel, which was established on July 24, 2001, issued its final report to the parties on June 21, 2002.

The Office of the United States Trade Representative.

WTO Panel Affirms Canada Continuing Illegal Dairy Subsidies.

06/25/2002

WASHINGTON - The Office of the U.S. Trade Representative, responding to press reports, has confirmed today that a second World Trade Organization (WTO) dispute settlement panel found that Canada is still illegally subsidizing its dairy industry even after restructuring its dairy export practices. Canadian dairy export subsidies cost American farmers and dairy processors up to $35 million a year in lost sales.

"This is an important win for American dairy farmers and processors," said U.S. Trade Representative Robert B. Zoellick. "The WTO panel has confirmed what the United States has been saying all along - that Canada is continuing to illegally subsidize its dairy exports. These unfair practices penalize our farmers trying to compete with the Canadians in world markets."

The dispute settlement panel concluded that Canada had not properly implemented the findings of an earlier WTO panel. The WTO findings set an important precedent that will help prevent other countries from adopting similar export subsidy programs harmful to America's dairy industry.

"We applaud the decision of the WTO regarding Canadian dairy subsidies that have hurt U.S. dairy producers," said Secretary of Agriculture Ann M. Veneman. "This decision demonstrates how the dispute resolution system works. Export subsidies are the most trade-distorting form of support and we call on Canada to immediately comply with the WTO ruling and eliminate its illegal dairy export subsidies. We also call on all WTO members to commit to the elimination of export subsidies in the current round of WTO negotiations."

Background.

As part of its Uruguay Round WTO obligations, Canada agreed to specific export subsidy limits on dairy products. However, on Aug. 1, 1995, Canada replaced its subsidy payments on dairy product exports, which were financed by a levy on producers, with a new permit system which allowed Canadian processors to purchase lower-priced milk for sales to export destinations. Canada claimed the new system was no longer an export subsidy.

In 1997, the National Milk Producers Federation, the U.S. Dairy Export Council and the International Dairy Foods Association petitioned the Office of the U.S. Trade Representative to challenge Canada's dairy trade practices as inconsistent with its WTO obligations on export subsidies. After bilateral consultations, the U.S. referred its complaint to a WTO dispute settlement panel in February 1998. New Zealand joined the WTO challenge to Canada's export subsidies.

In 1999, a WTO panel and the Appellate Body found that Canada's special milk class system, which provides reduced-priced milk for export, provides an export subsidy. The WTO Appellate Body also found that Canada was shipping subsidized dairy exports in greater quantities than is permitted under its export subsidy commitment levels, violating Canada's obligations under the WTO Agreement on Agriculture.

In response to the dispute settlement reports, Canada eliminated one of the export subsidies that was found to be inconsistent with Canada's WTO obligations. However, Canada introduced other programs to replace the challenged export subsidy. Both the United States and New Zealand alleged that Canada's changes failed to bring Canada's export subsidy system into conformity with its WTO obligations. In January 2001, the United States and New Zealand requested that a new WTO dispute settlement panel review Canada's new programs.

The two countries argued, and the WTO dispute settlement panel agreed, that the continued involvement of Canadian federal and provincial governments in the provision of low-cost milk to processors for export constituted an export subsidy. Canada appealed the panel findings, but the WTO Appellate Body announced in December 2001 that it could not reach a decision because the factual record was incomplete. The United States and New Zealand then requested another WTO

dispute settlement panel to review the additional factual information deemed necessary by the Appellate Body. That panel found yesterday that Canada is still in violation of its WTO commitments.

The Office of the United States Trade Representative.

USTR Says Retaliation against U.S. Safeguard Measure Would be Unprecedented.

04/29/2002

WASHINGTON - The Office of the United States Trade Representative said today that any immediate unilateral retaliation against the United States for its recent temporary safeguard action on steel would be unprecedented in the history of World Trade Organization (WTO) dispute settlement procedures, and would strike at the heart of the multilateral trading system.

Both Japan and the European Union have threatened immediate retaliation against the United States for imposing temporary tariffs on imported steel under safeguard provisions of the WTO without waiting for a WTO ruling by an independent, neutral panel.

A review of 32 WTO safeguard cases over eight years shows only one example of a country unilaterally retaliating against a safeguard measure that a WTO member imposed prior to a WTO ruling. That retaliation, by Poland against Slovakia's safeguard on imported sugar, prompted such widespread criticism among WTO members that Poland quickly withdrew its retaliation.

Moreover, in none of these 32 cases did the country taking the safeguard action notify the WTO of any rebalancing - a step that the EU and Japan insist is required.

Two of the cases dealt with the question of whether there was an absolute increase in imports - an issue the EU has raised with the United States in the steel case. "Absolute" refers to the volume of goods imported, rather than the amount imported relative to domestic production.

In a 1998 case involving imported footwear from Argentina, the EU contested Argentina's claim that there was an absolute increase in imports, but recognized that the dispute settlement process was the appropriate venue for resolving the case. The question of whether there was an absolute increase in imports rose again last year when Korea was challenging the U.S. safeguard measure on line pipe. Korea did not seek unilateral retaliation, and the dispute panel eventually decided that the United States was correct.

"As the EU itself has said, no nation should take justice in its own hands without a prior review by an independent and neutral panel," said Josette Shiner, Associate U.S. Trade Representative for Policy and Communications. "To ignore this long string of precedent would undermine the integrity of the WTO rules and processes."

The EU made its statement in a 1999 case, United States - Import Measures on Certain Products from the European Communities, in which it criticized the United States for an effort "to be judge and jury . . . and take justice in its own hands without a prior review by an independent and neutral panel."

Taking unilateral action will encourage other WTO members to ignore the dispute settlement process, which both Europe and Japan have vigorously defended in dispute settlement cases before the WTO. The WTO's Dispute Settlement Understanding (DSU) does not contain any exceptions that would allow a member to deviate from normal dispute settlement procedures when resolving issues under Article 8.3 of the Safeguards Agreement.

Europe and Japan have gone on the record denouncing the use of unilateral trade action in dispute settlement procedures. Japan took the following position in a recent dispute settlement case before the WTO: "The renunciation of unilateral trade measures in the WTO Dispute Settlement is one of the most important rules of the WTO. WTO Members are prohibited from unilaterally suspending concessions or other obligations under the WTO Agreement."

The Office of the United States Trade Representative.

WTO Upholds Adverse Ruling on Foreign Sales Corporation (FSC) Tax.

01/14/2002

WASHINGTON - The WTO Appellate Body affirmed today a prior finding by a WTO dispute settlement panel that the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (ETI Act) is inconsistent with United States obligations under the WTO.

"We are disappointed with the outcome," said United States Trade Representative Robert B. Zoellick. "Given prior decisions, we knew this would be an uphill struggle, but we believed it was important to make our case for a level playing field on tax rules. The United States respects its WTO obligations, which serve America's interests, and we intend to continue to seek to cooperate with the EU in order to manage and resolve this dispute."

"This is an especially sensitive dispute that, at its core, raises questions of a level playing field with regard to tax policy," added Zoellick. "We will be consulting closely with Congress and affected U.S. interests regarding next steps."

Background.

In February, 2000, the WTO Appellate Body upheld a panel decision finding that the Foreign Sales Corporation (FSC) provisions of U.S. tax law violated U.S. WTO obligations. In response to these findings, in November, 2000, the United States enacted the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (ETI Act). The EU challenged the ETI Act, and on August 20, 2001, a WTO panel issued a report containing the following findings: (1) the ETI Act confers a prohibited export subsidy under the WTO Subsidies Agreement; (2) the ETI Act confers an export subsidy which violates U.S. obligations under the WTO Agriculture Agreement; (3) the ETI Act violates the national treatment provisions of Article III:4 of the GATT 1994; and (4) the ETI Act's transition rules violate the panel's recommendation (as modified by the WTO Dispute Settlement Body) to withdraw the FSC subsidy with effect from November 1, 2000.

The United States appealed the panel report to the WTO Appellate Body on October 15. The Appellate Body held an oral hearing on November 26-27. The Appellate Body circulated its report on January 14, affirming the findings of the panel.

The Office of the United States Trade Representative.

WTO Issues Report Upholding Key Aspects of U.S. Law in Trademark Dispute.

01/01/2002

WASHINGTON–The World Trade Organization (WTO) issued a report today upholding key aspects of a U.S. law concerning the ownership of U.S. trademarks associated with businesses confiscated in Cuba.

Today's WTO report confirms the longstanding U.S. position that WTO intellectual property rights rules leave WTO Members free to protect trademarks by establishing their own trademark ownership criteria. The ruling does not call into question the distinction that the U.S. law in question (section 211 of the FY1999 Omnibus Appropriations Act) draws between original trademark owners and companies that acquire a trademark as part of a government confiscation.

In another key finding requested by the United States, the WTO report, issued by the Appellate Body, also overturned an earlier WTO panel report finding that section 211 denied parties fair and equitable judicial procedures to enforce trademark rights. It found, however, that the law's treatment of U.S. and Cuban companies is contrary to the national treatment and most-favored-nation obligations under WTO rules.

Today's report suggests that in the absence of discrimination a law along the lines of section 211 would be consistent with WTO rules, and therefore those trademark owners who currently enjoy protection under section 211 could continue to enjoy that protection.

At issue is a European Union (EU) challenge to a provision of U.S. law, section 211, that limits the ability of Cuban entities or their successors to claim ownership of trademarks and trade names that they have confiscated, unless the original owner has consented. The EU's complaint, claiming a violation of international trade law, specifically the Agreement on Trade-Related Intellectual Property Rights (TRIPs), was prompted in part by a dispute over a trademark for a Cuban rum.

The Appellate Body's findings cannot be appealed, and will be final when the WTO Dispute Settlement Body adopts the report. The USTR will consult closely with Congressional committees and interested Members in considering an appropriate response to today's report.

Background.

The EU requested consultations on section 211 in July 1999, and a WTO panel, composed in October 2000 to consider the EU's complaint, circulated its report on August 6, 2001. The panel found in favor of the United States on most grounds, but said that section 211 breached TRIPs Agreement obligations to make fair and equitable procedures available to right holders. The EU appealed most of the issues it lost to the WTO Appellate Body, and the United States cross-appealed on the one issue it lost. This Appellate Body report resolves those appeals.

The Office of the United States Trade Representative.

U.S. Wins WTO Case on Indian Auto Restrictions.

12/21/2001

WASHINGTON - United States Trade Representative Robert B. Zoellick today announced that a dispute settlement panel of the World Trade Organization has found that restrictions on U.S. companies manufacturing cars in India violate the WTO Agreement.

"The panel report confirms that WTO Members cannot impose local content requirements or trade balancing requirements on companies doing business in their countries. Not only do such requirements make it much harder for U.S. companies to operate abroad, they also take away export opportunities from our companies at home,"Ambassador Zoellick said. "It is a priority of this Administration that Americans be treated fairly in the global trading system. I am pleased that we have won this case and that the panel has rejected India's restrictions on their automotive sector."

India maintained regulations that require auto manufacturers in India to sign memoranda of understanding (MOU's) that impose local content and trade balancing obligations on the signatories. These regulations are designed to protect Indian domestic auto parts manufacturers from competition.

Local content rules require that a minimum percentage of parts be used in manufacturing cars in India. Trade balancing measures require manufacturers to export Indian origin goods to offset the value of goods they import to India. Both of these requirements apply to all companies in the auto sector (foreign and domestic), and severely restrict both foreign investors' and Indian domestic companies' ability to conduct business. Requiring companies to use local content reduces competitiveness and raises costs. By imposing a preference on local goods, these measures also make it harder for U.S. goods to compete in India.

If India does not appeal the decision, the WTO ruling may be considered for formal adoption in January, after which India will be required to bring its regulations and MOU's into compliance.

Background:

Under the local content provisions, MOU signatories were required to use no more than 50% imported content in their passenger car production by the end of the third MOU year, and no more than 30% imported content by the end of the fifth year. Under the trade balancing provisions, MOU signatories were required to "balance" their imports of auto kits and components into India with exports of cars or car parts of at least equal value of those imports.

The United States and the European Communities brought a WTO dispute to challenge these requirements in summer of 1999. The WTO dispute settlement panel report, which was given to the parties on December 13, 2001, agrees with the United States and the EC that these practices violate the WTO Agreement.

The Office of the United States Trade Representative.

U.S. Wins WTO Case on Sea Turtle Conservation.

10/22/2001

WASHINGTON–The World Trade Organization (WTO) Appellate Body today released a report finding that the United States' implementation of its sea turtle protection law is fully consistent with WTO rules and complies with earlier recommendations of the Appellate Body. Malaysia, along with three other countries, had brought an initial challenge to the law (known as the "shrimp-turtle" law) in 1996. In the latest phase of the case, Malaysia challenged the United States' compliance with the earlier Appellate Body report. Today's report upholds the conclusions of a WTO panel in June, which found that the United States had complied.

"Today's Appellate Body report confirms that our sea turtle conservation law is consistent with WTO rules, and more generally, shows that the WTO as an institution recognizes the legitimate environmental concerns of its Members," said U.S. Trade Representative Robert B. Zoellick. The preamble to the WTO Agreement recognizes the importance of sustainable development and environmental protection.

The U.S. law restricts imports of shrimp caught in a way that harms endangered sea turtles. In a 1998 report, the Appellate Body agreed with the United States that the law does not violate WTO obligations because it is covered by an exception to WTO rules for measures relating to the

conservation of exhaustible natural resources. However, the Appellate Body found that the United States had unjustifiably discriminated among exporting countries in applying the law. The United States complied with the Appellate Body findings by modifying implementation of its law in a manner that both enhanced sea turtle conservation and addressed the unfair discrimination identified by the Appellate Body.

In the report released today, the Appellate Body agreed with the June 2001 panel report and the United States that the U.S. implementation steps had remedied any unfair discrimination. The Appellate Body took note of the revisions to the shrimp-turtle guidelines that provide more due process to exporting nations. The Appellate Body also recognized the good faith efforts of the United States to negotiate a sea turtle conservation agreement with the Indian Ocean and South-East Asian nations affected by the law.

Background.

Sea turtles are an ancient and far-ranging species, with migratory patterns extending throughout the oceans of the world. Due to the harvesting of sea turtles and their eggs and to accidental mortality associated with shrimp trawling and other fishing operations, all but one species of sea turtles have become threatened or endangered with extinction throughout all or part of their range.

Researchers have developed special equipment, known as the Turtle Excluder Device, or TED, that virtually eliminates accidental deaths of sea turtles in shrimp trawl nets. For more than a decade, the United States has required that U.S. shrimp fishermen employ TEDs. Over a dozen countries around the globe also require that their shrimp trawlers employ TEDs. Experience has shown that the use of TEDs, combined with other elements of an integrated sea turtle conservation program, can stop the decline in sea turtle populations and will, over time, lead to their recovery.

The U.S. law at issue -- Section 609 of Public Law 101-162 -- restricts imports of shrimp harvested with fishing equipment, such as shrimp trawl nets not equipped with TEDs, that results in incidental sea turtle mortality. It thereby avoids further endangerment of sea turtles.

In October 1996, India, Malaysia, Thailand and Pakistan challenged the U.S. law under WTO dispute settlement procedures, claiming that it was inappropriate for the United States to prescribe their national conservation policies. In April 1998, a panel found that the U.S. measure was inconsistent with Article XI of the General Agreement on Tariffs and Trade (GATT), which provides that WTO Members shall not maintain import restrictions. The United States had maintained that Section 609 fell within the exception under Article XX(g) of the GATT that permits import restrictions relating to

the conservation of an exhaustible natural resource. The United States appealed the panel findings to the WTO Appellate Body.

In October 1998, the Appellate Body reversed the findings of the dispute settlement panel. It agreed with the United States that the U.S. law is covered by the GATT exception for measures relating to the conservation of exhaustible natural resources, but found that the United States had implemented the law in a way that resulted in unfair discrimination between exporting nations. The Appellate Body also agreed with the United States that the GATT and all other WTO agreements must be read in light of the preamble to the WTO Agreement, which endorses sustainable development and environmental protection. The Appellate Body confirmed that WTO members may adopt environmental conservation measures such as the U.S. law, so long as they are administered in an even-handed manner and do not amount to disguised protectionism.

In November 1998, the United States announced that it would comply with the Appellate Body report in a manner consistent with its firm commitment to the protection of endangered sea turtles. The United States and the other parties to the dispute reached agreement on a 13-month compliance period, which ended in December 1999.

U.S. compliance steps included revised Department of State guidelines for implementing Section 609, which were issued after providing notice and an opportunity for public comment. The revised guidelines were designed to increase the transparency and predictability of decisionmaking under Section 609 and to afford foreign governments a greater degree of due process.

U.S. compliance steps also included efforts to launch the negotiation of a sea turtle conservation agreement with the governments of the Indian Ocean region on the protection of sea turtles. The United States provided financial assistance to facilitate the attendance of representatives from developing countries at such negotiations, and considerable progress has been made.

The United States has also offered technical training in the design, construction, installation and operation of TEDs to any government that requests it. Since the adoption of the Appellate Body report, the United States has provided such assistance and training to a number of governments and other organizations in the Indian Ocean and South East Asia region.

Despite the U.S. compliance steps, in October 2000, Malaysia – but none of the other original complainants – requested the re-establishment of the original panel to examine whether the United States had in fact complied with the Appellate Body findings. In June of this year, the panel found that the U.S. implementation of its sea turtle protection law is fully consistent with WTO rules and

complies with the earlier recommendations of the WTO Appellate Body. Malaysia then appealed the panel's findings to the WTO Appellate Body.

The Office of the United States Trade Representative.

U.S. Wins WTO Antidumping Case on High Fructose Corn Syrup.

10/22/2001

WASHINGTON–The World Trade Organization (WTO) Appellate Body has today affirmed a WTO panel's conclusion that Mexico's imposition of antidumping duties on imports of high fructose corn syrup (HFCS) from the United States is inconsistent with the requirements of the WTO Antidumping Agreement. The Appellate Body rejected Mexico's appeal of the panel's decision. The WTO panel had found that the steps Mexico had taken to comply with an earlier adverse WTO panel decision were insufficient.

"We are gratified that the Appellate Body has found in favor of the United States," said U.S. Trade Representative Robert B. Zoellick. "The Appellate Body agreed with our view that Mexico did not establish a basis for reversing the WTO panel's decision."

The Appellate Body's decision is an important win for U.S. agriculture and demonstrates the value of the WTO to U.S. agricultural interests.

Mexico had found that HFCS imports threatened material injury to Mexico's sugar industry. In June, the panel upheld U.S. arguments that Mexico's determination is inconsistent with the Antidumping Agreement. In particular, the panel concluded that the facts did not support Mexico's conclusion that HFCS imports were likely to increase substantially. The panel also ruled that Mexico had inadequately analyzed the likely impact of HFCS imports on the Mexican sugar industry. Mexico appealed the panel's decision on procedural and substantive grounds. The Appellate Body agreed with the U.S. position that the panel's decision should not be reversed.

Background.

In January 1998, Mexico's antidumping authority determined that imports of HFCS -- a sweetener used in soft drinks and other products -- from the United States were being dumped in the Mexican market and these imports threatened material injury to the Mexican sugar industry. The United States requested the formation of a WTO panel to review Mexico's determination.

The WTO Antidumping Agreement allows dumping duties to be imposed only if dumping and injury (including a threat of injury) to the domestic industry are established. The focus of the U.S. challenge was that Mexico's threat of injury analysis was flawed in several respects.

In January 2000, the panel issued its decision. The panel found that Mexico had not properly determined that HFCS imports were likely to increase substantially. The panel also concluded that Mexico had not properly analyzed the likely impact of HFCS imports on the Mexican sugar industry.

In September 2000, the Mexican antidumping authority issued a new determination that purported to comply with the panel's rulings. The Mexican antidumping authority again concluded that HFCS imports threaten the Mexican sugar industry. The United States challenged Mexico's redetermination before a second WTO panel. In June, the panel agreed with the U.S. view that Mexico had failed to cure the flaws already found in its original determination.

Mexico appealed the panel's decision on procedural and substantive grounds, which led to today's issuance of the Appellate Body's report.

The Office of the United States Trade Representative.

United States to Appeal WTO Ruling on FSC/ETI Tax Law.

10/10/2001

WASHINGTON - The United States Trade Representative today announced that the United States will appeal a World Trade Organization ruling on a provision of U.S. tax law that allows U.S. companies to exclude their foreign source income from tax. The European Union challenged the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 ("ETI Act") – which replaced the Foreign Sales Corporation ("FSC") provisions of U.S. tax law – as an unfair subsidy to U.S. corporations. The United States argued that the ETI Act was WTO-compliant and similar to European tax laws.

"The FSC/ETI issue is a sensitive one involving complex tax policy questions and the interests of many international companies. As I cautioned in May during a visit to Europe, there is a lot at stake and the United States will vigorously defend its interests," said United States Trade Representative Robert B. Zoellick.

"The prior Administration worked closely with the Congress to fashion the ETI remedy; this Administration consulted closely with the Congress in considering the appropriate approach. Many members of Congress and the business community expressed their strong preference that the United States should appeal the FSC decision," Zoellick said.

"We have decided to appeal because we believe the decision was in error. The United States stands by its WTO obligations, which serve America's interests. We have discussed our concerns with the EU, with which we'll continue to seek to cooperate to manage, and, ultimately, resolve this dispute," said Zoellick.

Background.

In March 2000, the World Trade Organization (WTO) ruled against the FSC provisions of U.S. tax law. Last November, Congress passed the ETI Act to comply with the WTO ruling, but the European Union (EU) challenged the new law. On August 20, 2001, a WTO dispute settlement panel found that the ETI Act violates U.S. WTO obligations. This second adverse ruling is what the United States today announced it would appeal.

The ETI Act provides an exclusion from tax for foreign-source income. The Act was intended to replicate, within the parameters of the U.S. tax system, the tax treatment afforded this type of income under European tax systems.

The appeal, which is provided for in a September 2000 procedural agreement between the United States and the EU, is expected to take between 60-90 days. If the WTO Appellate Body should reverse the panel's findings that the ETI Act is WTO-inconsistent, that will be the end of the dispute. On the other hand, if the Appellate Body should affirm the panel's findings, there would then be an arbitration to determine the amount of countermeasures, if any, to which the EU is entitled.

The Office of the United States Trade Representative.

Bush Administration Settles Lamb Safeguard Issue with Australia & New Zealand.

08/31/2001

WASHINGTON - The Bush Administration announced today that it had settled the WTO dispute over lamb meat imports with Australia and New Zealand. Under the agreement announced by United States Trade Representative Robert B. Zoellick, the United States will continue to provide adjustment assistance to domestic lamb producers through FY 2003, and end its tariff-rate quota safeguard on November 15, 2001. Australia and New Zealand agree that this constitutes a mutually satisfactory solution to the WTO dispute.

"We are pleased that by working cooperatively with our lamb producers, Members of Congress, and important trading partners, we have resolved this difficult issue," said Zoellick. "This program will enhance the competitiveness of our lamb industry and is fully consistent with our obligations under the WTO."

The United States will provide the U.S. lamb industry with up to $42.7 million in additional assistance through FY 2003 to help the industry to continue adjusting to import competition.

The Administration's decision was taken in close consultation with U.S. industry as well as key Members of Congress. The U.S. lamb industry has given its full support to the Administration decision. The Administration will now commence the legal process needed to ensure that its decision is effectuated by November 15, 2001.

The assistance program, to be funded by the U.S. Department of Agriculture, is designed to enhance a $100 million adjustment assistance package that was decided upon at the time the tariff rate quota was implemented in July 1999. It will include additional funding for direct payments to lamb producers, the purchase of lamb by the USDA under a domestic purchase program, and a breeding enhancement program.

The lamb meat safeguard was originally implemented in July 1999 under Section 201 of the Trade Act of 1974. Australia and New Zealand, who together account for approximately 99 percent of U.S. lamb imports, filed a WTO challenge to the lamb meat safeguard in October 1999. In May 2001, the WTO Appellate Body issued a decision finding certain aspects of the safeguard to be inconsistent with WTO rules.

The Office of the United States Trade Representative.

United States Wins WTO Case Challenging New Canadian Dairy Export Subsidies.

07/11/2001

WASHINGTON - The United States has won an important agriculture case before the World Trade Organization (WTO) that challenged Canadian dairy export subsidies as a violation of WTO rules. In a ruling released today, a WTO dispute settlement panel found that the steps Canada took to address an earlier adverse ruling regarding its dairy export practices were insufficient. The panel ruled that Canada's dairy export subsidies are inconsistent with its WTO commitments. The U.S. calculates that Canadian dairy export subsidies result in lost sales by American farmers and dairy processors of up to $35 million per year.

"This is a victory for American dairy farmers and processors. Canada has been improperly subsidizing its dairy exports - that's unfair to American dairy farmers and dairy processors who are competing with the Canadians in world markets," said U.S. Trade Representative Robert B. Zoellick. "Trade and export competition is a critical issue for American farmers. America's farmers support President Bush's legislative trade agenda and Trade Promotion Authority because they know that agricultural exports are critical to the health of our economy and rural America."

Besides the direct economic impact, the WTO ruling sets an important precedent which will help prevent other countries from adopting similar export subsidy programs harmful to America' s dairy industry.

"This is another example of how the United States is able to work within the WTO dispute process, make a strong case for America's interests and come away with a win - in this case for our dairy producers," Zoellick added.

Background.

In 1997, the National Milk Producers Federation, the U.S. Dairy Export Council and the International Dairy Foods Association petitioned the Office of the U.S. Trade Representative to challenge Canada's dairy trade practices as inconsistent with its WTO obligations on export subsidies and market access. After bilateral consultations, the U.S. referred its complaint to a WTO dispute settlement panel in February 1998. New Zealand joined the WTO challenge to Canada's export subsidies.

In 1999, a WTO dispute settlement panel found that Canada's special milk class system and import restrictions on dairy products violated WTO obligations. The WTO Appellate Body affirmed the panel's finding on export subsidies.

In response to the panel and Appellate Body reports, Canada replaced its special milk class system with a new dairy export program in each province. However, Canada's new measures left unchanged the fundamental aspects of the programs found by the WTO to constitute export subsidies. As a result, the United States and New Zealand requested that the WTO review the new provincial programs. The United States argued, and the panel agreed, that the continued involvement of Canadian federal and provincial governments in the provision of low-cost milk to processors for export constituted an export subsidy and that Canada had already exceeded its commitment under the WTO Agriculture Agreement on subsidized cheese exports. Canada has 60 days to appeal the report to the WTO Appellate Body.

The Office of the United States Trade Representative.

U.S. Wins WTO Case on High Fructose Corn Syrup.

06/22/2001

WASHINGTON--Mexico's imposition of antidumping duties on imports of high fructose corn syrup (HFCS) from the United States is inconsistent with the requirements of the World Trade Organization (WTO) Antidumping Agreement, according to a WTO ruling issued today. A WTO dispute settlement panel ruled that the steps Mexico had taken to comply with an earlier adverse WTO panel ruling were insufficient. The panel agreed with the U.S. view that Mexico failed to cure the flaws already found in its original determination.

Mexico had found that HFCS imports threatened material injury to Mexico's sugar industry. The panel upheld U.S. arguments that Mexico's determination is inconsistent with the Antidumping Agreement. In particular, the panel concluded that the facts did not support Mexico's conclusion that HFCS imports were likely to increase significantly. The panel also ruled that Mexico had inadequately analyzed the likely impact of HFCS imports on the Mexican sugar industry.

Background.

In January 1998, Mexico's antidumping authority determined that imports of HFCS -- a sweetener used in soft drinks and other products -- from the United States were being dumped in the Mexican market and these imports threatened material injury to the Mexican sugar industry. The United States requested the formation of a WTO panel to review Mexico's determination.

The WTO Antidumping Agreement allows dumping duties to be imposed only if dumping and injury (including a threat of injury) to the domestic industry are established. The focus of the U.S. challenge was that Mexico's threat of injury analysis was flawed in several respects.

In January 2000, the panel issued its decision. The panel found that Mexico had not properly determined that HFCS imports were likely to increase significantly. The panel also concluded that Mexico had not properly analyzed the likely impact of HFCS imports on the Mexican sugar industry.

In September 2000, the Mexican antidumping authority issued a new determination that purported to comply with the panel's rulings. The Mexican antidumping authority again concluded that HFCS imports threaten the Mexican sugar industry.

The Office of the United States Trade Representative.

U.S. Wins WTO Case on Sea Turtle Conservation.

06/15/2001

WASHINGTON--A World Trade Organization (WTO) dispute settlement panel today released a report finding that the United States' implementation of its sea turtle protection law is fully consistent with WTO rules and complies with earlier recommendations of the WTO Appellate Body. In October 2000, Malaysia challenged the U.S. implementation of the Appellate Body Report. Malaysia, along with three other countries, had brought an initial challenge to the law (known as the "shrimp-turtle" law) in 1996.

"We are gratified, but not surprised, that the dispute settlement panel has found in favor of the United States," said U.S. Trade Representative Robert Zoellick. "We have long maintained that the WTO Agreements recognize the legitimate environmental concerns of Members, and this report confirms our view. I am pleased that the arguments we have made in this and other disputes have contributed to the body of cases illustrating the WTO's sensitivity to environmental concerns."

The U.S. law restricts imports of shrimp caught in a way that harms endangered sea turtles. In a 1998 report, the Appellate Body agreed with the United States that the law does not violate WTO obligations because it is covered by an exception to WTO rules for measures relating to the conservation of exhaustible natural resources. However, the Appellate Body found that the United

States had unjustifiably discriminated between exporting countries in applying the law. The United States complied with the Appellate Body findings by modifying implementation of its law in a manner that both enhanced sea turtle conservation and addressed the unfair discrimination identified by the Appellate Body.

In the report released today, the dispute settlement panel agreed with the United States that it had remedied any unfair discrimination. The panel took note of the revisions to the shrimp-turtle guidelines that provide more due process to exporting nations. The panel also recognized the good faith efforts of the United States both to negotiate a sea turtle conservation agreement with the Indian Ocean and South-East Asian nations affected by the law, and to provide technical assistance in the adoption of fishing methods that do not cause incidental harm to endangered sea turtles.

Ambassador Zoellick also commented that "this case follows the report in the recent asbestos case, which similarly confirms the WTO's sensitivity to health and safety concerns. These two cases show that WTO rules are consistent with high levels of safety and environmental protection." In March, 2001, the WTO Appellate Body found that France's ban on imports of asbestos, based on health concerns, was consistent with WTO rules. The United States played an active role in that dispute, appearing as a third party in support of the WTO-consistency of the French ban.

Malaysia may appeal the panel's report to the WTO Appellate Body, a process that takes no more than 90 days.

Background

Sea turtles are an ancient and far-ranging species, with migratory patterns extending throughout the oceans of the world. Due to the harvesting of sea turtles and their eggs and to accidental mortality associated with shrimp trawling and other fishing operations, all but one species of sea turtles have become threatened or endangered with extinction throughout all or part of their range.

Researchers have developed special equipment, known as the Turtle Excluder Device, or TED, that virtually eliminates accidental deaths of sea turtles in shrimp trawl nets. For more than a decade, the United States has required that U.S. shrimp fishermen employ TEDs. Over a dozen countries around the globe also require that their shrimp trawlers employ TEDs. Experience has shown that the use of TEDs, combined with other elements of an integrated sea turtle conservation program, can stop the decline in sea turtle populations and will, over time, lead to their recovery.

The U.S. law at issue -- Section 609 of Public Law 101-162 -- restricts imports of shrimp harvested with fishing equipment, such as shrimp trawl nets not equipped with TEDs, that results in incidental sea turtle mortality. It thereby avoids further endangerment of sea turtles.

In October 1996, India, Malaysia, Thailand and Pakistan challenged the U.S. law under WTO dispute settlement procedures, claiming that it was inappropriate for the United States to prescribe their national conservation policies. In April 1998, a panel found that the U.S. measure was inconsistent with Article XI of the General Agreement on Tariffs and Trade (GATT), which provides that WTO Members shall not maintain import restrictions. The United States had maintained that Section 609 fell within the exception under Article XX(g) of the GATT that permits import restrictions relating to the conservation of an exhaustible natural resource. Accordingly, the United States appealed the panel findings to the WTO Appellate Body.

In October 1998, the Appellate Body reversed the findings of the dispute settlement panel. It agreed with the United States that the U.S. law is covered by the GATT exception for measures relating to the conservation of exhaustible natural resources, but found that the United States had implemented the law in a way that resulted in unfair discrimination between exporting nations. The Appellate Body also agreed with the United States that the GATT and all other WTO agreements must be read in light of the preamble to the WTO Agreement, which endorses sustainable development and environmental protection. The Appellate Body confirmed that WTO members may adopt environmental conservation measures such as the U.S. law, so long as they are administered in an even-handed manner and do not amount to disguised protectionism.

In November 1998, the United States announced that it would comply with the Appellate Body report in a manner consistent with its firm commitment to the protection of endangered sea turtles. The United States and the other parties to the dispute reached agreement on a 13-month compliance period, which ended in December 1999.

U.S. compliance steps included revised Department of State guidelines for implementing Section 609, which were issued after providing notice and an opportunity for public comment. The revised guidelines were designed to increase the transparency and predictability of decisionmaking under Section 609 and to afford foreign governments a greater degree of due process.

U.S. compliance steps also included efforts to launch the negotiation of a sea turtle conservation agreement with the governments of the Indian Ocean region on the protection of sea turtles. The United States provided financial assistance to facilitate the attendance of representatives from developing countries at such negotiations, and considerable progress has been made.

The United States has also offered technical training in the design, construction, installation and operation of TEDs to any government that requests it. Since the adoption of the Appellate Body report, the United States has provided such assistance and training to a number of governments and other organizations in the Indian Ocean and South East Asia region.

Despite the U.S. compliance steps, in October 2000, Malaysia – but none of the other original complainants – requested the re-establishment of the original panel to examine whether the United States had in fact complied with the Appellate Body findings. The panel concluded that "the United States has made a prima facie case that Section 609 is now applied in a manner that no longer constitutes a means of unjustifiable and arbitrary discrimination, as identified by the Appellate Body in its Report," and it noted that Malaysia did not submit sufficient evidence to the contrary.

FOREIGN PRESPECTIVES ON WTO LAW & LITIGATION.

Australian Government – Department of Foreign Affairs & Trade.

AUSTRALIA & WTO DISPUTE SETTLEMENT.

http://www.dfat.gov.au/trade/negotiations/wto_disputes.html

Overview.

Australia's profile as a trading nation means that it has strong interest in ensuring that the international trading regime of the WTO is open, equitable and enforceable. The WTO's dispute settlement system, which came into being in 1995, is central to that goal. It is one of the cornerstones of the WTO, and gives member countries confidence that the commitments and obligations contained in the WTO agreements will be respected.

There have been over 300 disputes initiated in the WTO since 1995 (although many have not proceeded past the consultations stage) and an important body of international law has developed as a result. The system provides a binding and enforceable mechanism through which member countries can prosecute their trade rights.

How can the WTO help Australian businesses and exporters?

Reflecting the growing importance of this aspect of the WTO, a WTO Trade Law Branch was established in the Department of Foreign Affairs and Trade in early 2001. It serves as a specialised centre on all international trade law matters. The Branch combines a high level of legal expertise with trade policy knowledge. Its objective is to deliver a world-class level of legal service for Australian industry and firms/businesses interested in examining how the WTO dispute settlement regime might be able to assist in addressing specific trade problems.

Australian exporters or companies whose competitive position is affected by the trade-restrictive actions of foreign governments are encouraged to tap into this expertise. Complaints can be lodged direct with the Department using the WTO disputes enquiry point. When submitting complaints, firms/companies (or their nominated legal representative) are required to provide details of the problem and the adverse impact on exports or imports. When the complaint is received, the WTO Trade Law Branch will (i) examine the details of the case (ii) determine the nature of the barrier and in particular whether or not it could be a breach of WTO rules and (iii) develop possible options for action.

Such options could include official consultations with the government of the trading partner in question aimed at settling the matter. This approach is often a more efficient and cost-effective way to settle disputes than going to full-blown formal WTO proceedings. Australia's right to take formal dispute action in the WTO creates valuable leverage which can assist in moving disputes toward a resolution. In cases where there are clear issues of inconsistency with WTO rules and where bilateral consultations have not been successful, there is the option of initiating a formal WTO complaint under WTO dispute procedures. The Minister for Trade would be expected to take the final decision on initiating dispute settlement action. When a panel is established, the WTO provides for set timeframes for the completion of the process - see dispute settlement process chart (pdf) which shows the timeframes for dealing with disputes in the WTO.

Australia's Involvement in WTO dispute settlement system.

The Department is committed to securing maximum advantage for Australia from participation in the WTO dispute settlement system. Since 1995 Australia has been involved a number of disputes as a complainant, a respondent or as a third party and results achieved to date have delivered real economic benefits to Australia. For example, Australia mounted successful challenges to Korean and United States meat import restrictions which have ensured significant benefits for Australian farmers and the rural sector more widely.

Australia is currently a complainant in three active disputes. For updates on progress in these and other disputes in which Australia is involved, see below for our Monthly Bulletin on Australia and WTO Dispute Settlement.

Disputes at consultations stage.

Philippines	**Certain Measures Affecting the Importation of Fresh Pineapple Fruit (Australia respondent)**	**WT/DS271**

Disputes: Australia as a complainant.

European Communities	**Export Subsidies on Sugar** **- Related Australian documents not on the WTO website** **- Frequently Asked Questions** **- Declassification of quota sugar to C sugar**	**WT/DS265**
European Communities	**Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs** **- Related Australian documents not on the WTO website** **- Frequently Asked Questions**	**WT/DS290**
United States	**Continued Dumping and Subsidy Offset Act of 2000** **- Related Australian documents not on the WTO website**	**WT/DS217**
United States	**Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (concluded)** **- Related Australian documents not on the WTO website**	**WT/DS178**
Korea	**Measures Affecting Imports of Fresh, Chilled and Frozen Beef (concluded)** **- Related Australian documents not on the WTO website**	**WT/DS169**
India	**Quantitative Restrictions on Agricultural, Textiles and Industrial Products (concluded)**	**WT/DS91**
Hungary	**Export Subsidies in respect of Agricultural Products (concluded)**	**WT/DS35**

Disputes: Australia as a respondent.

Australia	**Quarantine Regime for Imports**	**WT/DS287**
Australia	**Certain Measures Affecting the Importation of Fresh Fruit and Vegetables**	**WT/DS270**
Australia	**Anti-dumping Measures on Coated Woodfree Paper Sheets (concluded)**	**WT/DS119**
Australia	**Subsidies Provided to Producers and Exporters of Automotive Leather (concluded)** **- Related Australian documents not on the WTO website**	**WT/DS126**
Australia	**Subsidies Provided to Producers and Exporters of Automotive Leather (concluded)** **- Related Australian documents not on the WTO website**	**WT/DS106**
Australia	**Textile, Clothing and Footwear Import Credit Scheme (concluded)**	**WT/DS/57**
Australia	**Measures Affecting the Importation of Salmonids (concluded)** **- Related Australian documents not on the WTO website**	**WT/DS21**

Australia **Measures Affecting Importation of Salmon (concluded)** **WT/DS18**
- Related Australian documents not on the WTO website

Disputes: Australia as a third party.

In disputes involving Australia as a third party, Australia has actual or potential interests at stake or has wider systemic interests in the outcomes, for example where rulings on WTO principles and interpretations of WTO agreements may have important implications for other cases in which we are involved or for Australian trade and related policies generally. See Monthly Bulletin for current cases involving Australia.

Brazil --Ministry of Development, Industry & Foreign Commerce.

Secretaria de comercio exterior (Sesex).

http://www.desenvolvimento.gov.br

The Department of Commercial Defense - DECOM:

1. **to examine the origin and the merit of petitions of opening of inquiries of *dumping* , subsidies and you safeguard, with sights to the defense of the domestic production;**
2. **to consider the opening and to lead inquiries for the application of measures *antidumping* , compensatory and of you safeguard;**
3. **to recommend the application of the foreseen measures of commercial defense in the corresponding Agreements of the World trade organization - OMC;**
4. **to follow the relative quarrels to the norms and the application of the Agreements of together commercial defense to the OMC;**
5. **to participate in relative international negotiations to the commercial defense;**
6. **to follow the inquiries of commercial defense opened by third countries against Brazilian exportations and to give assistance to the defense of the exporter, in joint with other governmental bodies and the private sector.**

… Barriers to the Commerce of Good:

In the current scene of the international trade, it is of basic importance that efforts are developed in the direction significantly to increase the participation of the Brazilian exportations in the world-wide market.

To reach this objective, the identification of the barriers to the incident exportations becomes necessary on the Brazilian products of form that can be object of the international negotiations that aim at the elimination of the commercial obstacles. As the tariff barriers they are of ample spreading, since they consist of the commitments assumed in international forums, we look for to emphasize the identification of non-tariff barriers.

To make possible this initiative, the Department of International Negotiations of the SECEX/MDIC places it the disposal of the exporters who want in informing them on the difficulties of access of its products in any market, as well as he starts to evaluate studies on the non-tariff barriers and commercial information of third markets.

It is important that the private sector gives its contribution, therefore the success of this initiative will depend on the enrollment of the Brazilian exporting sector.

… Barriers to the Commerce of Services:

For the increment and strengthening of the Brazilian commercial relations in the current international scene it is primordial that it has an advance in our exportations of services.

Having itself in account that the sector almost represents 80% of the GIP in the developed countries, 60% of the Brazilian GIP and only 25% of the international trade, a notion of the incipient state can be had where the international commercialization of services if finds and the necessity to evidence the maximum efforts in such a way in the direction to increase our participation in the world-wide market, as to eliminate external obstacles to the Brazilian exportations.

Colon crucial it stops in assisting them in this task had been identified: the creation of a modern and current statistical system - whose degree of disaggregation in allows to identify them those sectors where we are more competitive; a system of identification of barriers to the Brazilian exportations of services, dynamic and accessible, that in supplies to greater subsidies to them the negotiations in the international forums.

Of this form, the Department of International Negotiations (DEINT) of the SECEX/MDIC looked for to create here a space so that the private sector can give its contribution in the identification of barriers to the Brazilian services in any external market, as well as directing information that can in helping them in this direction.

Beyond the adoption of a more operating position on the part of the Government, the participation of the private sector in the implementation of this new profile is basic pro-asset that Brazil desires to conquer in international the commercial scene.

... Presentation

In the current scene of the international trade it is of basic importance that efforts are developed in the direction significantly to increase the reduced participation of the Brazilian exportations in the world-wide market, whose slice is placed currently in less than 1%, cipher this that does not correspond much less to the dimensions of the economy of the country to its potentialities.

To reach this objective the identification of the existing barriers to our exportations, of form systematic and brought up to date becomes necessary, initially, for posterior analysis of its economic impact, aiming at, simultaneously, to inform and to improve the performance of the exporting sector, as well as serving of subsidies to the international negotiations that they aim at to the elimination of the commercial obstacles.

Of this form, to make possible this Project, the MDIC is opened the all exporting one that wants to participate with its ideas and to in general contribute with information and spreading of the difficulties of access for its products, in any market.
It is important that the private sector gives its contribution, therefore the success of this initiative will depend, over all, of the enrollment of the Brazilian exporting sector, in view of its experience and daily experience in the substance.

In international literature and works, normally non-tariff barriers are considered the measures and the instruments of economic policy that affect the commerce between two or more countries and that they excuse the use of tariff mechanisms (ad-valorem or specific tariffs).

Opening Doors to the World –
Canada's International Market Access Priorities (2004).

Department of Foreign Affairs and International Trade, Canada.
http://www.dfait-maeci.gc.ca/tna-nac/2004/5_04-en.asp

Canada and the WTO.

Trade is one of the key engines driving Canada's economy. Our current and future growth and prosperity depends on open world markets and a stable, predictable and transparent trading environment. Opening new markets benefits Canadian agricultural and non-agricultural producers, manufacturers, service providers and exporters. Increased trade means higher productivity and greater access to technology, inputs and funds for investment. For the Canadian public, it means jobs, additional income and access to a wider range of lower-priced goods and services. Canada's membership in the World Trade Organization (WTO) helps us achieve these benefits. The WTO is a cornerstone of Canadian trade policy and governs our trade relations with the European Union, Japan, other industrialized countries and a host of emerging markets worldwide. It also underpins much of our trade with the United States, our largest trading partner.

At the heart of the multilateral trading system are the WTO agreements, negotiated and signed by members and ratified by their elected representatives. The WTO provides a forum for negotiating trade rights and responsibilities, negotiating market access, monitoring the implementation of obligations and commitments under various agreements, and reviewing members' trade policies and practices. The WTO also offers a state-to-state dispute settlement system, whereby trade disputes are settled based on commonly agreed rules, rather than political or economic might.

The Doha Round of Multilateral Trade Negotiations and Canada's Objectives.

In November 2001, WTO trade ministers launched a new round of multilateral trade negotiations, known as the Doha Development Agenda, on a broad range of issues. The agenda included the seven negotiating areas of agricultural trade reform; market access for non-agricultural goods; services; rules for subsidy, anti-dumping and countervailing duty actions; a multilateral registry for wines and spirits; dispute settlement; and certain aspects of trade and the environment. Ministers agreed to conclude the negotiations by January 1, 2005.
Agriculture, market access and development lie at the centre of and are Canada's key objectives for these negotiations. We seek fundamental agricultural trade reform: the elimination of all export subsidies, substantial reductions in trade-distorting domestic support and improved market access for

all agricultural and food products. Canada also seeks improved market access in non-agricultural goods and services, as well as greater clarity and improvement in the rules on trade remedy provisions and subsidy disciplines. An ambitious outcome would help us attain these objectives and enable developing countries to better integrate into the global economy and realize the benefits of increased economic growth.

In the other negotiating areas, Canada seeks to conclude negotiations on a multilateral system for the notification and registration of geographical indications that is voluntary, facilitative, simple, cheap to implement and limited to wines and spirits. Such a system could be relatively easily implemented by any WTO member that wished to do so. On dispute settlement, Canada supports improvements with respect to the transparency of dispute settlement proceedings, the protection of confidential information and the panel roster system. Canada also seeks agreement on issues such as sequencing of compliance proceedings, the remand of issues from the Appellate Body to panels, and enhanced rights for members who are third parties to disputes.

On trade and the environment, Canada supports early action to reach agreement on the definition of environmental goods, so that tariff elimination for these goods can be covered in the non-agricultural market access negotiations. Canada supports an approach under which a core group of multilateral environmental agreement secretariats and other relevant international organizations would observe these negotiations rather than continuing with the current case-by-case invitation approach. Canada also supports discussions on voluntary eco-labelling in the WTO Committee on Trade and Environment. Considering the needs of developing countries and advancing the cause of sustainable development through these negotiations are also central to Canada's objectives with respect to the Doha Development Agenda. For this reason, Canada supports effective special and differential treatment; the provision of trade-related technical assistance and capacity-building; and greater institutional and policy coherence between the WTO, the World Bank, the International Monetary Fund and other international institutions to help developing countries manage their transition to full participation in the global economy.

In pursuing Canada's trade policy, the Government of Canada will continue its program of outreach and consultations to help build understanding and support for these WTO negotiations and to ensure that objectives and priorities reflect Canadian goals and values. As part of this effort, the government's trade policy Web site (*www.dfait-maeci.gc.ca/tna-nac*) will continue to provide information on trade policy issues and invite public comments on negotiating priorities and objectives.

Conclusion.

The Doha Development Agenda is about creating opportunities for growth and prosperity. Trade alone is not a panacea for all the challenges facing nations, but the long-term prospects for growth and prosperity for any country depend on its ability to tap into foreign markets and to keep its own markets open. These prospects are enhanced by the development of trade rules, which provide more predictability and stability in the trading system. Canada remains committed to advancing trade liberalization and achieving an end result that is beneficial to all members. Canada will continue its efforts to advance the development of a predictable and stable international trading system, including through regional and bilateral trade initiatives that augment multilateral efforts in the WTO. The WTO will continue to be a cornerstone of Canadian trade policy and the preferred vehicle for trade liberalization. Canada seeks the same commitment from other WTO members. Only through multilateral trade liberalization can we ensure that no one gets left behind.

Trade Remedies.

The Government of Canada plays an active role in monitoring trade remedy developments in countries of trade interest to Canadian industry. Specifically, the government identifies and analyzes changes in the trade remedy laws and practices of Canada's key trading partners and makes representations, as appropriate, in specific investigations against Canadian exports. In addition, the government assists Canadian exporters involved in trade remedy investigations by providing information and advice and can participate as a direct respondent in countervailing duty cases. The government has made submissions to various foreign authorities conducting trade remedy investigations against Canadian products. For example,it has filed extensive responses and interventions with U.S. authorities in the context of the U.S. Department of Commerce investigation of programs in the Canadian wheat sector (further details on this case can be found in the U.S. section in Chapter 4). In addition, government officials made representations in anticipation of a possible sunset review into China's anti-dumping duty on newsprint from Canada. A review was initiated on July 1, 2003, and is ongoing. Finally, the government continues to follow developments in various disputes under Chapter 19 of the North American Free Trade Agreement (NAFTA) that involve Canadian products, and it is defending Canadian interests in the Extraordinary Challenge launched by the United States regarding a NAFTA Chapter 19 panel decision instructing the U.S. Department of Commerce to repeal anti-dumping duties on pure magnesium. Last year's edition of *Opening Doors to the World* reported that the government made representations and monitored India's anti-dumping investigation involving vitamin C and China's safeguard investigation into certain steel products. Since that time, the Government of India has made an affirmative dumping determination and applied dumping duties. Similarly, Chinese authorities have informed WTO members of the application of temporary safeguard measures on steel imports. These measures are scheduled to end in May 2005. Also in 2003, Australia investigated grinding mill liners from Canada and announced on September 17, 2003, that dumping duties would be applied. Other anti-dumping investigations initiated in 2003 included one by Korea on choline chloride, one by Mexico on newsprint and one by the United States on kosher chickens.

Regarding the latter, in January 2004, the United States terminated the investigation after a negative preliminary injury determination.

World Trade Organization.

In the current multilateral trade negotiations, Canada is pursuing more specific disciplines and improved transparency and clarity in the use of trade remedy measures by our trading partners. In this regard, Canada wants to examine key trade remedy provisions with the goal of strengthening and clarifying the rules to achieve greater international convergence and predictability in their application. To this end, Canada participated in the discussion of issues proposed for negotiations and tabled a general paper on anti-dumping, subsidies and countervailing measures,

as well as more detailed submissions on anti-dumping and subsidies. These papers are accessible on the Department of Foreign Affairs and International Trade Web site (*www.dfait-maeci.gc.ca/tna-nac/goods-en.asp#9*).

As well as contributing to the work of the WTO Anti-Dumping, Subsidies and Safeguards committees to insure that WTO members administer their trade remedy laws in a WTO-consistent manner, Canada requests third-party rights in WTO dispute settlement proceedings involving trade issues

that affect our interests. To this end, Canada is currently engaged as a third party in WTO proceedings in the following cases: the European Union's sugar program, U.S. cotton subsidies, U.S. countervailing duties on steel plate from Mexico, U.S. anti-dumping duties on cement from Mexico, and U.S. anti-dumping duties on oil country tubular goods from Mexico. In addition, in 2003 Canada remained a co-complainant in the WTO challenge of the U.S. Byrd Amendment. (For information on the Byrd Amendment, please see Chapter 4.)

Finally, Canada participated as a third party in the WTO dispute involving the U.S. steel safeguard measures. Following the March 2002 decision to apply tariffs of up to 30% on imports of various steel products, WTO members, including China, Japan and the European Union, challenged the measures at the WTO. Although imports from Canada and Mexico were excluded from any restriction under the provisions of the North American Free Trade Agreement, the key interest to Canada in this dispute was the challenge by complainant countries that the United States had violated WTO obligations in exempting Canada and other free trade partners from application of the safeguard measures. On November 10, 2003, the WTO Appellate Body upheld the panel finding against the U.S. measure, including a ruling that the United States failed to adequately explain its decision to exempt imports from Canada. On December 4, President George W. Bush announced the termination of the steel tariffs, avoiding possible retaliation from complainants. In

his decision, President Bush stated that the tariffs on steel had achieved their purpose, allowing U.S. steel manufactures to adjust, through consolidations, to increased competition.

Dispute Settlement.

The WTO currently has 146 members. Given this large membership, disputes occasionally arise among members over the application of the rules contained in the Agreement Establishing the World Trade Organization. To resolve such disputes, WTO members have agreed to follow an elaborate process contained in the WTO Dispute Settlement Understanding (DSU). This process includes consultations, reviews by independent panels when parties are unable to settle their differences at the consultation stage and possible recourse to a standing Appellate Body. The DSU helps ensure that members adhere to the trade rules they have negotiated and reduces the scope for unilateral trade actions. The DSU is, without question, a key element of the rules-based, multilateral trading system.

There are relatively few cases among WTO members at any given time. Many complaints are resolved without recourse to the WTO dispute settlement system. During the past year, Canada made use of the dispute settlement provisions of the WTO to challenge a number of measures maintained by other members that Canada considers inconsistent with their international trade obligations. The most significant of these measures are the anti-dumping and countervailing duties that the United States has imposed on Canadian softwood lumber exports.

On January 8, 2003, a panel was established to hear Canada's challenge of the U.S. Department of Commerce's final determination of dumping. Canada considers the Department of Commerce's final determination to be inconsistent with the United States' WTO obligations under the Antidumping Agreement. The panel's final report is expected in the spring of 2004.

On May 7, 2003, a panel was established to hear Canada's challenge to the final determination of the U.S. International Trade Commission that a U.S. industry is threatened with material injury due to imports of softwood lumber from Canada. Canada considers that this final determination, and the

resulting duties imposed on imports of Canadian softwood lumber, are WTO-inconsistent. The panel's final report is expected in the spring of 2004.

On August 29, 2003, the final report was released by a panel established to hear Canada's complaint against the United States regarding the U.S. Department of Commerce's final determination of subsidy with respect to certain softwood lumber from Canada. The panel's findings were subsequently appealed, and the Appellate Body released its report on January 19, 2004. Details can be found on the WTO dispute settlement Web site (*www.wto.org/english/tratop_edispu_e/dispu_e.htm*), under document number 04 - 0145 or symbol WT/DS257/AB/R.

Also in August, a panel was established to hear a complaint by Canada, the United States and Argentina against the European Union's moratorium on the approval and marketing of biotech products. The complainants consider that these measures are inconsistent with the European Union's obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Technical Barriers to Trade and the GATT 1994. The panel report is expected in the fall of 2004. Canada was also a defendant in two cases. In March 2003, a panel was established to hear a U.S. complaint that certain actions of the Government of Canada and the Canadian Wheat Board, as well as some Canadian grain transportation policies, are WTO-inconsistent. The panel report is expected in the spring of 2004.

As well, an earlier U.S. and New Zealand challenge to Canada's dairy export pricing mechanism was resolved in May 2003, when the United States and New Zealand withdrew their requests for retaliation following the implementation of compliance measures by Canada.

The WTO Dispute Settlement Understanding is arguably the most effective system in existence for resolving disputes between sovereign states. Many believe, however, that it can be further improved. WTO members therefore agreed, at the fourth Ministerial Conference in Doha, to negotiate improvements and clarifications to the DSU by May 2003. Although members were unable to reach agreement by that date, the WTO General Council subsequently agreed in July to extend the deadline for DSU negotiations by one year to May 2004. Members also agreed to have the talks continue on the basis of the work already done, including a draft text produced by the chair and proposals by members. In January 2003, Canada submitted a proposal to improve the DSU with respect to enhanced transparency, the protection of confidential information and the panel roster system. Canada will continue to build support for these proposals and will also work to secure agreement on a number of other improvements to the DSU, including the sequencing of compliance proceedings, alternatives to retaliation, the remand of issues from the Appellate Body to panels, and enhanced rights for members who are third parties to disputes.

Discussions are continuing in an effort to build consensus on a package of improvements to the DSU by the new deadline of May 2004. However, the number of substantive proposals for changes to the DSU, coupled with slow progress in the negotiations, calls into question whether the new deadline will be met.

CANADIAN INTERNATIONAL TRADE – WORLD TRADE ORGANIZATION.

Department of Foreign Affairs and International Trade Canada (International Trade)
http://www.dfait-maeci.gc.ca/tna-nac/c_wto-en.asp (March 21, 2006)

Canada and the WTO.

Canada is a trading country, and international commerce is the lifeblood of our economy. Canada is the most open of the globe's major economies. We are the world's fifth largest exporter and importer – trade is equivalent to more than 70% of our GDP. Exports account for almost 40% of our economy, and are linked to one-quarter of all Canadian jobs. Increased exposure to international competition has energized our economy, spurred innovation, attracted foreign investment and created hundreds of thousands of jobs for Canadians.

Canada's current and future prosperity depends on an international framework of rules that provides access to growing world markets and keeps pace with changes in technology, business practices, social systems, and public interests.

The WTO provides the multilateral trade rules that underpin our commercial relations with its 147 other members. All of our most significant trading partners are members, and developing countries make up the vast majority of the WTO's membership. Established in 1995, the WTO is the successor to the General Agreement on Tariffs and Trade (GATT). At its heart are several multilateral trade agreements, which have been negotiated and signed by Members and ratified in accordance with their domestic procedures. Decisions in the WTO are taken by consensus, ensuring that all Members have an equal say in the rules governing the multilateral trading system. Membership is open to any country prepared to accept WTO rules and obligations. The WTO currently has 148 Member countries, with more than 25 others seeking to join.

The overall objective of the WTO is to increase economic growth and raise standards of living by making trade more free and predictable. Negotiations to increase market access and improve trade rules create new market opportunities for business. While negotiations take place in Geneva, Canadian trade policy objectives are formulated in Canada in consultation with Canadians. Canada continues to retain the ability to regulate in the public interest, including in such areas as public health, education, social services and the environment. Canada will also safeguard the right of countries to promote and preserve their cultural diversity.

Considering the needs of developing countries is central to Canada's objectives at the WTO. For this reason, Canada supports effective special and differential treatment for developing countries; the provision of trade-related technical assistance and capacity-building; and greater institutional and policy coherence between the WTO, the World Bank, the International Monetary Fund and other international institutions, to help developing countries manage their transition to full participation in the global economy.

Canada is actively promoting improved transparency at the WTO. Canada believes that a more inclusive process and improved communications with the public will foster a better understanding of the benefits of liberalized trade and the clear and equitable rules that serve as the foundation of the international trading system. WTO Members and the WTO system of agreements stand to benefit from the views and support of an informed global public.

Please click on any of the links at the top-right hand corner of this page to learn more about Canada and the WTO.

Dispute Settlement at the World Trade Organization (WTO).

Given that there are over 140 Members of the World Trade Organization (WTO), including nearly all of the major trading countries, it should not be surprising that trade disputes arise from time to time concerning the interpretation of the rules contained in the WTO Agreements and how they are being applied by WTO Members. What is surprising, however, is how relatively few disputes there are given that the value of goods and services exports worldwide exceeds US$6 trillion.

Update on Canada's Participation in the WTO DSU Negotiations (July 2005).

1. Background

At the Fourth WTO Ministerial Conference held in Doha in November 2001, Ministers agreed to begin negotiations aimed at improving and clarifying the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Ministers further agreed that these negotiations should be based on work carried out in an earlier DSU Review that took place in 1998-1999, as well as on new proposals submitted by Members. Agreement on improvements and clarifications to the DSU is not formally tied to the so-called "single undertaking" that will result from the broader round of multilateral trade negotiations taking place at the WTO. In other words, a stand-alone package of improvements to the DSU is theoretically possible as an outcome of the DSU negotiations.

The DSU negotiations commenced on an informal basis in March 2002, and the first formal meeting was held on April 16, 2002. Progress in the negotiations has been slow. After a second deadline for their conclusion was missed in May 2004, the negotiations were further extended and no new deadline has been set. Despite the slow pace, the work to date has been useful in identifying areas where improvements to the DSU can and should be made.

2. Canada and the DSU

The DSU sets out rules and procedures for resolving disputes that arise between WTO Members concerning the interpretation and application of the WTO Agreement. The Members of the WTO, sitting as the Dispute Settlement Body (DSB), administer the rules and procedures of the DSU.

The DSU is based on the rule of law. It gives all WTO Members, regardless of their size or power, the ability to enforce their rights under the WTO Agreement. By providing fair and effective procedures for settling trade disputes between WTO Members, the DSU sustains the credibility of a rules-based multilateral trading system under the WTO Agreement.

3. Key Issues.

Canada welcomed the creation of the DSU in 1995 as one of the crowning achievements of the Uruguay Round of multilateral trade negotiations. However, based on its dispute settlement experience and the advice of Canadians, Canada believes that there are significant benefits to be gained by improving and clarifying the DSU to address a number of issues. These issues include what is known as the "sequencing" issue; enhanced third party rights; rules and procedures governing participation by amicus curiae; improvements targeted to greater efficiency in the dispute settlement process; enhanced surveillance of implementation procedures by the DSB; post-retaliation procedures; effective and viable alternatives to retaliation; transparency of the dispute settlement process; and the protection of business confidential information. To date, many of these issues have been the subject of proposals tabled by Canada and the other WTO Members in these negotiations. Canada is working with a broad range of like-minded Members to refine outstanding proposals and secure consensus on the direction that negotiations will take in the months leading up to the Hong Kong Ministerial meeting in December.

Resolving the "sequencing" issue.

There is a need to clarify the DSU to ensure that no Member can seek to engage in trade retaliation until there has been a multilateral determination that the defending party has failed to comply with its WTO obligations. Resolving the "sequencing" problem became a key focus of attention in the course of the DSU Review conducted in 1998-1999 when Canada tabled the first informal proposal to resolve this critical systemic issue. Members continued to discuss the issue after the Review ended in July 1999. Canada, along with a number of other WTO Members, subsequently co-sponsored a formal proposal at the 1999 Seattle Ministerial Conference to amend the DSU in a manner that would resolve the sequencing issue. Canada and a number of other WTO Members tabled a similar proposal at the Doha Ministerial Conference in 2001.

The "sequencing" proposals that have been submitted by other Members during the current negotiations reflect the proposals tabled by Canada and other Members at Seattle and Doha. Canada supports these proposals and will continue to work towards amendments to the DSU to resolve this issue.

Enhancing third party rights.

While any WTO Member can participate as a third party in a dispute, the DSU currently circumscribes effective third party participation at both the panel and Appellate Body stage. For example, third parties only receive the disputing parties' first submissions to the panel, and while third parties are permitted to make an oral statement at the panel's first meeting with the disputing parties, they may not be present for the parties' oral statements at that meeting, nor may they otherwise attend or participate in subsequent panel meetings with the parties.

Canada supports proposals to enhance third party rights in panel and in Appellate Body proceedings. Canada believes that at both the panel and Appellate Body level, third parties to a dispute should receive copies of all submissions and should have the right to attend all substantive meetings related to that dispute. Such enhanced third party rights, however, would be subject to procedures governing the treatment of confidential information. In addition, Canada supports proposed changes to the DSU that would permit a Member to notify its third party interest in the appellate level proceedings of a dispute even if that Member was not a third party during the earlier panel proceedings.

Participation by amicus curiae.

Canada supports proposals to clarify and improve the DSU to assist panels and the Appellate Body in their consideration of unsolicited amicus curiae ("friends of the court") briefs. In Canada's view, the DSU should explicitly recognize the right of panels and the Appellate Body to accept unsolicited amicus curiae briefs. Members should also agree on specific rules and procedures applicable to amicus curiae participation in disputes. Any such rules and procedures, for example, those associated with timelines for filing amicus curiae submissions, must protect the rights of the disputing parties to due process and a timely resolution of the dispute. These negotiations provide Members with an opportunity to replace the current ad hoc approach to amicus curiae participation in WTO dispute settlement proceedings with a more predictable process endorsed by the Membership.

Improving the efficiency of dispute settlement procedures.

Beyond its proposal to streamline the selection of panelists, Canada supports proposals aimed at improving the efficiency of the dispute settlement process. For example, on occasion, the Appellate Body has declined to rule on certain issues due to the absence on the record of sufficient findings by the panel. In such a situation, the complainant can be left without a decision that resolves the matter in dispute, and may need to commence an entirely new set of proceedings. Canada therefore supports

proposed amendments to the DSU that would provide the Appellate Body with the "remand" authority to refer factual or legal issues back to the original panel to address issues not covered earlier or to re-examine factual findings.

Enhancing the surveillance function of the DSB.

Article 21.6 of the DSU currently provides that the issue of a Member's implementation of DSB recommendations or rulings is to be placed on the DSB agenda after a fixed period of time and the Member concerned must provide the DSB with written status reports of its progress in respect of implementation. Experience suggests that both these status reports and the corresponding DSB surveillance of implementation have become pro forma. Several Members have proposed amendments to Article 21.6 aimed at enhancing the surveillance function of the DSB.

These proposals reflect the amendments to Article 21.6 earlier tabled by Canada and other Members at Seattle and Doha. Canada supports these proposals. However, Canada also believes that further improvements to Article 21.6 are desirable. In particular, Canada will encourage Members to consider providing for a special DSB meeting to be held at six-month intervals during which Members would engage in a detailed discussion in respect of all outstanding instances where Members have failed to comply with DSB recommendations and rulings within the prescribed compliance period. These meetings would provide an opportunity for the DSB to review the history of a case, revisit the relevant recommendations and rulings and recall the period of time within which the Member was to effect compliance. The defending Member would be invited to explain its continued failure to fulfill its obligation to comply. A record of these proceedings would be made available to the public and instances of non-compliance would be identified each year in the DSB's Annual Report. Likewise, they would form part of a Member's Trade Policy Review (TPR) process and the Annual Report of the WTO Director-General.

Establishing clear post-retaliation procedures.

A defending party that has failed to comply with the recommendations and rulings of the DSB may face retaliatory measures by a complaining party. Currently, the DSU does not make explicit the procedures that should govern situations where a defending party subsequently asserts that it has now complied and that the retaliatory measures should be lifted. Canada and other Members believe that this should be addressed, and are working on proposals to that end.

Finding effective and viable alternatives to retaliation.

Where a Member has not implemented a DSB ruling, the DSB may authorize retaliation through the suspension of concessions or other obligations. Although intended to encourage compliance, trade retaliation has widely-recognized shortcomings: trade retaliation is inherently at odds with the objectives of trade liberalisation; it does not benefit the injured parties; it can cause commercial hardship for business of the retaliating Member; and it is least effective in the hands of smaller economies. Accordingly, some Members have proposed revisions to the DSU to make compensation a more viable alternative to retaliation for encouraging compliance with DSB recommendations and rulings. Canada continues to examine options that would provide a more viable and effective alternative to retaliation.

4. Canada's Proposal.

Since 1994, Canada and a number of other developed- and developing-country Members have worked together to develop new proposals on sequencing, remand procedures, third party rights and

post-retaliation procedures. Previously, in 2003, Canada made proposals on:

- **the protection of business confidential information;**
- **the streamlining of the panel selection process; and**
- **transparency of the process in the form of hearings open to the public and publicly-available submissions.**

As these negotiations proceed, Canada will continue to play an active role, working with other Members to achieve meaningful improvements and clarifications to the DSU.

Contribution of Canada to the Improvement of the WTO Dispute Settlement Understanding.

Canada considers that, in general, the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) provides effective rules and procedures for the preservation of the rights and obligations of Members under the covered agreements. However, experience with the DSU has identified certain deficiencies in the rules and procedures that may impede this objective.

In addition to the sequencing proposals tabled by Canada and other Members for consideration by Ministers both in Seattle [WT/MIN(99)/8] and Doha [WT/MIN(01)/W/6] that have clearly contributed to subsequent proposals in respect of sequencing, and without prejudice to the positions that Canada may take on issues raised and proposals tabled in these negotiations, Canada proposes in this document certain improvements to the DSU to address the following concerns:

- **the treatment of business confidential information;**
- **the panel selection process; and**
- **transparency.**

1. Procedure to Protect Business Confidential Information (BCI):

Background

Effective dispute settlement pursuant to the DSU is premised on an objective assessment by a dispute settlement panel of the matters in dispute, including an objective assessment of the facts of the case. The receipt and provision of factual information is a central feature of the process. Members must be able to disclose and receive the evidence necessary to defend or challenge the measure at issue. This evidence may include proprietary or commercially sensitive information of private parties (known as "business confidential information" or "BCI"). Private parties will not consent to their BCI being disclosed by Members unless they have sufficient assurance that the confidentiality of the information will be maintained.

Current DSU rules acknowledge the need to provide protection for confidential information in the context of dispute settlement. Article 18.2 of the DSU provides, among other things, that Members "shall treat as confidential" information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. Similar provisions are found in the panel Working Procedures (Appendix 3, paragraph 3) and the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* (Article VII:1). However, these rules offer insufficient procedural guidance for the treatment of BCI.

This is not a theoretical problem. *In United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* [WT/DS166/AB/R], the Appellate Body noted its "strong agreement with the Panel that a "serious systemic issue" is raised by the question of the procedures which should govern the protection of information requested by a panel under Article 13.1 of the DSU and which is alleged by a Member to be confidential"[1]" The absence of clear and predictable rules in the DSU to protect BCI can be detrimental to a Member's ability to advance or defend a challenge and thereby to the effectiveness of the dispute settlement system.

The ad hoc procedures adopted by panels, in the absence of specific procedures to protect BCI, have on occasion failed to satisfy disputing parties. In some cases, disputing parties (including Canada) have refused panel requests for BCI where they have considered the procedures adopted by the panel inadequate to ensure appropriate protection of the BCI. Moreover, in *Canada- Measures Affecting the Export of Civilian Aircraft* [WT/DS70/AB/R], the Appellate Body refused a joint request from the disputing parties to adopt additional procedures to protect BCI in the appellate proceedings.

Proposal: Procedures Governing Business Confidential Information.

Canada therefore proposes an effective procedure to protect BCI, which would be included as a new Appendix to the DSU. The procedure would apply to all panel proceedings, and mutatis mutandis, to all arbitral proceedings, commenced under the DSU. With respect to appellate review, Canada proposes that pursuant to DSU Article 17.9, the Chairperson of the DSB and the Director-General refer this procedure to the Appellate Body with a recommendation that it be incorporated mutatis mutandis into the Working Procedures for Appellate Review.

In Canada's view, an effective procedure to protect BCI would build upon Article 18.2 of the DSU, the *Working Procedures* and the *Rules of Conduct*, and would include the following elements[2] :

Scope.

The procedures will protect all BCI submitted in the course of the panel process but will not apply to a party's treatment of its own BCI.

Designation of Information as BCI.

When a party introduces as evidence information that is proprietary or commercially sensitive and not in the public domain, it will be permitted to designate that information as BCI, provided that it acts in good faith and exercises restraint. If another party considers that a party has unreasonably designated information as BCI, the panel may ask the party to justify the designation. If the party fails to provide an adequate justification in accordance with the established criteria, the panel will be permitted to decline to consider the information unless the party agrees to remove the designation.

Effects of Designating Information as BCI.

Access to BCI will be limited to persons who have signed a declaration of non-disclosure and who fall into the following categories: (i) representatives of the disputing parties, including employees, legal counsel or other advisors, but excluding employees, officers or agents of private entities that could reasonably be expected to benefit commercially from the receipt of the BCI; (ii) members of the panel; (iii) staff of the Secretariat; and (iv) experts appointed by the panel.

In the event that the party submitting BCI objects to any person being designated an approved person, the panel will decide on the objection as a preliminary matter.

An approved person will be permitted to communicate BCI only to other approved persons and to use the BCI only for the purposes of the dispute settlement proceedings.

A party referring to BCI in a document or other recording will be required to indicate that it contains BCI and to identify the BCI where it appears. In the case of text documents, the party submitting the BCI will be required within two business days, to submit a version of the document with the BCI redacted. Documents or other recordings containing BCI will have to be securely stored.

A party intending to refer to BCI at an oral hearing will be required to inform the panel prior to the hearing. Only approved persons will be permitted to be present when the BCI is discussed before the panel.

The panel will not be permitted to disclose BCI in its report, but will be permitted to make statements of conclusion drawn from the BCI.

Destruction or Return of BCI.

Within a fixed period after the conclusion of the proceeding, including any appeal, the Secretariat and the parties will be required to destroy or return all documents or recordings in their possession that contain BCI.

Additional or Alternative Procedures.

The panel will be permitted, at its own discretion, to impose additional procedures to protect BCI. It will also be permitted to modify or waive any of the procedures if the parties so request or agree.

2. Enhanced Panel Professionalism through the Creation of a Panel Roster

Background.

Panelists play a key role in fulfilling the objectives of the DSU. They are charged to make an objective assessment of the matters raised in a dispute, including as finders of fact. They also must assess the applicability of and conformity with the agreements relevant to the dispute and make the findings that will enable the Members, acting as the Dispute Settlement Body, to make the appropriate recommendations or rulings.

Canada agrees with many of the observations made by the European Communities in its communication TN/DS/W/1 addressed to the shortcomings of the current ad hoc system of panel selection, including the quantitative discrepancy between supply and demand, insufficient number of qualified panelists and costs in the timeliness of panel composition. Like the EC, Canada considers that adjustments to the current panel selection system could be made to improve the timeliness of panel proceedings, ensure availability of qualified panelists and encourage better and more consistent panel findings. However, in lieu of establishing a system of permanent panelists, Canada suggests that

Members transform the current indicative list into a streamlined panel roster. In Canada's view, this roster would provide an effective alternative to the current *ad hoc* approach of panel selection and composition.

Article 8.4 of the *Dispute Settlement Understanding* provides that "to assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications of a panelist outlined in paragraph 1, from which panelists may be drawn as appropriate". Panelists are to be selected with a view to ensuring the independence of those serving on a panel, a sufficiently diverse background and wide spectrum of experience.

Canada believes that the selection criteria need greater rigour. The more demanding selection criteria for members of the Appellate Body stand in stark contrast to that for panelists. The Appellate Body selection criteria are appropriate to the trust discharged by Appellate Body members and are instructive as to criteria suited to panelist selection. In Canada's view, the qualifications for panelists should be no less stringent than those for Appellate Body Members.

The current indicative list is not performing its intended function as a source of potential panelists. Despite an extensive number of candidates, panelists are drawn infrequently from the list. The relative inutility of the current indicative list may be a reflection of the absence of appropriate criteria for candidates as well as a failure by Members to recognize its function in respect of panel selection. Transformation of the indicative list into a roster composed of individuals selected on the basis of strict criteria and agreement by Members as to the function of the roster would make panel selection more efficient and contribute to panels that are qualified and representative.

Proposal: A New Panel Roster.

To replace the current indicative list, each WTO Member will be invited to nominate one individual, who may or may not be a national, for placement on a Panel Roster. In nominating an individual, each Member will be required to provide a statement of qualifications that identifies the nominee's capabilities and capacity to serve as a panelist in reference to a set of qualifications outlined in an amended DSU Article 8.1, closely tracking those currently applicable to Appellate Body Members.

The nominations and accompanying qualification statements will be transmitted to a committee which will verify that the nominees meet the requisite level of expertise to serve as a panelist. The Committee will be the same as the selection committee for appointments to the Appellate Body - i.e. the Chairs of the five main Councils of the WTO: Goods, Services, TRIPS, the DSB and the General

Council. Once confirmed by the Committee, this Panel Roster will be submitted to the General Council for approval. Approved individuals will remain on the Roster for a period of five years, with the possibility of one more five-year term on approval by the General Council. In the event of an individual's resignation or inability otherwise to serve, the nominating Member would be at liberty to submit a replacement nominee for consideration, through the same process. With assistance from the WTO Secretariat, the DSB will maintain the Roster and qualification statements and will ensure access to this information by the Membership.

A New Panel Roster – Function.

Following the establishment of a panel by the DSB, the disputing parties will endeavour to agree on the composition of the panel. As under the current system, the Secretariat will propose potential panelists to the disputing parties. The Secretariat will draw its candidates from the Panel Roster. The disputing parties will be able to propose "off roster" candidates. Absent agreement on the composition of the panel within 15 days after the date of the establishment of the panel, at the request of any of the disputing parties, the Director-General will compose the panel from the Panel Roster on the understanding that his/her selection will be made with due consideration to the issues in dispute. If, however, the Director-General determines that insufficient expertise is available from the roster for a particular dispute, the Director-General will be able to appoint an individual other than from the roster to serve as a panelist in that dispute. As under the current system, citizens of Members whose governments are parties or third parties to the dispute shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

A streamlined and effective Panel Roster would be advantageous to the WTO dispute settlement system for a number of reasons. In addition to ensuring that adequate information is available regarding the qualifications of potential panelists, the Roster would help to reduce the time and resources currently devoted to the process of panel composition by parties and the Secretariat, thereby allowing for a quicker resolution of disputes and better allocation of scarce Secretariat resources. Compared to a permanent panel arrangement, moreover, this system would allow for greater flexibility in terms of both resources and representation.

Remuneration of Panelists

In addition, providing an adequate level of compensation to panelists will help to ensure that sufficient numbers of qualified individuals are willing to advance their candidacy to the Panel Roster and that those selected to serve on a panel will not be penalized financially for the time they dedicate to this task.

Canada appreciates the resource constraints faced by the WTO. However, an adjustment to the *per diem* remuneration of panelists is warranted. Compared against other international tribunals, the *per diem* offered to WTO panelists is very low (see Annex 2). Remuneration accorded to WTO panelists must reflect more closely the value of panelist service not only to the individual parties to a dispute but also to ensuring the ongoing capacity of the DSU to provide security and predictability to the multilateral trading system to the benefit of all WTO members.

3. **Transparency.**

Background.

Members recognize that the strength of the WTO owes much to the support of the constituency it serves. That constituency has greatly expanded. Panels and the Appellate Body frequently adjudicate disputes involving matters of broad public interest that can affect large sectors of civil society. The implementation of DSB recommendations and rulings normally requires adjustments to a Member's trade measures and may prompt the enactment of new laws by national legislatures. Denying public observation to a process that results in government measures being repealed or amended runs the risk of arousing suspicion and courting public resistance where none is warranted.

Making the dispute settlement process more transparent could have significant benefits for the institution and the Membership. Granting the public access to Members' written submissions and the opportunity to observe panel and Appellate Body proceedings would reinforce the legitimacy of WTO dispute settlement procedures. Representatives of WTO Members with less experience in dispute settlement also could benefit from the opportunity to observe panel and Appellate Body proceedings. At the same time, greater transparency will require suitable protection for confidential information, including business confidential information submitted by parties to disputes.

More transparency need have no adverse effect on Members' ability to reach negotiated solutions to disputes. Consultations (and good offices, conciliation and mediation) are appropriately confidential because they involve negotiations conducted on a "without prejudice" basis between the disputing parties. Opening consultations to public scrutiny could undermine Members' ability to reach negotiated solutions to disputes. However, the rationale for keeping consultations confidential does not apply to panel or Appellate Body proceedings. Members do not engage in negotiations at panel and Appellate Body meetings. Likewise, Members do not negotiate with one another through their written submissions to panels and the Appellate Body.

Proposal: Public Access to Submissions and Meetings.

Canada proposes that the DSU be amended to provide as follows:

Written Submissions.

The written submissions of parties and third parties to the panel and the Appellate Body would generally be made available to the public at the time of filing. The Secretariat would establish and administer a dispute settlement registry at the WTO to facilitate public access to these submissions. It is expected that the Secretariat would make the submissions available to the public on the WTO website.

If a party or third party has designated information contained in its written submissions as confidential, as soon as is reasonably possible, it would provide the Secretariat with a redacted version of its written submissions that could be made available to the public.

Panel and Appellate Body Meetings.

Panel and Appellate Body meetings would be open to the public. In accordance with Canada's proposed *Procedures Governing Business Confidential Information*, the public would be excluded from portions of panel and Appellate Body meetings where confidential information is discussed.

To address resource limitations, the Secretariat could facilitate public access to panel and Appellate Body meetings by transmitting a live telecast of such meetings to a public viewing location designated by the Secretariat. Portions of meetings where confidential information is discussed would not be transmitted to the public viewing location.

Department of Foreign Affairs and International Trade Canada (International Trade).

CANADA -- DISPUTE SETTLEMENT.

http://www.dfait-maeci.gc.ca/tna-nac/dispute-en.asp (March 21, 2006).

WTO - Retaliation Authorization Requests.

- **As part of the Government's efforts to defend Canadian interests and in order to preserve any future retaliation rights, Canada has filed requests for authorization to retaliate against the United States in three different cases before the World Trade Organization (WTO): the WTO U.S. Byrd Amendment case, the WTO softwood lumber subsidy case, and the WTO softwood lumber threat of injury case.**
- **This factsheet provides information about these cases and includes timelines of proceedings before the WTO.**

WTO - U.S. Byrd Amendment

- **Under the Continued Dumping and Subsidy Offset Act of 2000 (commonly referred to as the Byrd Amendment), anti-dumping and countervailing duties are disbursed to U.S. producers who supported these trade remedy actions. These duties were previously deposited in the U.S. Treasury.**
- **Byrd disbursements have the effect of subsidizing U.S. producers and encouraging more U.S. trade remedy actions.**
- **The Byrd Amendment was successfully challenged in the WTO by Canada and 10 other WTO members.**
- **As a result of the U.S. failure to comply with its WTO obligations, on November 26, 2004, Canada received WTO authorization to retaliate against the United States. Brazil, Chile, India, Japan, South Korea, Mexico, and the European Union have also received retaliation authorization.**
- **These WTO members can retaliate in an amount of up to 72 percent of the annual level of Byrd disbursement of duties on their respective exports in a given year.**
- **On March 31, 2005, Canada announced that it will retaliate against the United States in response to the U.S. failure to repeal the Byrd Amendment. This decision follows extensive public consultations with domestic stakeholders. Starting May 1, 2005, a 15% surtax on imports**

of the following U.S. goods will be imposed: live swine, cigarettes, oysters, and certain specialty fish.

- **For more information on this dispute and Canada's retaliation decision, please visit the Byrd Amendment website.**

WTO - Softwood Lumber: Subsidy

- **On January 19, 2004, the WTO Appellate Body ruled that the U.S. countervailing duty determination issued in April 2002 was WTO-inconsistent. Specifically, the Appellate Body found that the U.S. Department of Commerce (DOC) failed to demonstrate that a subsidy existed in arm's-length sales of logs by timber harvesters to softwood lumber producers. On December 6, 2004, the U.S. DOC issued a revised countervailing duty determination to implement the Appellate Body's ruling but again failed to properly demonstrate the existence of a subsidy in such log transactions.**
- **Canada considers that the U.S. has not properly implemented the WTO ruling and, on December 30, 2004, requested that a WTO compliance panel review the U.S. DOC's revised determination. Compliance panels typically take three to six months to issue a report. The results of compliance panels can be appealed, which would take an additional three months.**
- **In order to preserve any future retaliation rights, on December 30, 2004, Canada also filed a request for authorization to retaliate against the United States. Canada indicated that it is seeking authority to retaliate by imposing a tariff surtax on a maximum of C$200 million of U.S. products imported into Canada in 2005. The issue of retaliatory rights will be adjudicated after the matter of compliance has been determined.**

WTO - Softwood Lumber: Threat of Injury

- **On March 22, 2004, a WTO panel found the U.S. International Trade Commissions (ITC) original determination that Canadian softwood lumber imports threaten to injure the U.S. industry to be inconsistent with U.S. WTO obligations. The United States was given until January 26, 2005, to implement the WTO ruling.**
- **On November 24, 2004, the U.S. ITC issued a new positive threat of injury determination to implement the panel ruling. The United States also published amended anti-dumping and countervailing duty orders to reflect the new U.S. ITC determination.**
- **Canada considers that the U.S. ITC's November 24 threat of injury determination relies on the same faulty analysis that was found to be WTO-inconsistent by the original WTO panel. Therefore, on February 14, 2005, Canada requested that a WTO compliance panel be established to review U.S. implementation.**
- **Compliance panels typically take three to six months to issue a report. The results of compliance panels can be appealed, which would take an additional three months.**
- **In order to preserve any future retaliation rights, on February 14, Canada also filed a request for authorization to retaliate against the United States. Canada has requested authority to retaliate in the amount of softwood lumber cash deposits currently held with the U.S. Treasury (over C$4.25 billion), plus the amount of cash deposits that the United States continues to collect illegally (over C$1 billion annually), until such time as the U.S. complies with its WTO obligations. The issue of retaliatory rights will be adjudicated after the matter of compliance has been determined.**

WTO PANEL CASES to which Canada is a Party.

1. **Canada - European Communities - Asbestos**

   - **Canada disappointed with the WTO Appellate Body's Decision**
     News Release - March 12, 2001
     WTO Appellate Body Report - March 12, 2001
   - **Canada to Appeal WTO Decision Regarding France's Ban On Chrysotile Asbestos**
     News Release - September 18, 2000
   - **Fact Sheet on Chrysotile Asbestos (.pdf format)**
   - **WTO Panel Report**

2. **Canada/Brazil WTO Regional Aircraft Dispute**

   - **Link to updated information and background documentation, including WTO reports.**

3. **Canada - US - Term of Patent Protection.**

   - **WTO Arbitration Report - February 28, 2001 *(pdf)***
   - **Government Tables Amendments to Bring Patent Act Into Conformity with WTO Agreement**
     News Release and Backgrounder - February 20, 2001
   - **Canada disappointed with WTO Appellate Body Decision**
     News Release and Backgrounder - September 18, 2000
   - **WTO Appelate Body Report**
   - **Canada to Appeal WTO Ruling**
     News Release and Backgrounder - May 5, 2000
   - **WTO Panel Report**
     The Report is reproduced in two parts *(pdf)*
     Part I (pages 1-30)* *Part II (pages 31-163)

4. **Canada - European Union Panel - Patent Protection of Pharmaceutical Products**

   - **Link to the WTO Arbitration Report - August 18, 2000 *(pdf)***
   - **"Canada Welcomes Adoption of WTO Ruling"**
     News Release - April 7, 2000
   - **"Canada Welcomes WTO Ruling on EU Challenge of Canada's Pharmaceutical Patent Regime"**
     News Release - March 17, 2000
     Including a Profile of Canada's Pharmaceutical Industry and Details of the Early Working and Stockpiling Exceptions.
   - **Report of the WTO Panel (*pdf*)**
     (Note that the Report contains 222 pages)
   - **Case Summary**

5. **Canada - Australia Measures Affecting Importation of Salmon - Recourse to Article 21.5 by Canada**

   - **Bilateral Agreement between Canada and Australia - May 16, 2000**
     See letters of agreement between Canada and Australia
   - **Canada and Australia Reach Agreement on Salmon**
     News Release including a Backgrounder - May 16, 2000
   - **Australian Measures on Imports of Canadian Salmon violate WTO Rules, Concludes Panel - News Release - February 18, 2000**
   - **Backgrounder - February 18, 2000** ***(including: History of the Dispute, Recent Developments and Next Steps)***
   - **Canada Goes to WTO on Australian Salmon Ban**
     News Release - July 5, 1999
   - **Government seeks input on possible retaliation against Australia**
     News Release - May 28, 1999 ***(includes a Backgrounder)***

6. **Canada - Japan/EU - Certain Measures Affecting the Automotive Industry**

   - **Award of the Arbitrator under Article 21.3(c) - October 4, 2000** ***(pdf)***
   - **WTO Appellate Body Issues Report on Auto Pact**
     News Release - May 31, 2000 (including a Chronology of the Dispute)
   - **Link to the WTO Appellate Body Report - May 31, 2000** ***(pdf)***
   - **Canada to Appeal WTO Panel Ruling on Autos**
     News Release - February 11, 2000
     Including a Backgrounder
   - **Report of the WTO Panel - February 11, 2000**

7. **Canada - New Zealand/US - Measures Affecting the Importation of Milk and the Exportation of Dairy Products**

   - **Canada Announces End of Dairy WTO Dispute**
     News Release - May 9, 2003
   - **Canada disappointed with WTO Dairy Decision**
     News Release and Backgrounder - December 20, 2002
     WTO - Appelate Body Report - December 20, 2002
     pdf - 48 pages, 123 KB
   - **Canada Appeals WTO Dairy Ruling**
     News Release - September 23, 2002
     Backgrounders

     - **All About Canada's Dairy Industry**
     - **Chronology: Canada-United States-New Zealand WTO Dairy Dispute**
     - **WTO Dairy Challenges**

- **Report of the WTO Panel - July 26, 2002**
  (pdf - 318 pages, 313 KB)
- **Canada to Appeal WTO Dairy Ruling**
  News Release - June 24, 2002
- **WTO Appellate Ruling Good News for Canadian Dairy Industry**
  News Release and Backgrounder - December 3, 2001
- **WTO Report of the Appelate body - December 3, 2001**
- **Status Report on the Dispute - Updated November 2001, including:**
  - **WTO Dispute Settlement Panel Report - May 1999**
  - **WTO Appellate Body Report - October 1999**
  - **Adoption by the WTO Dispute Settlement Body - October 1999**
  - **Implementation**
  - **WTO Compliant Commercial Export Contracts**
  - **WTO Compliance Panel**
  - **Agreement Between Canada, New Zealand and the USA Pursuant to Article 21.3(b) of the Dispute Settlement Understanding (DSU) - December 22, 1999**

8. Canada - EU - Beef Hormones

- **Update on the Dispute (August 11, 2005)**
- **EU- Beef Hormones - Canada Retaliates Against the EU**
  News Release and History of the Dispute - July 29, 1999
- **EU - Beef Hormones - Canada receives WTO Arbitration Report**
  News Release - July 12, 1999
- **Canada will request WTO authority to retaliate against the EU**
  News Release - May 14, 1999

9. Canada - US - Certain Measures Concerning Periodicals

10. Canada - US - Measures Treating Export Restraints as Subsidies

- **Minister Pettigrew Welcomes WTO Panel Ruling on Export Restraints**
  News Release - June 29, 2001
- **WTO Panel Report - June 29, 2001**
  Part I, Part II, Part III
- **Constitution of the Panel Established at the Request of Canada - Note by the Secretariat - October 27, 2000**
- **Pettigrew Announces Establishment of WTO Panel**
  News Release - September 11, 2000

- **Request for Establishment of a Panel by Canada - July 25, 2000**
- **Request for Consultations by Canada - May 24, 2000**

11. Canada - United States - Final Dumping Determination on softwood lumber from Canada

- **Request by the United States for Arbitration under Article 22.6 of the DSU – May 31, 2005**
- **Understanding between Canada and the United States Regarding Procedures under Articles 21 and 22 of the DSU (*Sequencing Agreement*) - May 27, 2005**
- **Canada Requests WTO Panel to Review U.S. Implementation in Softwood Lumber Dumping Case**
  News Release - May 20, 2005
- **Recourse to Article 22.2 of the DSU by Canada (*Request for Authority to Suspend Concessions Against the United States*) - May 19, 2005**
- **Recourse to Article 21.5 of the DSU by Canada (*Request for the Establishment of a Compliance Panel to Review the Measures Taken by the United States to Comply with the DSB Rulings and Recommendations*) - May 19, 2005**
- **Modification to Agreement on Period of Time for Implementation - February 14, 2005**
- **Agreement on Period of Time for Implementation - December 6, 2004**
- **Adoption of Appellate Body and Panel Report - August 31, 2004**
- **WTO Appellate Body Rules in Canada's Favour on Softwood Anti-Dumping Duties**
  News Release - August 11, 2004
- **Appellate Body Report - August 11, 2004**
- **Communication from the Appelate Body - July 8, 2004**
- **WTO Panel Decision on Softwood Anti-Dumping Determination**
  News Release - April 13, 2004
  Panel Report - April 13, 2004
    - **Part 1**
    - **Part 2**
    - **Part 3**
    - **Part 4**
    - **Part 5**
- **Communication from the Chair - December 8, 2003**
- **Communication from the Chair - August 29, 2003**
- **Constitution of a Panel Established at the Request of Canada - March 5, 2003**
- **Request for the Establishment of a Panel Presented by Canada - December 9, 2002**
- **Request for Consultations by Canada - September 13, 2002**
- **"Pettigrew launches new WTO Challenge of U.S. Lumber Dumping Determination"**
  News Release - September 13, 2002

Background information about the softwood lumber dispute...

12. Canada - United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada

- **WTO Compliance Panel Finds U.S. Countervailing Duties on Canadian Softwood Lumber Exports Illegal**
  News Release - August 1, 2005

- **Compliance Panel Report - August 1, 2005**

  - **Part 1**
  - **Part 2**
  - **Part 3**
  - **Part 4**
  - **Part 5**

- **Understanding between Canada and the United States Regarding Procedures under Articles 21 and 22 of the DSU (*Sequencing Agreement*) - January 14, 2005**
- **Request by the United States for Arbitration under Article 22.6 of the DSU - January 13, 2005**
- **Recourse to Article 22.2 of the DSU by Canada (*Request for Authority to Suspend Concessions Against the United States*) - December 30, 2004**
- **Recourse to Article 21.5 of the DSU by Canada (*Request for the Establishment of a Compliance Panel to Review the Measures Taken by the United States to Comply with the DSB Rulings and Recommendations)* - December 30, 2004**
- **Softwood Lumber: Canada Denounces U.S. Department of Commerce Determination**
  News Release - December 14, 2004
- **Agreement on Period of Time for Implementation - April 28, 2004**
- **Adoption of Appellate Body and Panel Reports - February 17, 2004**
- **Appellate Body Report - January 19, 2004**
- **Corrigendum - August 29, 2003**
- **Panel Report - August 29, 2003**

  - **Part 1**
  - **Part 2**
  - **Part 3**
  - **Part 4**
  - **Part 5**

- **Pettigrew welcomes Positive Interim WTO Decision on Softwood Lumber**
  News Release and Backgrounder - May 27, 2003
- **Communication from the Chair - May 16, 2003**
- **Constitution of a Panel Established at the Request of Canada - November 12, 2002**

- **Request for the Establishment of a Panel Presented by Canada - July 19, 2002**
- **Request for Consultations by Canada - May 3, 2002**

Background information about the softwood lumber dispute...

13. Canada - United States – Investigation of the International Trade Commission in softwood lumber from Canada

- **Understanding between Canada and the United States Regarding Procedures under Articles 21 and 22 of the DSU (*Sequencing Agreement*) – February 23, 2005**
- **Request by the United States for Arbitration under Article 22.6 of the DSU - February 23, 2005**
- **Recourse to Article 22.2 of the DSU by Canada (*Request for Authority to Suspend Concessions Against the United States*) - February 14, 2005**
- **Recourse to Article 21.5 of the DSU by Canada (*Request for the Establishment of a Compliance Panel to Review the Measures Taken by the United States to Comply with the DSB Rulings and Recommendations)* - February 14, 2005**
- **Statement by Minister Peterson on Softwood Lumber - February 9, 2005**
- **Agreement on Period of Time for Implementation - October 1, 2004**
- **Adoption of Panel Report - April 26, 2004**
- **News Release - March 22, 2004**
- **Panel Report - March 22, 2004**
  - **Part I**
  - **Part II**
  - **Part III**
  - **Part IV**
- **Communication from the Chair - December 24, 2003**
- **WTO Releases Interim Report on Softwood Lumber**
  News Release - December 19, 2003
- **Constitution of a Panel Established at the Request of Canada - July 2, 2003**
- **Request for the Establishment of a Panel - April 4, 2003**
- **Request for Consultations by Canada - January 7, 2003**

Background information about the softwood lumber dispute...

14. Canada - United States - Preliminary Determinations with Respect to Certain Softwood Lumber from Canada (DS236)

- **Canada Wins Key WTO Lumber Decision**
  News Release and Backgrounder - September 27, 2002
- **WTO Panel Report - September 16, 2002**
  Part I (126 pages, 600 KB)

Part II (21 pages, 100 KB)
Part III (19 pages, 58 KB)

- **Canada Wins Key WTO Lumber Dispute**
  News Release and Backgrounder - July 26, 2002
- **Constitution of a Panel Established at the Request of Canada - February 8, 2002**
- **Canada Asks WTO Director General to Appoint Lumber Dispute Panellists**
  News Release and Backgrounder - January 22, 2002
- **WTO Panel to Review Unfair U.S. Duties on Canadian Softwood Lumber**
  News Release and Backgrounder - December 5, 2001
- **Request for the Establishment of a Panel Presented by Canada - October 26, 2001**
- **Request for Consultation by Canada - August 27, 2001**

Background information about the softwood lumber dispute...

15. Canada - US - Section 129(C)(1) of the Uruguay Round Agreement Act

- **Report of the Panel - July 15, 2002**
- **Communication from the Chair - May 2, 2002**
- **Constitution of the Panel established at the request of Canada**
  Note by the Secretariat - October 31, 2001
- **Minister Pettigrew announces Canada's Request to Establish a WTO Panel**
  News Release - July 16, 2001
- **Request for establishment of a Panel by Canada - July 13, 2001**
- **Request for Consultations by Canada - Section 129(C)(1) of the Uruguay Round Agreement Act - January 22, 2001**
- **Pettigrew announces WTO Consultations with U.S.**
  News Release and Backgrounder - January 17, 2001

16. Canada/Other Countries - US - Continued Dumping and Subsidy Offset Act of 2000 (DS 234)

- **Canada/Other Countries - US - Continued Dumping and Subsidy Offset Act of 2000 (DS 234)**
  Notice seeking comments on possible trade retaliation in response to the failure of the Government of the United Sates to repeal the Continued Dumping and Subsidy Offset Act of 2000, commonly known as the Byrd Amendment.

17. Canada - U.S. - Measures Relating to Exports of Wheat and Treatment of Imported Grain (DS276)

- **WTO upholds favourable Ruling on Canadian Wheat Board**
  News Release - August 30, 2004
  WTO Appellate Body Report - August 30, 2004
- **WTO Report on Canadian Wheat Board Victory Made Public**
  News Release and Backgrounder - April 6, 2004
- **WTO Panel Report - April 6, 2004**
  - **Annex A**
  - **Annex B**
- **WTO Panel Report Supports Canada's Position on Key Canadian Wheat Board Issue**
  News Release and Backgrounder - February 10, 2004
- **Canada Will Defend its Wheat Policies Before WTO**
  News Release and Backgrounder - March 31, 2003
- **Request for the Establishment of a Panel by the United States**
  (pdf - 2 pages, 77 KB)

18. Canada - U.S. - Investigation of the International Trade Commission in Hard Red Spring Wheat from Canada

- **Canada Asks for WTO Consultations with U.S. on Hard Red Spring Wheat**
  News Release - April 8, 2004

19. Canada Initiates WTO Proceedings against the European Union on GMOs
News Release and Backgrounder - May 13, 2003
Chronology (pdf 2 pages, 51 KB)

Department of Foreign Affairs and International Trade Canada (International Trade)

U.S. TRADE REMEDY LAW: THE CANADIAN EXPEIENCE (1985-2000).

http://www.dfait-maeci.gc.ca/tna-nac/disp/menu-en.asp

In March 1993, the Department of Foreign Affairs and International Trade issued a study entitled *U.S. Trade Remedy Law: A Ten Year Experience.* Produced by the Department's U.S. Trade Relations Division, it reviewed Canada's experience with the full range of U.S. trade remedy laws in the 1980s. The following study, while limited in scope to U.S. anti-dumping, countervailing duty and safeguard investigations, is intended to update and expand on the information regarding Canada's experience with U.S. trade remedy laws as provided in the 1993 study. In contrast with its predecessor, the study includes more detailed information on U.S. anti-dumping and safeguard investigations involving imports from Canada, including discussion of some of the key issues raised in those investigations. It also includes a discussion of the role that the Government of Canada played in the investigations. In addition, there is an updated review of the U.S. countervailing duty investigations involving Canada. In view of the constraints of time, resources and frequent staff changes first within the U.S. Trade Relations Division and then in the Trade Remedies Division, this study may not be entirely comprehensive. Regardless, the intent is to provide as much information as possible in the hope that it will be as useful a reference document as the original 1993 study.

United States Anti-Dumping Duty Investigations regarding Imports from Canada: Case Histories, 1985–1999.

I. United States Anti-Dumping Duty Law

II. United States Countervailing Duty Law

III. United States Safeguard Law

IV. United States Anti-Dumping Duty Investigations regarding Imports from Canada:

Case Histories, 1985–1999

1. **Rock Salt**
2. **Heavy Walled Rectangular Welded Carbon Steel Pipes**
3. **Iron Construction Castings**

Oil Country Tubular Goods
4. **Brass Sheet and Strip**
5. **Fresh Cut Flowers**
6. **Colour Picture Tubes**
7. **Potassium Chloride**
8. **Certain Welded Carbon Steel Line Pipe**
9. **Fabricated Structural Steel**
10. **New steel Rails**
11. **Thermostatically Controlled Appliance Plugs and Internal Probe Thermostats**
12. **Generic Cephalexin Capsules from Canada**
13. **Limousines**
14. **Magnesium**
15. **Ball Bearings, Mounted or Unmounted**
16. **Nepheline Syenite**
17. **Steel Wire Rope**
18. **Potassium Hydroxide, Liquid and Dry**
19. **Medium Voltage Underground Distribution Cable**
20. **Certain Flat-Rolled Carbon Steel Products**
21. **Certain Steel Wire Rod**
22. **Certain Steel Wire Rod**
23. **Certain Stainless Steel Plate 133**
24. **Certain Stainless Steel Round Wire Rod**
25. **Cattle**

V United States Countervailing Duty Investigations regarding Imports from Canada: Case Histories, 1991–1999

1. **Softwood 1**
2. **Softwood 2**
3. **Softwood 3**
4. **Live Swine and Fresh, Chilled and Frozen Pork Products**
5. **Magnesium**
6. **Certain Laminated Hardwood Trailer Flooring**
7. **Certain Steelwire Rod**
8. **Live Cattle**

VI United States Safeguard Investigations regarding Imports from Canada: Case Histories, 1982–1999

1. **Certain Specialty Steel (Stainless Steel and Alloy Tool Steel)**
2. **Carbon and Certain Alloy Steel Products**
3. **Wood Shingles and Shakes**
4. **Steel Fork Arms**
5. **Certain Cameras**
6. **Corn Brooms**
7. **Tomatoes and Bell Pepper**
8. **Wheat Gluten**
9. **Lamb Meat**
10. **Certain Steel Wire Rod**
11. **Circular Welded Carbon Quality Line Pipe**

CHINA Mission to the World Trade Organization.
Press Release / Statements & Documents.

MOFCOM Spokesman Chong Quan Expressed Regret Over the Request From EU, USA and Canada to Set up Expert Groups.

Wednesday, September 20,2006 Posted: 23:23 BJT(23 GMT) MOFCOM
http://wto2.mofcom.gov.cn/aarticle/bilateralcooperation/inbrief/200609/20060903220800.html

MOFCOM Spokesman Chong Quan Expressed Regret Over the Request From EU, USA and Canada to Set up Expert Groups. Wednesday, September 20,2006.

MOFCOM spokesman Chong Quan recently expressed regret over the request from EU, USA and Canada to set up export groups against Chinese administration rules on import of automobile parts. Mr. Chong Quan said that the administration rules of China on import of automobile parts was to prevent lawless persons from circumvention of Customs' supervision and tariff evasion by means of tariff difference between whole vehicle and automobile parts, and was also the measure to fight against illegal assembly of automobiles and protect interests of consumers, it was in accordance with WTO rules. On which China Party had cleared up to EU, USA and Canada in the negotiations with great sincerity, and felt regret on the requirement.

China Mission to the WTO.

CHINA -- Statement by H.E. Ambassador SUN Zhenyu of China at the WTO as to the US Trade Policy Review Report (2006).

March 22, 2006, Geneva

http://wto2.mofcom.gov.cn/aarticle/bilateralvisits/200603/20060301739437.html

First of all, I would like to join other Delegations to welcome the delegation of the United States to attend this review and thank Ambassador Allgeier for his statement.

I would also like to thank the WTO Secretariat and the US Government for their reports, which have laid good foundation for Members to take part in the review process. Besides, I would like to thank the discussant, Ambassador Mohamed for her comprehensive and profound comments on the U.S. trade policy.

China and the United States enjoy important and far-reaching trade partnership. In 1979, when PRC and the United States established diplomatic relations, bilateral trade volume between the two countries was less than 2.5 billion US dollars. Last year bilateral trade totaled 211.63 billion US dollars according to China's statistics, representing more than 80 times increase within 26 years. For the last four years, China-US trade has been growing the fastest as compared to bilateral trade between the US and its all other major trading partners.

Compared with 26 years ago, the nature of bilateral economic and trade cooperation between China and the United States has changed fundamentally, from trade alone to cover almost all areas in the economy. The United States is one of the main sources of FDI to China and a major provider of goods and services to China. There is strong complementarity and potential for further cooperation between China and the United States in natural resources, human resources, capital and technology. The stable, healthy and diversified development of economic and trade relations between China and the United States is in line with the long-term interests of the two countries.

Madam. Chair, while we have full confidence in further developing the bilateral economic and trade relations, China has some concerns about U.S. trade policies. Prior to this review, China has submitted written questions to the U.S. concerning various issues such as the "twin deficits" of trade and finance, fulfillment of transparency obligations, fair implementation of anti-dumping measures, foreign investment restrictions in the service sector, etc. I would like to take this opportunity to highlight China's major concerns and hope the United States would consider and respond to our concerns.

1. Compliance to the rulings of the Dispute Settlement Body. Going through the Report by the Secretariat, we get an impression that, as the most frequent user of dispute settlement mechanism, the

United States shows strong desire for compliance by other Members when DSB rulings are in its favor, but fails to meet DSB "prompt compliance" requirement when rulings are against its interest. Such an attitude towards DSB rulings has constituted striking contrast. For instance, three years have passed since the Appellate Body made the final ruling on the issue of Byrd Amendment in January, 2003, the United States just started taking steps to comply with the ruling. However, the United States will not actually fulfill its obligations until 2007. Besides, Members have still been waiting for the United States to honor its obligations to comply with many other rulings and recommendations from the DSB, including the one regarding the Section 211 of the U.S. Omnibus Act.

2. In recent years, the United States has taken many trade measures based on national security, some of which have significantly affected the normal operation of international trade and foreign direct investment flows. Recently the United States exerted pressure and imposed restrictions on inward FDI on account of national security, which prevent foreign companies from seeking merger and acquisition within the United States. These have dealt heavy blows to Members' confidence in the business environment of the United States. By interpreting and applying WTO national security clauses in an excessive way, it has again seriously undermined the credibility of the multilateral trade regime, over which China is highly concerned. Besides, export control policy and measures of the United States such as restrictions on the export of high-tech products to China have deprived many American high-tech enterprises of the opportunities to do business with China. According to China's statistics, among all the supplies of high-tech products, the rankings of the United States dropped from 2nd in 2001 to the 6th place in 2005 with its share in China's total high-tech imports decreased from 16.5% to 8.1%. This policy of the United States not only harmed the interest of American exporters, but also made trade deficit situation even worse between the United States and China.
Among those written questions raised, China has also expressed its concerns about the enforcement of Bioterrorist Act, as well as customs measures by the United States. China would like to urge the United States to assess the influence of these measures on normal trade objectively and to make improvements on its existing practices.

3. The United States is a major user of anti-dumping measures. However, there are quite a number of practices in its anti-dumping investigations and measures which are not consistent with WTO Anti-Dumping rules. For instance, Members have expressed much concern about "zeroing" of the United States in anti-dumping investigations, which has greatly harmed the interest of other Members. The DSB has made a clear ruling on this specific issue. China urges the United States to observe this ruling and make immediate policy changes accordingly. Besides, the United States has extended the time span of many anti-dumping measures with its "sunset review" practices, which is against the purpose of provisions about "sunset review."

4. Rules of origin in certain unilateral preferential arrangements of the United States require developing Members to import raw materials from the United States to produce goods for export and enjoy preference. This "American content" requirement in preferential trade arrangement is inconsistent with the position of the United States to eliminate "local content" under TRIMS negotiations and is also causing trade diversions. For instance, beneficiary countries of US unilateral preferential arrangement cannot import yarns from countries other than the United States to manufacture textile products in order to enjoy preferential treatment.

5. After the Hong Kong Ministerial, Members still face enormous challenges to conclude the Doha negotiations within the expected timeframe. We hope the United States will assume greater responsibility and continue to play the leading role in this Round. Especially in agriculture, the

United States should make a further steps forward in domestic support, thereby making due contributions to the progress of the Doha negotiations.

China – Ministry of Commerce (Mofcom).

CHINA -- FOREIGN MARKET ACCESS REPORT (2005)

http://gpj.mofcom.gov.cn/table/2005en.pdf

Foreword.

The year of 2004 witnessed a rapid development of China's foreign trade. According to the Chinese Customs, China's foreign trade volume exceeded US$1000 billion for the first time, reaching US$1154.74 billion in 2004, up by 35.7%, among which China's export was US$593.36 billion, up by 35.4%, while China's import was US$561.38 billion, up by 36.0%. The trade surplus in 2004 was US$31.98 billion, up by 25.6%. The trade volume of China was the third largest in the world.

As Chinese companies being more exposed to the international competition, China's overseas investment increases remarkably. In 2004, Chinese non-financial overseas investment reached US$3.62 billion, up by 27%. By the end of 2004, the accumulated overseas direct investment of China was about US$37 billion. The volume of completed labour service cooperation contracts was US$3.75 billion in 2004, up by 13%, and that of the newly signed labour service cooperation contracts was US$3.5 billion, up by 13%.

With the fast development of Chinese foreign trade and investment, some trading partners set all kinds of barriers to trade and investment frequently to protect their domestic industry and home market. According to the WTO, a total of 16 countries and regions initiated 57 anti-dumping, countervailing, safeguard and product-specific safeguard investigations against Chinese products. The total value related on these cases is US$1.26 billion, which was the largest in the world. From WTO establishing in 1995 to the first half one of 2004, WTO members initiated 2537 anti-dumping cases, among which 356 cases involved Chinese products, accounting for one seventh of the total. In addition the role of technical barriers to trade, barriers to IPRs of China's trading partners became more important in these partners' trade policy against China. It reveals that China had been coming into the period of barriers to trade. In a certain long period from now on, Chinese companies will face more complicated international trade and investment climate.

In accordance with relevant provisions of the Foreign Trade Law and the Regulations on Administration of Import and Export of Goods, MOFCOM started to compile and publish the Foreign Market Access Report (hereinafter referred to as the Report) as of 2003 on an annual basis. The Report is complied in the course of enabling Chinese enterprises and relevant organizations to have better knowledge on the trade regimes and practices of China's trading partners in the field of trade in goods and services as well as foreign investment, to obtain a full-scaled understanding of competition on global market, and thus to participate in the international competition on an even ground. It also aims at maintaining a equal, fair and reasonable international trade and investment

environment according to the WTO rules, and expressing the concerns of the Chinese government and industries over the external environment for trade development.

MOFCOM is now publishing the Foreign Market Access Report:2005.

Coverage of the Report.

Based upon information provided by Chinese enterprises and government agencies, while taking into account of trade volumes between China and its global trading partners in 2003 provided by the Chinese Customs, the Report covers 22 trading partners of China, including, Egypt, South Africa, Nigeria, Saudi Arabia, Turkey, Thailand, the Philippines, Malaysia, Indonesia, Vietnam, India, the Republic of Korea, Japan, Russia, the European Union, Canada, the United States, Mexico, Brazil, Argentina, Australia and New Zealand. China's export to these trading partners accounted for about 68% of China's total export in 2004.

The Report will evaluate more trading partners of China so as to present a more comprehensive scenario for the development of China's foreign trade and overseas investment.

Sources of information and content.

The Report is based upon information compiled within central government agencies, local competent authorities for foreign trade, Chinese Commercial Counselor's Offices abroad, enterprises and intermediary organizations. However, views and complaints of enterprises and intermediary organizations in the Report do not necessarily represent those of the government's.

Information presented in the Report on each trading partner covers mainly three areas, including bilateral economic and trade development, trade and investment regulatory regime of a given trading partner and barriers to trade and investment.
Wherever possible, the Report estimates the impact on China's exports of a specific foreign trade barrier. However, it should be understood that due to technical and information constraints, the estimates on negative effect are made only to parts of the trade barriers to Chinese foreign trade and overseas investment, and have not reflected the consequent impact regarding the loss of potential trade opportunities.

Definition and classification of barriers to trade and investment.

According to on Article 3 of t*he Trade Barriers Investigation Regulation*, promulgated on Feb.2, 2005, trade barriers are defined in the Report as government-imposed or government-supported measures or practices that satisfy one of the following:

- **inconsistent with or failing to fulfill the obligations provided in any economic and trade treaties or agreements of which both the given trading partner and China have concluded or acceded to;**

- **which results in one of the following negative trade effects:**

- **imposing or threatening to impose obstacle or restriction on the access of Chinese products or services to the market of the given trading partner or the market of any other trading partner;**
- **causing or threatening to cause impairment to the competitiveness of Chinese products or services on the market of the given trading partner or the market of any other trading partner.**
- **imposing or threatening to impose obstacle or restriction on the products or services of the giving trading partner or any other trading partner exporting to China.**

Trade barriers are defined in the Report mainly according to WTO agreements as the majority of China's trading partners are WTO members. In case of non-WTO members or a given trade barrier not covered by WTO agreements, bilateral or plural -lateral agreements or established international trade practices will be taken as references.

Barriers to investment are defined in the Report mainly according to WTO rules and relevant multilateral, plural-lateral and bilateral agreements. Hereby, barriers to investment in the Report refer to government-imposed or government-supported measures, satisfying one of the following:

- **inconsistent with a multilateral/plural-lateral agreement of which both the given trading partner and China are among the signatories, or a bilateral investment protection agreement signed between the given trading partner and China; or failing to fulfill obligations provided in a multilateral/plural-lateral investment agreement of which both the given trading partner and China are among the signatories or a bilateral investment agreement signed between the given trading partner and China.**
- **imposing or threatening to impose unjustified obstacle or restriction on Chinese capital's access to or withdrawal from the market of the given trading partner; or**
- **causing or threatening to cause impairment to the interest of commercial entities with Chinese investment in the given trading partner.**

The Report classifies barriers to investment into three different categories as follows:

- **Barriers to the access of investment, e.g., unjustified restrictions on access of foreign capital, and in case of WTO members, failure in fulfilling its commitment to open certain sectors to foreign investment.**

The United States of America.

Bilateral trade relations.

The United States of America (hereinafter referred to as the US) is the second largest trading partner of China in 2004. According to the China Customs, the bilateral trade between China and the US in 2004 reached US$169.63 billion, up by 34.3%, among which China's export to the US was US$124.95 billion, up by 35.1%, while China's import from the US was US$44.68 billion, up by 31.9%. China had a surplus of US$80.27 billion. China mainly exported to the US machinery and electronic products, furniture & lighting, toys, footwear, steel products, plastic products, automobiles and auto parts, garments, leather products and suitcases and bags, other textile products, photo-optical equipment, and etc. China mainly imported from the US machinery and electronic products, optical

medical apparatus, oilseed feed, spacecraft, plastic products, organic chemical products, cotton, wood pulp, miscellaneous chemical products, steel, leather and etc.

According to the Ministry of Commerce (hereinafter referred to as MOFCOM), the turnover of completed engineering contracts by Chinese companies in the US reached US$240 million in 2004, and the volume of the newly signed contracts was US$ 380 million. The volume of completed labor service cooperation contracts was US$120 million, and that of the newly signed labor service cooperation contracts was US$50 million. By the end of 2004, the accumulated turnover of engineering contracts completed by Chinese companies in the US had reached US$2.02 billion, with that of all the contracts signed being US$2.8 billion, and the volume of completed labor service contracts had reached US$1.9 billion, with that of the total contracts signed being US$1.88 billion.

According to MOFCOM, 97 Chinese-funded non-financial enterprises were set up in the US in 2004, with a contractual investment of US$140 million by Chinese investors. By the end of 2004, a total of 883 Chinese-funded non-financial enterprises had been set up in the US with a total contractual investment of US$1.09 billion.

According to MOFCOM, US investors invested in 3925 projects in China in 2004, with a total contractual investment of US$12.17 billion and an actual utilization of US$3.94 billion. By the end of 2004, US investors had accumulatively invested in 45,265 FDI projects in China with a contractual investment of US$98.61 billion and an actual utilization of US$48.03 billion.

Trade remedy measures.

The US trade remedy system covers two aspects: affected imports and affected exports. Remedies available to imports include anti-dumping and countervailing measures against unfair price competition, safeguard measures to regulate imports, and measures against imports infringing US intellectual property rights under Section 337. Trade remedies for export are mainly the application of Section 301.

The current US anti-dumping and countervailing rules are contained in the United States Code: Title 19-Chapter 4-Tariff Act of 1930, while the specific administrative regulations are included in the Code of Federal Regulations, Title 19. The President, under the authority of Sections 201-204 of the Foreign Trade Act of 1974, has the right to take safeguard measures against specific imports. This authorization can be used in the circumstances of import without unfair competition. Section 337 of the Tariff Act of 1930 is usually used to protect the interests of US intellectual property rights owners by barring imported products that allegedly violate US intellectual property rights from entry into the United States. The International Trade Committee (ITC) is the executive body of Section 337, and is authorized to issue exclusion orders to the Customs prohibiting the entry of IPR-infringing goods.

Section 301 of the Trade Act of 1974 are used to enforce U.S rights under current trade agreements and are also used to obtain increased market access for U.S goods and services, and protect American goods from being affected by foreign intellectual property infringements. It has provided the USTR with specific procedures to investigate foreign trade practices that violate IPR, and consult with foreign governments in order to seek a solution. The expanded use of Section 301 is reflected by Super 301, and Special 301 for the purpose of IPR protection. The series of 301 is administered and implemented by the USTR

Impact of political and economic measures on trade.

The American government is authorized to impose restrictions or administration on imports and exports out of political or economic safety concerns provided the restriction or control meet the requirements of relevant laws. These laws include the International Emergency Economic Powers Act approved in 1977, which authorizes the President to freeze foreign assets in the US, impose embargoes, or take other appropriate action when there is a threat to the national safety, foreign policy or economic interests of the US. Also included are the Trading With the Enemy Act, whose authority was extended for 1 more year by President Bush on September 10th 2004, the Narcotics Control Trade Act, the International Security and Development Cooperation Act of 1985, the Embargo on Transactions with Cuba, and many other laws.

Barriers to trade.

The overall tariff rate in the US is relatively low. However, the US imposes high tariffs on certain products, which constitutes tariff peak. Currently, 7.5% out of the total tariff headings of the US have a tariff rate three times higher than the average tariff rate, and 4.3% have a tariff rate over 15%. High tariffs or tariff peaks are mainly applied to textiles and garments, leather products, rubber products, pottery, footwear and travelware, which are the major export items of China to the US, thus affecting China particularly. Furthermore, within one specific product classification such as footwear or pottery, usually lower tariff rates are applied to high-priced products, and higher tariff rates to low-priced products, thus putting Chinese products which occupy a large share of the low-end market in the US at a great disadvantage.

Tariff escalation.

Tariff escalation is a serious issue in the US. For metal products, precious metal and precious stone, the arithmetic average tariff for primary products is 0.43%, for semi-finished products, 1.17%, and for finished products, 6.12%. For textiles and clothing, the arithmetic average tariff for primary products is 7.17%, for semi-finished product, 9.21%, and for finished products, 10.16%. Take products under a single tariff heading as another example. The tariff rate for non-retail-use non-twisted spin eurelon-6 single yarn is 0, while that of unbleached or bleached pure nylon fabric is 13.6%, and knit or crocheted T-shirts made of chemical fiber 32%. Such a tariff structure has considerably hindered China's export of higher-value-added products such as semi-finished or finished products to the US, and seriously undermined the legitimate rights and interests of Chinese enterprises.

Tariff quotas.

The US imposes tariff quotas on imports of certain agricultural products in order to control the quantities of import and protect the interests of domestic producers,. Products subject to tariff quotas in fiscal year 2004 included almost all dairy products, sugar and sugar products, peanut and certain peanut products, unprocessed tobacco leaves and processed tobacco, tuna fish, fresh, chilled or frozen beef, cotton, etc. High tariffs are imposed on products exceeding quota. For instance, the average tariff rate for in-quota nonfat dried milk is 2.2%, while that of off-quota is 52.6%.

Import restrictions.

According to Article 2, Section 232 of the Trade Expansion Act of 1962, DOC has the right to self-initiate or, based on a request from an interested party or a request from other departments or agencies, initiate Section 232 investigations to evaluate whether the imports threaten to impair the

national security, and submit a report to the President, who will decide whether to adjust imports. Since 1980, DOC has completed 16 investigations under Section 232.

Although the Trade Expansion Act of 1962 provides for provisions on factors that need to be considered for determining the injury or threaten of injury to national security as a result of importation, the criteria are very ambiguous. Therefore, the Act grants great discretionary power to the President, DOC and relevant authorities in practice. In addition, when an industry files a petition under Section 232, no evidence of injury is required, which has substantially lowered the threshold for initiating an investigation under Section 232, and made it more difficult to distinguish whether the true intention of the petitioner is to protect national security or to prevent the competition from imports. In order to avoid trade distortions, China hopes that these measures should be implemented in a more prudent manner.

Import quotas.

In accordance with the Uruguay Round Agreement on Textiles and Clothing, the US removed all quantitative restrictions on textiles on January 1, 2005. In terms of concrete implementation, however, there still exist the following restrictive measures in the US. The Committee for the Implementation of Textile Agreements (CITA) declared on December 13, 2004 that for all shipments exported in 2004 that exceed the applicable 2004 agreed quota limit, entry would not be permitted upon the removal of quota. Rather, entry would be permitted to goods in an amount equal to 5 percent of the applicable 2004 base quota limit until all shipments in excess of the quota limits have been entered. In addition, CITA required that all shipments in excess of the quota need to be presented at the moment of opening to ensure the 5% could be distributed proportionally among all products. Shipments in excess of the 5% will have to wait till the following month or later for clearance. The delay will inevitably increase importers' warehousing costs and affect the timely supply of products concerned.
In addition, in the absence of sufficient factual evidences as required by the bilateral agreements, the US authorities have taken unilateral actions to deduct China' s textile quotas at its determination that illegal transshipments exist in China's textile trade. These actions have severely affected China's textile export to the US. In fact, the thorough investigations by China revealed that many such transshipments, alleged illegal by the US, were conducted by exporters from a third country (or area), rather than by Chinese exporters, and a considerable number of cases involved US importers who, in collusion with US Customs Service staff, transshipped Chinese products originally destined to a third country (or area) to the US. Several consultations were held for solving this issue between China and the US, and the US has corrected only part of its practices so far.

Barriers in customs procedures.

The US Customs Service requires that exporters should provide additional documents and information on goods waiting for customs clearance. For certain products, such as textiles, clothing or footwear, the information required is quite beyond the necessity for normal customs clearance. These formalities, which are complicated and costly, have constituted barriers to exporters, particularly to small exporters.

The US Customs Service also requests confidential processing information for the imports of textiles and clothing under certain circumstances. For example, when the exterior of a clothing article is made of more than one material, information must be provided on the respective weight, value and surface area of each material. Such action has resulted in an increase of cost.

In addition, the US Customs Service issued a regulation in January 2003, requiring that all eyeglasses shipped to the US can't be cleared unless a "dropping test certificate" is provided. According to the US Customs Service, eyeglasses include normal eyeglasses and sunglasses. Sample eyeglasses mailed by express delivery are not exempt from the requirements.

Technical barriers to trade.

The US has a very complicated and decentralized system of technical standards and governing laws. 17 agencies of the federal government and 84 independent organizations have the right to draw up technical regulations. State or local governments have also enacted many different technical regulations in the areas of manufacturing, transportation, environmental protection, food and drugs. It is estimated that there are more than 400 non-governmental standard institutions and associations in the US today, and more than 50,000 technical standards and regulations have been established by the US official authorities, and another 50,000 by various non-governmental standard institutions, professional associations and industry groups in the US. The US rarely adopts standards formulated by international standard organizations and some US standards are even contrary to international ones. For instance, imports into the US are required to meet not only ISO9000, but also many other conditions. Due to the complicated and dispersed technical standards and governing laws, there is usually a lack of clarity in the administration of these regulations.

The system of certification and conformity assessment in the US is also rather decentralized and complicated. There are currently 55 certification systems in the US, but no uniform quality certification authorities. Government organizations, local government agencies and non-government organizations can all conduct quality certification. In conformity assessment, the US commonly uses the "third-party" method, which has brought unnecessary burdens to foreign manufacturers. Moreover, delays by certain agencies in the examination and approval process have incurred additional costs for the entry of foreign products, including Chinese products.

Food inspection and quarantine.

The Registration of Food Facilities and the Prior Notice of Imported Food Shipments regulations issued by FDA took effect as of December 12th, 2003. The two regulations require domestic and foreign facilities that manufacture, process, pack, or hold food for consumption in the United States to register with FDA, and require a prior notice to be submitted electronically to FDA 5 days before the arrival of imported food or feed. Unregistered foreign food or feed will be detained when arriving at the port of entry. According to the regulations, registration by a foreign company must be done through a US agent for thousands of US dollars. It is held by China that the US inspection and quarantine procedures are unduly complicated with no scientific justification. The overuse of inspection and quarantine and even discriminatory measures have increased the cost of importing agricultural products, prolonged customs clearance time, restrained normal import and violated Article 5.4 of the Agreement on Sanitary and Phytosanitary Measures of the WTO, which says that "member should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects".

It is the hope of the Chinese side that the U.S use relevant measures consistent with the SPS Agreement of the WTO. China is also concerned about the adverse impact of these measures.

Trade remedies.

By frequently using antidumping and safeguard measures, the US has practically restricted the exports from China. From 1980 to the end of 2004, the US had initiated 110 antidumping investigations and 19 safeguard investigations against Chinese exports, including 5 product-specific safeguard investigations and 12 textile special safeguard investigations. According to statistics from ITC, there have been 59 anti-dumping orders which were made since 1980 and are still in force by the end of 2004. In addition, US has initiated 6 new anti-dumping investigations against imports from China and 12 special safeguard investigations against Chinese textiles in 2004. There are many discriminatory provisions against Chinese products in relevant US anti-dumping legislations. Many unfair practices that exist in the investigations have also constituted barriers to China's exports to the US.

Existing issues in antidumping investigations against Chinese products -- China's market economy status.

Section 1677 (18), Chapter 4 of the Smoot-Howley Tariff Act of 1930 lays down specific provisions on non-market economy. According to (18) (B), there are 6 factors to be considered in making determinations whether a country is a market economy or not, namely, the extent to which the currency of the foreign country is convertible into the currency of other countries, the extent to which wage rates in the foreign country are determined by free bargaining between labor and management, the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country, the extent of government ownership or control of the means of production, the extent of government control over the allocation of resources and over the price and output decisions of enterprises, and such other factors as the administering authority considers appropriate. In spite of China's accession to the WTO, and China's achievements in its market economy development over the years, the US has consistently treated China as a non-market economy and refused to grant market-economy status to China.

The US DOC held a public hearing on China's market economy status for the first time in June 2004. Representatives from industry groups of steel, wood furniture, cookware, paper and manufacturing as well as business representatives spoke at the hearing. Although most recognized the progress and achievements China has made in developing market economy since the reforms and opening up, it was deemed by most people that there was still a gap China needs to fill before becoming a market economy country. Many US officials have spoken publicly on many occasions that unless China takes significant reforms in its labor market and exchange rate mechanism, the US government won't recognize China's market economy status. To push for an earlier resolution of this issue, the Sino-US Joint Commission on Commerce and Trade (JCCT) agreed to set up a working group for China's market economy status. The first meeting of the working group was held in July 2004.

In view of the aforesaid position of the US government, in anti-dumping investigations against Chinese products, the US will continue to use surrogate country prices in determining the normal value of a Chinese product, ruling its normal price as dumping price, and thus inflicting heavy losses on Chinese exports.

Market oriented industry (MOI) and surrogate country -- Market oriented industry

According to relevant US laws, in antidumping investigations, if the respondent company could prove that its industry meets standards for Market Oriented Industry (MOI), the US antidumping investigation authorities should adopt the cost data of this respondent company or its industry in calculation of production cost and dumping margin, rather than adopting Surrogate Country approach. US DOC has set down a three-prong MOI test as follows: there be virtually no government involvement in production or prices for the industry; the industry is marked by private or collective ownership that behaves in a manner consistent with market considerations; and producers pay market-determined prices for all major inputs, whether material costs (raw materials and parts, public utilities including water, electric power and gas), or immaterial costs (labor force and management fee). However, although in numerous antidumping investigations, Chinese respondents had provided proof for their consistency with the above MOI standards, US investigation authorities refused to grant MOI status, and insisted on using unfair Surrogate Country approach. So far, no single Chinese respondent has yet won the MOI status.

In the color TV set antidumping investigation, a certain Chinese respondent company applied for MOI status twice on behalf of the Chinese color TV set industry. This respondent has provided evidences to DOC, effectively showing that the company is a publicly listed company that is free from state control and doesn't receive subsidies from the government, and that other Chinese respondents also conduct production, pricing and selling in market-economy patterns. However, DOC disregarded the respondent's request, and refused to grant China's color TV set industry MOI status.

In the antidumping case against furniture, the Chinese Light Industry Chamber of Commerce and the Chinese Furniture Association applied for the MOI-status on behalf of the Chinese furniture industry by submitting a 300-page report to illustrate in great detail how the Chinese furniture industry fully complies with three prongs of the MOI test. DOC, however, claiming the submission was too late to give investigation authorities enough time for review, refused to initiate the MOI investigation procedure.

These measures taken by the US have totally disregarded China's achievements in market construction and failed to reflect objectively China's advantages in raw materials and labor cost. As a result, dumping margins were set at an unreasonably high level, and have seriously undermined the legitimate rights and interests of Chinese companies. China hopes the US could correct these discriminatory practices at an early date.

Surrogate country.

To non-market economy countries, DOC usually uses surrogate country data to determine the normal value and set dumping margins. The surrogate country chosen should be at a level of economic development comparable to that of the non-market economy country and is an important producer of the subject product. In practice, the US usually uses India, Pakistan, Indonesia, Sri Lanka and the Philippines as candidates for surrogate country. India is usually a favorite choice because of the easy availability of information in India. In the 7 antidumping rulings in 2004, DOC all used India as the surrogate country. However, certain industries in India are by no means comparable to like industries in China. Therefore, using India as the surrogate country will inevitably lead to unfair rulings against Chinese enterprises. For instance, in the anti-dumping investigation against Chinese color TV sets, India was selected as the surrogate country. The color TV set industry in India, however, is still in a

monopoly stage, with small production scale and high costs, while in China, color TV set makers exercise full autonomy in production, participate in free competition, with the whole process of production and marketing under market mechanism. Government intervention in the industry has been practically eliminated. Therefore, using India's standards to measure China's color TV set industry will naturally lead to the wrong conclusion that Chinese color TV sets were sold at an abnormally low price. Likewise, in the investigation against bedroom furniture initiated in 2003, over 99% Chinese furniture makers involved are private enterprises or joint ventures with a fairly high degree of marketization, while the furniture industry in India is rather backward with high labor costs. The value calculated by using India standards is much higher than the normal value of Chinese furniture.

It is the opinion of China that in future cases, when China is still treated as a non-market economy country, the US DOC should refrain from using Indian standards invariably. Instead, based on the specific nature of each case, it should use correct standards to select a right surrogate country in order to come to a reasonable determination of the normal value of the subject product.

Factors of production and selection of surrogate price.

When determining the normal value of a product made by a non-market economy country, DOC mainly uses the factors of production method. If the factors of production method is used, widely applicable prices for production factors in the surrogate country should be adopted. These regulations, however, give great discretionary power to DOC, which may abuse the power to adopt rather unfair prices for production factors against Chinese producers to determine the normal value of Chinese products. For example, in December 2004, in the final ruling of anti-dumping investigation against certain frozen and canned warm water shrimps exported from China to the US, DOC insisted on using the average "single price" of all shrimp products in one certain company to calculate the normal value of the product in question. Such measure as using the average price of a company rather than the average price of the industry not only provided minimum representation, but also offered practically no comparability as the chosen substitute price was not within the investigation period in some cases.

In the color TV set investigation initiated in May 2004, DOC adopted the wage rate of 2001, which was not within the investigation period. In calculating the power price, DOC refused to use Indian price by claiming that data publicized by the Energy Department of the Indian Planning Committee failed to reflect the true consumption price in India. Instead, DOC adopted an unidentified statistical report of the International Energy Organization. The arbitrary action of DOC in selecting substitute prices have deliberately raised the normal value of Chinese products, and have ultimately led to rulings negative to China's interest. Such measures have not only violated the relevant "right and fair" principle set forth in US anti-dumping laws, but also seriously undermined the interests of Chinese companies. China attaches great concern to this issue.

Producers' profit margins calculation in the surrogate country.

When using the surrogate country method, if a surrogate country has many like product producers where some are profitable and others not, DOC normally counts profits of the losing producers as nil. Thus, the average profit margin of the surrogate country is obtained by dividing the sum of all the profit margins by the number of the producers. But in antidumping cases against imports from China in 2004, without prior notice to the Chinese respondents, DOC changed this method all of a sudden

with no valid reason. Unprofitable companies were left out from the divisor while the overheads and marketing, management and miscellaneous costs of these unprofitable companies were counted in the relevant statistics, thus resulting in an artificial rise of the profit margin of the surrogate country. Such incongruous means of calculation have put Chinese companies at a great disadvantage. China will continue to monitor the issue.

Separate rates.

Different from the past practice by DOC applying one-country tariff rate towards all producers from non-market economy countries, the current separate rate policy has made it possible for Chinese respondent company to obtain a lower individual rate or weighted average rate. In practice, however, DOC has in many cases refused Chinese company's application for individual rates in the procedural review under the pretext that the application materials submitted and information provided were not adequate. On July 6, 2004, DOC issued the initial ruling on the antidumping case against warm water shrimp of Chinese origin. Citing the inadequacy of materials and information submitted by Chinese exporters as the reason, the ruling refused to apply weighted average rate towards 32 Chinese companies, and levied a 98.34% anti-dumping tariff on most Chinese exporters. In fact, in current US laws, there is no clearly defined standard to judge whether the submitted information is adequate or not. DOC has a great discretionary power in this regard. As a result, in anti-dumping cases against Chinese enterprises, DOC, while unable to prove from a legal perspective or by facts that the Chinese government has intervened into the business activity of respondent enterprises, has all along used procedural excuses such as inadequate information to refuse substantial review of Chinese enterprises. Consequently, a high all-China rate has been applied to a considerable number of enterprises involved, and great losses on their part have been incurred.

DOC is currently considering adjusting the policy of granting separate rates to Chinese companies. Interested parties have been asked to submit written comments. In the furniture and shrimp cases, the US apparently strengthened the reviewing procedure for separate rates, and refused to grant separate rates to Chinese respondent companies on various pretexts. These policy changes will restrict the ability of Chinese companies and companies from other non-market economy countries to obtain separate rates. It is noteworthy that the US is on the tendency to raise standards towards China and make it more difficult for Chinese companies to obtain separate rates.

The Chinese government, as well as relevant Chambers of Commerce, has submitted several written comments to DOC, urging the US government not to impose barriers to Chinese companies on this issue.

Zeroing.

In accordance with the Tariff Act of 1930, DOC uses zeroing when setting the dumping margin. In the anti-dumping case against Chinese wood bedroom furniture initiated in 2004, Chinese companies have questioned the methodology of DOC in calculating dumping margin. The US government, however, disregarded the exporters' non-dumping sales in the US, and stuck to the old methodology, which was ruled by the WTO as in violation of the Anti-dumping Agreement of the WTO. China believes that the US practice as such has injured Chinese companies' rights under the WTO Anti-dumping Agreement, and the US should correct this action as soon as possible.

Product-specific safeguard measures.

Section 421 of the US Trade Act of 1974 (hereinafter referred to as Section 421) sets forth regulations on procedures and entities of implementing product-specific safeguard measures against Chinese products. It's deemed by China that Paragraph 16 of the Protocol on the Accession of the People's Republic of China to the WTO doesn't provide sufficiently detailed procedural and substantial regulations over implementation and enforcement of product-specific safeguard measures, and that Section 421 doesn't provide detailed regulations over certain important concepts and procedures about product-specific safeguard measures, either. In particular, Section 421 is not consistent with relevant WTO rules in the definition of "significant cause", criteria for "rapid increase", definition of "other related factors", definition of "similar or directly competitive products", etc.

In the 5 product-specific safeguard investigations launched from 2002 to 2004, the US authorities all referred to Section 201 about global safeguard measures, Section 406 about remedies of imports from communist countries and even Section 731 about antidumping investigation in the process of reviewing and ruling. However, it's deemed by China that the procedural and entity requirements for product-specific safeguard measures in Paragraph 16 of the Protocol on the Accession of the People's Republic of China to the WTO are significantly different from relevant provisions of the Agreement on Safeguards and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Agreement on Antidumping) of the WTO, and that the US practice of invoking domestic legislation and precedents about safeguard measures and antidumping could not necessarily guarantee the practice under Section 421 fully consistent with provisions of the Protocol on the Accession of the People's Republic of China to the WTO. It's hoped by China that the US amend Section 421 of the Trade Act of 1974 to bring it into full consistency with relevant WTO rules.

Special safeguard measures against Chinese textiles -- Restriction on Chinese textile products.

By the end of 2004, the US Committee for the Implementation of Textile Agreements (CITA) had accepted for consideration several requests to restrict or to resume the restriction on Chinese textiles. One petition was received in 2003 based on "market disruption", and a one-year restriction starting from December 24, 2003 was imposed on knit fabric, brassieres, and dressing gowns and robes of Chinese origin. Another one was accepted in July 2004, also based on "market disruption", and a one-year restriction starting from October 29, 2004 was imposed on cotton socks, wool, and man-made fiber socks imported from China. 10 requests have been accepted for consideration by CITA since October 2004 based on the "threat of market disruption", involving Men's & Boys' and Women's & Girls' Cotton Trousers, Men's & Boys' and Women's & Girls' man-made Fiber Trousers, Men's & Boys' and Women's & Girls' man-made fiber knit shirts and blouses, Men's & Boys' cotton and man-made fiber shirts, not knit, cotton and man-made fiber underwear, combed cotton yarn, other synthetic filament fabric, and wool trousers.

It's deemed by China that as set forth by paragraph 242 of the Report of the Working Party on the Accession of China, to adopt special restrictions on Chinese textile products, a WTO member must be able to show that it meets the three conditions, i.e., the existence of market disruption, threatening to impede the orderly development of trade in these products, and the causal link of the two. The materials submitted by US petitioners merely showed a threat of increased imports from China, and failed to illustrate the causal link, and bore other inconsistencies with Paragraph 242. Therefore the implementation procedures of the US restriction measures lack determination on basic concepts such as market disruption, which renders the whole implementation process not conforming to basic requirements for petition. The Chinese government and relevant chambers of commerce have on

many occasions expressed strong objection to the US determination of imposing restrictive measures on the textile products imported from China.

Implementation procedures of restrictions on textile products.

Procedures for Considering Requests from the Public for Textile and Apparel Safeguard Actions on Imports from China (hereinafter referred to as the Procedures), publicized by CITA in accordance with Paragraph 242, came into force as of May 21, 2003. It is the viewpoint of China that when any WTO member draws up relevant laws or procedures to implement Paragraph 242, the laws or procedures must be consistent with Paragraph 242, and with the Safeguard Agreement of the WTO, Article 19 of GATT, and other relevant rules. The US Procedures, however, are inconsistent with Paragraph 242 in many aspects, such as the requirements on implementing entities, procedures to implement the measures, determination of the causal link, range of requesting parties, requirements for information supplied by the requesting party, conditions for a reapplication, duty of notice, prior notice, procedures for public comment, and etc. It is the hope of China that the US would make necessary supplements and clarification to the Procedure to bring it in line with WTO rules.

Export restrictions .

The US control on export of technology to China has long existed, and has remained a big issue affecting the trade balance between the two countries. The US government imposes strict controls over exports of products for military use or dual uses to China. The intention is to prevent China from benefiting in nuclear weapons, missiles, chemical and biochemical weapons, and other important military items.
It is admitted by DOC that China is afforded very few license exceptions in the exports of dual-use products. In fact, over the past few years, China has accounted for the highest volume of export license applications, and the export license application procedure for China is the lengthiest one. In addition, certain products or technologies are basically prohibited from exporting to China or unless meeting the most stringent conditions, for instance, nuclear nonproliferation, missile technology, chemical and biological controls, etc. In the export of High Performance Computer (HPC), the US has ascribed China to the category of Tier III, which means that computers with a hypothetical processing capability over 190,000 MTOPS can only be exported under export licenses. In fact, the standard had remained at 65,000 MTOPS until amended on December 10, 2003. Moreover, all HPC exports and re-exports under license to the PRC China require a PRC End-User Certificate issued by the Ministry of Commerce of China.

Apart from the product-based licensing requirement, the US made an Entity List according to Supplement No. 4 to Part 744 of the Export Administration Regulation (EAR). Entities on the list are subject to license requirements. 19 Chinese entities are on the list by the end of 2004, accounting for one third of the total, only after Pakistan (20 entities from Pakistan), which is under close scrutiny by the US. The US has also asked for wider coverage to visit end-users of high and new technologies exported from the US to China.

On April 1, 2004, the US imposed a two-year sanction against 13 entities including 5 Chinese ones under the assertion that these entities had transferred to Iran equipment and technology falling within export control classification. These entities were denied new export licenses, and were prohibited from any business transaction with the US government. The US had imposed sanctions against a total of 45 Chinese entities in the years from 1999 to 2004.

It is deemed by China that many discriminatory measures are in existence in US export control towards China, which has considerably affected bilateral trade. It is, therefore, hoped by China that the US could review its export control policies and make necessary corrections as soon as possible.

Subsidies.

Ever since Roosevelt's New Deal was implemented, the US government has been providing subsidies to its agriculture. During the GATT negotiations from 1946 to 1947, it was under the insistence of the US that agricultural subsidies were treated as exceptions, thus giving rise to a surge of global protectionism in agriculture over the following half century. On May 13, 2002, President Bush signed the Farm Security and Rural Investment Act of 2002 (FSRI 2002) with a 6-year validity (2002-2007). The supported commodities include 15 items, such as wheat, corn, soybean, cotton, rice, dairy products, peanut, wool, honey, apples and etc.

In the area of domestic support, FSRI 2002 has strengthened direct support to farmers' income and expanded the support coverage through the three measures of user marketing payments, direct payments and counter-cyclical payments. It is estimated that the direct subsidies and counter-cyclical support provided by FSRI 2002 every year can amount to as much as US$11.5 billion, far more than the US$ 6 billion to US$ 8 billion government subsidies every year since 1998.

In the area of export support, according to FSRI 2002, the US continues to provide direct subsidies to the export of agricultural products. The amount of subsidies is on the rise. Support for products with lowest market access will increase from the current US$90 million year by year and reach US$ 200 million in 2007 to be spent on expanding export markets for US agricultural products. US$478 million is spent every year on export promotion projects, providing assistance to US exporters suffering from other countries' agricultural subsidies.

Apart from direct export subsidies, in years from 2002 to 2007, the US will continue to provide export credit. The Commodity Credit Corporation (CCC) provides at least US$ 5.5 billion every year till 2007 to promote the export of processed or high-valued agricultural products. Meanwhile, payment term has been extended from 180 days to 360 days.

After the implementation of FSRI 2002, total agricultural subsidies in the US will hit a record high both in amount and in coverage. As a result, government expenditure on agricultural subsidies will rise substantially, reaching or even exceeding the flooring of Aggregate Measurement of Support committed by the US to the WTO. The implementation of this act will also threaten the position of the US in future trade reforms under the WTO, and lead to stronger resistance from other countries against trade liberalization.

In fact, the implementation of FSRI 2002 has already been challenged by other WTO members. On September 8, 2004, the WTO Dispute Settlement Body issued the panel report for the upland cotton case brought by Brazil against the US, ruling that user marketing payments, marketing loan program payments, direct payments, and counter-cyclical payments provided by US FSRI 2002 are in violation of the Agreement on Agriculture, the Agreement on Countervailing Measures, and GATT 1994. China holds that subsidies under the FSRI Act are not in the category of green-box subsidies. Therefore, the above measures of the US have violated its commitments to the WTO and in the Doha Conference about reducing agricultural subsidies.

Inadequate protection of intellectual property.

The US is one of the few countries in the world that still use the "first-to-invent" system in patent determination. According to such a system, as long as the applicant can prove he is the first to invent, he will obtain the patent, even if someone is the first to file. Although the system doesn't violate relevant provisions of TRIPS, it will, however, give rise to uncertainty and unpredictability for patent application, and in real sense, a rise of cost for patent application by foreign companies in the US.

In determining the novelty of a patent being applied, the US follows Section 102 of the US Patent Act. The standard applied to inventions made in the US is different from that applied to inventions made outside the US. For example, it stipulates that an invention is protected as long as it is patented in the US and a person shall be entitled to a patent unless the invention was patented in a foreign country more than one year prior to the date of the application for patent in the United States.

Moreover, according to Paragraph 5, Section 110 of the Copyright Law of the United States, "communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes" is exempt from the protection of IPR. This exemption is also in violation of Article 31 of TRIPS.

Unjustifiable protection of intellectual property.

According to Section 337 of the Tariff Act of 1930 (entitled as Unfair Practices in Import Trade), ITC conducts investigation into asserted unfair trade practices in import, and imposes restrictive measures. In practice, the main target of Section 337 investigation is violations of US intellectual property by foreign companies in the exportation to the US.

In recent years, Section 337 investigations involving Chinese products have risen rapidly. In 2004, among all the Section 337 investigations initiated, 11 were filed involving subject products from China, up by 57% over 2003. Products involved were optical disk controller chips and chipsets, personal computers, pet food treats, plastic food containers, ear protection devices, voltage regulator circuits, components thereof, ink markers, point of sale terminals and components, semiconductor devices and products containing same, digital image storage and retrieval devices, etc.. China has become one of the major targets of Section 337 investigations.

China holds that Section 337 of the Tariff Act of 1930 is inconsistent with relevant WTO rules and discriminates against imports in investigations. The inconsistencies are reflected in two aspects. Firstly, the criteria for adoption of general exclusion order are unduly low, and ITC has great discretion in determining whether to adopt the general exclusion order, which has unjustifiably hurt the interests of the foreign exporters not named as respondents. Secondly, certain Section 337 investigations only name country of origin of investigated products without naming respondent companies, which in fact has deprived involved foreign companies of the right to respond, and undermined the interests of involved foreign companies. In the 1989 GATT Panel report, it was ruled that Section 337 of the Tariff Act of 1930 and practices in Section 337 investigations were not consistent with Paragraph 3, Article 4 of GATT on according national treatment to imports in the application of domestic laws and regulations, nor with Paragraph (d) of Article XX on general exceptions to the protection of IPR. Although Section 337 was later amended, to a great extent, it is still not consistent with Paragraph 3, Article 4 of GATT and relevant provisions in TRIPS. Therefore, China expresses great concern over this issue and the adverse impact thereof on China's normal trade with the US.

EUROPEAN COMMUNITIES.

EUROPEAN COMMISSION Directorate-General for Trade.

GENERAL OVERVIEW OF ACTIVE WTO DISPUTE SETTLEMENT CASES INVOLVING THE EC AS COMPLAINANT OR DEFENDANT & OF ACTIVE CASES UNDER THE TRADE BARRIERS REGULATION.

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INTRODUCTION.

At present, the EC is actively involved in 25 WTO disputes: in 14 of these cases the EC is the complaining party while in the remaining 11 cases the EC is on the defending side. These cases relate to the EC's relations with 12 of its trading partners (Argentina, Australia, Brazil, Canada, Honduras, India, Korea, Mexico, Nicaragua, Panama, Thailand and the US).

Dispute settlement activities against the US continue to represent the majority of EC's active disputes. In most of these disputes it is the EC which is the complaining party (9 disputes), being the defendant in 5 cases (GMOs, hormones, customs procedures, aircraft and Geographical Indications). Regarding the substance of EC's offensive cases with the US, a major part concerns the misuse of trade defence instruments (Anti-dumping, CVD and Safeguards).

Below follows a short description of each of the abovementioned disputes. New developments are indicated in bold.

I – ARGENTINA

DEFENSIVE CASES

DS 293 – EC – Measures affecting the approval and marketing of biotech products (GMOs) (procedural stage: panel). See description under DS 291. Joint case with US and Canada.

OFFENSIVE CASES

DS 330 – Argentina: countervailing duties on olive oil, wheat gluten and canned peaches (procedural stage: consultations).On 29 April 2005, the EC requested WTO consultations with Argentina in relation to the countervailing measures imposed by Argentinean authorities on imports of olive oil, wheat gluten and canned peaches originating from the EC. The EC considers that the investigation and determinations made by the Argentinean authorities in 2004 in the context of the review of existing CVD measures on EC imports of those products are inconsistent with Article VI:3 of the GATT and the provisions of the SCM Agreement. Consultations with Argentina were held in Geneva on 8 July 2005. Mexico participated in the consultations on CVD measures on olive oil as a third party.

II – AUSTRALIA

OFFENSIVE CASES

DS 287 - Quarantine regime for imports (procedural stage: Panel) On 4 April 2003, the European Communities requested WTO consultations on the measures applied by Australia to protect human, animal and plant health against risks posed by imports of agricultural and food products (sanitary and phytosanitary measures). These measures are thought to be contrary to the SPS Agreement, in particular Articles 4.1, 5.1 and 5.6. Consultations were held in Geneva on 8 May 2003 but failed to settle the dispute. The EC therefore requested that the DSB establish a panel. The panel was established on 7 November 2003. At this stage, the panel has not yet been composed as Australia has offered to settle the dispute in an amicable manner. Discussions between the EC and Australia are continuing. A meeting is scheduled for 3 February 2006 in Brussels.

DEFENSIVE CASES

(1) DS 265 - Sugar subsidies (procedural stage: implementation) Joint case with Australia, Brazil and Thailand (DS265, DS266, DS283). See description under DS266 (Brazil). (2) DS 290 – Trademarks & geographical indications (procedural stage: implementation) On 17 April 2003, Australia requested WTO consultations regarding Regulation No 2081/92 on geographical indications. Joint case with US (DS174). See description under DS174.

III – BRAZIL

OFFENSIVE CASES

DS 332 – Measures affecting imports of retreaded tyres (procedural stage: consultations) On 20 June 2005, the EC requested WTO consultations with Brazil on its measures affecting the importation of retreaded tyres from the EC. Brazil maintains an import ban on retreaded tyres and also applies financial fines on the importation as well as storage, transportation and sale of imported retreaded tyres. Imports from other Mercosur countries are exempted from these measures. The EC considers that these measures are inconsistent with Articles I:1, III:4, XI:1 and XIII:1 of the GATT 1994. Consultations were held on 20 July 2005 and clearly showed that Brazil is not willing to settle this case amicably. On the contrary, the Brazilian government has submitted a draft law to the Brazilian legislature that would confirm in an act of parliament the above-mentioned import ban on retreaded tyres and an exemption for imports under a regional integration agreement. Although this draft has in the meantime been withdrawn, Brazil seems determined to rely on what it considers to be an

"environmental (and health) justification" of its import ban. On 17 November 2005, the EC requested the establishment of a panel. This first request has been blocked by Brazil when presented to the DSB on 28 November 2005, but the DSB should establish the panel at its meeting on 20 January 2006.

DEFENSIVE CASES

(1) DS 266 - Sugar subsidies (procedural stage: implementation). On 27 September 2002, Brazil requested WTO consultations on Council Regulation (EC) 1260/2001 on the European Communities' common organisation of markets and all other legislation, regulations, administrative policies and other instruments relating to the EC regime for sugar and sugar containing products. Consultations were held on 21 and 22 November 2002.

The panel report was circulated on 15 October 2004. The panel found that both exports of C sugar and exports of ACP/Indian equivalent sugar were subsidised contrary to the WTO Agreement on Agriculture.

The EC appealed the panel's decision on 13 January 2005. The Appellate Body circulated its report on 28 April 2005 and confirmed the panel's ruling that exports of Csugar and of sugar equivalent to ACP/Indian imports are illegally subsidised. In the case of ACP/India equivalent sugar exports, the panel and the Appellate Body did not recognise the footnote in the EC's schedule as permitting an additional 1.6 million tonnes of such sugar exports with refunds. As regards C sugar, the panel and the Appellate Body considered these exports to benefit from indirect subsidies stemming from high revenues from internal sales of A and B sugar. The Dispute Settlement Body adopted the panel and Appellate Body reports on 19 May 2005. The violation findings are limited to the Agreement on Agriculture, since both the panel and the Appellate Body ultimately refrained from making findings under the Subsidies Agreement.

On 28 October 2005, the arbitrator determined the reasonable period of time for the EC to implement the ruling of 19 May 2005 to be of 12 months and 3 days, i.e. to run until 22 May 2006.

On 24 November 2005, EU agriculture ministers agreed on the reform of the Common Market Organisation. The final decision was a price cut of 36 per cent over a four-year period.

(2) DS 269 - Frozen chicken cuts (procedural stage: 21.3(c) arbitration and implementation process) On 11 October 2002, Brazil requested WTO consultations on the EC Commission Regulation No. 1223/2002 of 8 July 2002 concerning the classification of certain goods (frozen chicken cuts with a certain salt content). Following two rounds of WTO consultations in November 2003, a single Panel was established to examine both Brazil's and Thailand's (identical) claims (DS269 and DS286). The final Report was circulated on 30 May 2005. The Report found that the product concerned ("frozen boneless chicken cuts impregnated with a salt content of 1.2% to 3%") is covered by the EC concession contained in heading 0210 of the EC Schedule and not by the EC concession contained in heading 0207 of the Schedule (which provides for potentially higher duties). The Panel Report concluded that the EC had acted inconsistently with Articles II:1(a) and II:1(b) of the GATT, since by applying EC Regulation 1223/2002 and EC Decision 2003/97 (classifying the product concerned under CN heading 0207), the EC had in practice imposed customs duties on the products at issue that are in excess of those duties provided for in the EC's concession for heading 0210 of the EC schedule.8

On 13 June 2005, the EC notified the WTO of its decision to appeal the panel report. The report of the Appellate Body was circulated on 12 September 2005. The AB, although it modified the panel's

reasoning on a number of issues (subsequent practice), essentially upheld the panel's findings and found that the EC had acted inconsistently with Articles II:1(a) and II:1(b) of the GATT, since by applying EC Regulation no 1223/2002 and EC Decision no 2003/97 (classifying the products at issue under CN tariff heading 0207), the EC had in practice imposed customs duties on the products at issue that are in excess of those duties provided for in the EC's concession for heading 0210 of the EC Schedule. The AB report and the panel report, as modified by the AB report, were adopted by the DSB at its meeting of 27 September 2005.

At the DSB meeting held on 18 October 2005, the EC indicated that it intended to implement the relevant DSB rulings and recommendations in an appropriate manner and that it needed a Reasonable Period of Time (RPT) in order to implement. As a result of the failure of the parties to reach a mutually agreed RPT, Brazil requested on 22 November 2005 that the RPT be determined through binding arbitration pursuant to Article 21.3(c) of the DSU. Upon agreement by the disputing parties, Mr. James Bachus, former Appellate Member, was designated as arbitrator under DSU Article 21.3(c). The oral hearing is envisaged for 26 January 2006 and the arbitral award is expected to be issued on 20 February 2006.

IV – CANADA

OFFENSIVE CASE

DS 321 – Canada – Continued suspension of obligations in the *Hormones* dispute
(procedural stage: panel) Case practically identical to that against the US. See description under US.

DEFENSIVE CASES

(1) DS 292 – EC – Measures affecting the approval and marketing of biotech products (GMOs) (procedural stage: panel) Joint case with the US. See description under DS 291. (2) DS 26 – Hormones Joint case with the US. See description under DS 48

V – HONDURAS

DEFENSIVE CASE

DS27- Banana import regime and ACP-EC Partnership Agreement (procedural stage: consulta-tions) On 30 November 2005, Honduras, Nicaragua and Panama made identical requests for consultations with the EC under Article 21.5 of the DSU ("surveillance of implementation of recommendations and rulings") with respect to EC Council 9

Regulation 1964/2005 of 29 November 2005 introducing a new EC bananas import regime in force since 1 January 2006. These requests argue that the new EC bananas import regime is inconsistent with the recommendations and rulings of the DSB in the *EC-Bananas III* case (DS27- Panel and AB reports adopted in 1997), the Doha Waiver on the Cotonou Agreement adopted in 2001, the two arbitration awards issued in 2005 pursuant to that waiver, as well as Article XXVIII of the GATT. The EC has agreed to hold consultations with Honduras, while reserving its position on the legal basis invoked (Article 21.5 DSU). These consultations will be held in Geneva on 19 January 2006.

VI – INDIA

OFFENSIVE CASE

DS304 –Anti-Dumping Measures - (procedural stage: consultations) On 8 December 2003, the EC requested consultations with India concerning antidumping measures on imports of certain EC products. 27 products are at stake, which account for more than € 50 millions of EC exports: Methylene Chloride; Phenol; Vitamin A Palmitate; Para Hydroxy Phenyl Glycirine Base; Vitamin AB2D3K; Acrylic Fibre; Sodium Nitrite; Cold Rolled Flat Products Stainless Steel; Flexible Slabstock Polyol; High Styrene Rubber; Vitamin AD3; Acrylic Fibre below 1.5 denier; Purified Terephtalic Acid; Sodium Cyanide; Seamless Tubes; OXO Alcohols; Hydroxyl Amine Sulphate; Sodium Ferrocyanide; Caustic Soda; Aniline; Theophiline and Caffeine; Chlorine Cloride; Vitamin C; Black and White Photographic Paper; Thermal Sensitive Paper; Acrylonitrile Butadiene Rubber; Acrylic Fibres. The EC considers that the Indian antidumping investigations and measures on these products are inconsistent with the obligations set forth in Article VI:1 of GATT 1994 and Articles 1, 3.1, 3.2, 3.5, 6.6, 6.8 (including Annex II), 6.9 and 12.2 of the Anti-Dumping Agreement in particular because the determination of the effect of the dumped imports on prices does not seem to be based on positive evidence and on an objective examination; there is no demonstration that dumped imports caused the alleged injury and that injury caused by other factors was not attributed to dumping; interested parties were not properly informed of the relevant essential facts which formed the basis for the decision to apply the anti-dumping measures and did not have sufficient time to defend their interests; interested parties were not properly informed of the reasons why evidence or information they had submitted within the investigation procedure were not accepted; the public notice of information concluding the investigation did not contain all relevant information on the matters of fact and law and reasons which led to the imposition of the anti-dumping measures. India accepted the EC request for consultations on 12 December 2003. Consultations are still ongoing. India has indicated its willingness to review the measures concerned.

VI – KOREA

DEFENSIVE CASE

(1) DS 299 – CVD measures on DRAMs (procedural stage: implementation) 10 On 25 August 2003, Korea requested consultations against EC's definitive countervailing measures on DRAMs (semiconductors) made by Hynix in Korea, which it considers in violation of the WTO Subsidies Agreement. The Panel was established at the DSB meeting of 23 January 2004. The Panel broadly confirmed the EC finding that the Korean government had directed nominally private banks to bail-out Hynix and, consequently, that four out of the five bail-out programmes investigated were actually subsidies conferring a specific benefit to Hynix and causing injury to the EC industry. The remaining programme, which the panel acknowledged conferred a benefit to Hynix but considered as not directed by the Korean government, involves only a very small amount. The Panel's only reservations were recommendations that the EC should fine-tune its methodology for calculating the benefit conferred to Hynix, re-evaluate one injury factor out of the 15 subject to investigation and refine some technical aspects of the analysis concerning the causal link between the subsidies and the injury. The DSB adopted the Panel report on 3 August 2005. The EC confirmed in the next regular meeting on 31 August 2005 its intention to implement the DSB rulings and recommendations but requested an RPT to do so. On 12 October 2005, the EC and Korea agreed on an RPT of 8 months from the date of adoption of the ruling. The RPT will consequently expire on 3 April 2006. (2) DS 307 – Shipbuilding subsidies (procedural stage: consultations) This is the continuation of the remainder of case DS 301.

Due to the fact that Korea changed the scope of its consultations request in comparison to DS 301, these are considered as new consultations. Consultations took place on 23 July 2004 in Geneva.

VII– MEXICO

OFFENSIVE CASE

DS 314 – CVD measures on olive oil (procedural stage: consultations) On 18 August 2004, the EC requested consultations with Mexico regarding provisional countervailing duties imposed by Mexico against imports of olive oil from the EC. The EC considers that these provisional countervailing measures are contrary to the Subsidies Agreement and the Agreement on Agriculture of the WTO, in particular because Mexico was not entitled to initiate its investigation and because at that time there was no domestic industry that could have been injured or materially retarded in its establishment. The only Mexican producer of olive oil had ceased production more than a year before the initiation of the investigation.

Consultations with Mexico took place on 17 September 2004. In the meantime, the provisional measures expired. Mexico has decided to continue the investigation after the public hearing, despite the fact that, according to the WTO Agreement on Subsidies and Countervailing Measures (ASCM), a final determination was due by 16 January 2005. The final determination by the Mexican authorities was issued on 1 August 2005. As a result, imports of EC olive oil whose customs value is lower than a reference price of $4.05/kg are subject to countervailing duties ranging from $0.4/kg to $0.73/kg.

VIII – NICARAGUA

DEFENSIVE CASE

DS27- Banana import regime and ACP-EC Partnership Agreement (procedural stage: consultations) Joint case with Honduras. See description under DS27. Nicaragua was not a party to the Bananas-III case.

IX– PANAMA

DEFENSIVE CASE

DS27- Banana import regime and ACP-EC Partnership Agreement (procedural stage: consultations) Joint case with Honduras. See description under DS27. Panama was not a party to the Bananas-III case.

X– THAILAND

DEFENSIVE CASES

(1) DS 283 – EC export subsidies on sugar (procedural stage: implementation) Joint case with Brazil and Australia. See description under DS 266. (2) DS 286 - Frozen Chicken Cuts (procedural stage: Art. 21.3 (c) arbitration and implementation) Joint case with Brazil. See description under DS 269.

XI – USA

OFFENSIVE CASES

(1) DS 217 – Continued Dumping and Subsidy Offset Act ("Byrd amendment")
(procedural stage: implementation) The Continued Dumping and Subsidy Offset Act (named "Byrd amendment" after its sponsor, the Senator, R. Byrd) adopted in October 2000 provides that the proceeds from anti-dumping and countervailing duty cases shall be paid to the US companies responsible for bringing the cases. This imposes a second hit on dumped or subsidised products: domestic producers are, first, protected by anti-dumping and anti-subsidy duties and, second they receive subsidies paid from these duties at the expense of their competitors. To date, the US authorities have distributed to domestic petitioners more than US $ 1 billion. 12

Following an unprecedented common action of 11 Members (Australia, Brazil, Canada, Chile, the EC, India, Indonesia, Japan, Korea, Mexico and Thailand), the DSB adopted in January 2003 the Panel and the Appellate Body reports concluding that the *Byrd Amendment* was an impermissible action against dumping or subsidisation. The US had until 27 December 2003 to comply with the WTO ruling, but failed to do so. Following an arbitration on the appropriate level of retaliation, the EC and 7 other cocomplainants (Brazil, Canada, Chile, India, Japan, Korea, Mexico) obtained the DSB's authorisation to impose countermeasures on US products at any time they deem fit (DSB meeting of 24 November 2004, and of 17 December 2004 for Chile). The level of authorised retaliation is 72% of the payments made to the US industry in the most recent year from duties collected on each one's products (i.e. EC products for the EC, Brazilian products for Brazil …) The 72% coefficient represents the average trade effect of each dollar disbursed under the *Byrd amendment* as measured by an economic model. The level of retaliation will consequently vary every year so as to reflect the fluctuations in the amount of payments made in the yearly distributions.

Since 1 May 2005, an additional duty of 15% has been imposed on imports of certain products originating in the United States (paper products, textiles, machinery and sweetcorn; Council regulation (EC) No 673/2005 of 25 April 2005 establishing additional customs duties on imports of certain products originating in the United States of America, OJ L 110, 30/04/2005, p. 1). Three other Members have also decided to apply retaliation: (1) Canada since 1 May 2005 in the form of a 15% additional import duty on imports from the US of live swine, oysters, speciality fish and tobacco, (2) Mexico since 18 August 2005, with additional duties of 30% on dairy products, 20% on wine and 9% on candy and chewing gum, and (3) Japan since 1 September 2005 in the form of a 15% additional import duty on 15 products (ball bearings, different steel products, printing machines, fork lift trucks). On 25 July 2005, the Ways and Means' Trade Subcommittee chairman invited interested parties to comment on the inclusion into a miscellaneous trade bill of a bill aiming to repeal the *Byrd Amendment*. The Trade Subcommittee will decide which bills will be part of the miscellaneous trade package in light of the comments received. The Commission submitted comments in support of the repeal of the *Byrd Amendment*.

On 18 November 2005, the House adopted the bill for the "Deficit Reduction Act" which included repeal of the *Byrd Amendment*. As the Senate had already passed its version of the bill without repeal of the *Byrd Amendment*, a conference committee was called to find a text acceptable to both chambers. Repeal of the *Byrd Amendment* was maintained in the conference report but at the price of a compromise: the repeal would not affect distribution of the anti-dumping and countervailing duties collected on imports made before 1 October 2007. Since collection of duties stretch over several years

in the US after the import took place, this means that distribution of duties under the Byrd Amendment may even continue for several years after 1 October 2007.

The Conference report was adopted by the House of Representatives on 19 December 2005 and the Senate on 21 December 2005. However, some provisions were excluded by the Senate. These provisions were unrelated to the repeal of the Byrd Amendment, but their exclusion means that the version of the conference report passed by the Senate again differs from that passed by the House of Representatives and a second vote of the House of Representatives adopting the 13

Senate version is needed before the "Deficit Reduction Act of 2005" goes to the President for signature and becomes law. The House is scheduled to return from recess on 31 January 2006.

(3) DS 212 - US countervailing measures on privatised EU firms/follow-up to the British Steel case (procedural stage: implementation) This case is the follow-up of a previous WTO case *"Lead Bar from UK"* also known as *"British Steel"* (DS 138). In the British steel case, the AB found, in May 2000, that the US change in ownership methodology was WTO inconsistent because the investigating authority did not evaluate the nature of the privatization. The AB also found that a privatization at arm's length and for fair market value eliminates the benefit to the privatized firm of all the subsidies previously bestowed.

The US, instead of implementing the WTO ruling, refused to revise the previous cases where the change in ownership methodology was used and, in January 2001, developed a new methodology, the so-called *"same person"* approach, to be applied to all the new investigations (or reviews).

This new methodology was also clearly WTO-inconsistent, and after a long series of discussions with the US, the Community was forced to request a new Panel. The complaint brought by the Community in this case concerned the two methodologies, the US law governing changes in ownership (Section 1677(5)(F)) and the decision of the US authorities to impose or maintain countervailing duties in 12 cases involving the following firms: Usinor and GTS (France), Dillinger (Germany), Corus (United Kingdom), AST, Ilva and Cogne Acciai Speciali (Italy), SSAB (Sweden) and Aceralia (Spain). The panel was established at a special DSB meeting on 10 September 2001. The final report was circulated on 31 July 2002. The panel found that the US measures were inconsistent with WTO rules. The US appealed the panel's report. On 9 December 2002, the Appellate Body upheld the incompatibility of the US measures and practice, while "saving" its legislation. The Appellate Body report was adopted on 8 January 2003. The reasonable period of time for implementation expired on 8 November 2003. The US informed the DSB of the measures they have taken to comply on 7 November 2003. The US replaced the *"same person"* methodology with a new methodology, which, although not completely satisfactory, is an important evolution of the US position. Furthermore, the application of the new methodology led to the termination of four CVD cases and positively impacted on other four (duty rates reduced).

Notwithstanding this result, there are certain aspects of the US privatization approach which fall short of compliance with the DSB rulings in this case. In particular, the benchmark for the calculation of subsidy benefits, including those from the sale of employees' shares, is clearly inflated and has led to the US improperly continuing countervailing duties in the case of Corrosion-Resistant Steel from France. Furthermore, the US has failed to examine the privatisation in the sunset reviews involving the UK and Spain. The EC therefore requested consultations with the US under Article 21.5 in order to ascertain whether a mutually acceptable solution could be reached. As the consultations led to no

acceptable result, the EC requested a compliance panel under Article 21.5 of the DSU at the DSB meeting of 27 September 2004. The Panel was established at that meeting.14

The final report was circulated to WTO Members on 17 August 2005. The mainconclusions of the report were the following. Regarding France, the US did not act inconsistently with the SCM Agreement when considering Usinor's privatisation.

Concerning the UK and Spain, the US was found to have acted inconsistently with the SCM Agreement when a) considering British Steel and Aceralia's privatisations, and, b) when failing to examine other evidence of subsidization during the sunset reviews, and therefore to have failed to implement the recommendations and rulings of the DSB. Consequently, the Panel recommended that, to the extent that the US had violated the SCM Agreement, the US needed to bring its measures into conformity with its obligations under this agreement and the GATT 1994. The compliance panel report was adopted by the DSB at its meeting of 27 September 2005. The US submitted a Status Report regarding the implementation of the relevant DSB rulings and recommendations on 17 November 2005. The US states that it has consulted with relevant Congressional committees with regard to the implementation and rulings of the DSB and will continue to take steps to implement those recommendations and rulings. In fact, the US (DOC) began its implementation process on 29 November 2005 and must finish within 180 days. DOC has sent two questionnaires to the UK (concerning the privatization of British Steel and the Glynwed/Niagara change in ownership respectively) and one questionnaire to Spain (concerning the privatisation of Aceralia).

(4) DS 108 - Foreign Sales Corporation ("FSC") (procedural stage: implementation) The history of this case goes back to 1971 to the Domestic International Sales Corporation (DISC) scheme, which was declared an illegal export subsidy by a GATT panel in 1976 (the panel ruling was adopted in 1981). The US replaced the DISC scheme with the FSC scheme in 1984. At the time the EU contested the legality of the FSC but did not pursue it due to the opening of the Uruguay Round trade negotiations. Following further complaints by EU companies, and in view of the increasing amount of FSC subsidies being granted by the US, the EU resumed bilateral contacts with the US in 1997. Since no progress was made, the EU requested a WTO panel to pronounce itself on the dispute. The Panel in its report of October 1999 found the FSC to constitute an illegal export subsidy under both the Subsidies Agreement and (in relation to agricultural products) the Agriculture Agreement.

The US appealed against the Panel Ruling but the Appellate Body confirmed the panel findings on the illegality of the FSC scheme. The US was then given until 1 October 2000 (extended to 1 November 2000) to withdraw the FSC scheme. In an effort to comply with the WTO ruling, on 15 November 2000, President Clinton signed the FSC Replacement Act (*ETI Act*) into law. The ETI Act, however, did not modify the substance of the export subsidy scheme and as a result on 17 November 2000, the EU launched a further Panel on compliance and at the same time presented a request for countermeasures for an amount of US $ 4,043 million. On 20 August 2001, the WTO compliance panel examining the ETI Act issued its report in full support of the EU. In particular, the panel found that the ETI Act also constituted a prohibited export subsidy under WTO rules. The US appealed but in January 2002 the WTO Appellate Body once more confirmed the panel findings. As a result, on 30 August 2002 the WTO arbitrators authorised the EU to impose countermeasures at the level of US $ 4,043 million by increasing the customs duties on certain selected products up to 100%.15

Council Regulation 2193/03 on countermeasures was adopted on 8 December and published in OJ L 328 of 17 December 2003. On the basis of the Regulation, countermeasures started being gradually applied as from 1 March 2004; they were to remain in force until the US comes into compliance (i.e.,

WTO compatible law signed by the President).On 22 October 2004, the US adopted legislation foreseeing the repeal of the FSC-ETI legislation (The American JOBS Creation Act of 2004). The legislation repeals the FSCETI subsidies as from 1 January 2005 but maintains such subsidies for a transitional period expiring end 2006, as well as for a number of contracts for an indefinite period of time under the so-called grandfathering clause. On 5 November 2004, the EC requested consultations under Art 21.5 of the DSU (compliance Panel) but has at the same time signalled its willingness to suspend countermeasures. Consequently, on 31 January 2005 the Council adopted Regulation 171/2005 suspending the additional duties – the suspension is retroactive as from 1 January 2005. In the meantime, WTO consultations took place on 11 January in Geneva but have failed to resolve the issue; accordingly a Panel was established at the DSB meeting of 17 February 2005. The final report of the panel was released on 30 September 2005 and circulated to WTO members. The report concludes that despite some changes to its legislation the US has yet to abide by previous WTO rulings and the recommendations of the DSB. The panel also clarified that the tax subsidies which have been carried forward by using transitional periods and so-called 'grandfathering' violate WTO rules.

On 14 November 2005, the US formally appealed the panel report, no doubt also due to considerable pressure from members of Congress. The US submitted its Appellant's Submission on 21 November 2005, in which it essentially makes the same procedural arguments as earlier in the proceeding. The hearing before the Appellate Body took place on 9 January 2006, and the report should be circulated on 13 February 2006. In terms of EC countermeasures, Regulation 171/2005 provides for the automatic reintroduction of sanctions, if the WTO dispute settlement process leads to the another affirmative pronouncement on the WTO-inconsistency of the US measures (but in any event not before 1 January 2006). The US appeal of the panel decision means that the reintroduction can only take place when the appeal is resolved (and in favour of the EC), i.e. approximately March 2006, and the WTO-inconsistency has been confirmed by the DSB.

(5) DS 294 – Zeroing methodologies in the establishment of dumping margins (procedural stage: Panel) In original investigations, the US Department of Commerce ('DOC') calculates the dumping margin using the zeroing methodology condemned in the *EC - Bed linen* case. This methodology consists in disregarding negative dumping margins established for certain models of the product concerned (put at zero) when calculating the overall margin for the product. Although this dispute concerned the EU practice, it unambiguously condemned the "zeroing" methodology as such when used in well-defined circumstances. The US, however, refuses to abandon its methodology, arguing that the *Bed-Linen* decisions have effect *inter-partes* only. In reviews, DOC systematically uses a calculation methodology, which also includes "zeroing" in circumstances not foreseen by the WTO AD Agreement.16

On 12 June 2003, WTO consultations were requested on the law, the implementing regulation, the DOC methodologies and 21 specific cases (new investigations and annual administrative reviews). An additional request for consultation was made on 8 September 2003 on 10 additional new investigations. In most cases, without "zeroing", the dumping margin would have been *de minimis* or even negative and, therefore, no anti-dumping duty would have been imposed or collected. Two rounds of consultations were held in 2003.

A first request for the establishment of a Panel was put forward in the DSB meeting of 17 February 2004. The Panel was established at the DSB meeting of 19 March 2004 and its report was circulated to all WTO Members on 31 October 2005. The panel has concluded that the United States is in breach of its WTO obligations not only by using zeroing in specific investigations but also by using a zeroing

methodology in original investigations. However, two of the three panellists (whose views then prevail) concluded that Members are free to apply zeroing in reviews.

This creates a serious imbalance of rights and obligations between WTO Members by opening a way out of the prohibition of zeroing for Members which, as the United States, apply a retrospective system of collection of duties. In such systems, the margin established in the original investigation will indeed rarely determine the amount of anti-dumping duties to pay. In most cases, the final liability is determined by the margin calculated in reviews and which could then be duly inflated by the use of zeroing. By contrast, in prospective systems such as the EC's system, the duties to be paid are determined by the rate established during the original investigations in which the prohibition of zeroing fully applies.

On 24 November 2005, the EC and the US agreed to extend the deadline by which the DSB shall adopt the Panel report (unless appealed or opposed by all WTO Members) from 30 December 2005 to 31 January 2006. This agreement was endorsed at the DSB meeting of 6 December 2005. It allows for greater flexibility for any further step in the proceeding given the year-end period. The EC has appealed the panel report.

(6) DS 160 - Section 110(5) of the US Copyright Act ("Irish Music") (procedural stage: implementation) On 27 July 2000, the DSB adopted the Panel report that found Section 110(5)(B) of the US Copyright Act to be incompatible with the TRIPs Agreement, in connection with the Bern Convention on the Protection of Literary and Artistic Works, as it provides an exceedingly broad derogation from the exclusive right of authors to authorise the public communication of their works. In particular, Section 110(5) allows the public retransmission of broadcast music in commercial premises (bars, shops, restaurants etc.) without royalties being paid.

In 2001, an arbitration panel determined that the level of nullification or impairment was equal to € 1.219.900 per year. As the US declared not to be in a position to comply promptly with the WTO ruling; the EC agreed to discuss a possible mutually acceptable arrangement. The parties eventually reached a common understanding: the US was to provide financial assistance to EU performing societies with a view to developing activities for the promotion of authors' rights, pending compliance with the DSB recommendations and rulings. The understanding covered a 3-year period ending on 21 December 2004.17

In July 2002, the US Congress passed the Trade Promotion Authority Act, which included a provision setting up a fund for the payment of settlements of WTO disputes. In April 2003, the Wartime Supplemental Appropriations Act foresaw an appropriation to make a payment in connection with the Section 110(5) dispute. In the light of these legislative developments, the US and the EC notified to the WTO a mutually satisfactory temporary arrangement on 23 June. In September 2003, the US made the agreed payment. The arrangement expired on 21 December 2004 and the US has so far failed to offer either a temporary or definitive solution to the dispute. For the time being there are no legislative initiatives to bring the Copyright Act into compliance with the TRIPs Agreement.

The EC's right to suspend concessions or other obligations has been safeguarded by means of a request under Article 22.2 DSU made on 7 January 2002. The requested suspension of TRIPs obligations consists in the levying of a special fee to US right holders that apply for action by the EU customs authorities to block pirated copyright goods. The EC request was immediately submitted to arbitration due to US opposition. The arbitration procedure is currently suspended.

(7) DS 176 - Section 211 of the US Omnibus Appropriations Act ("Havana Club") (procedural stage: implementation) Section 211 U.S. of the Omnibus Appropriations Act was adopted by the U.S. Congress in October 1998. It is designed to diminish the rights of owners of U.S. trademarks and trade-names which previously belonged to a Cuban national or company which was expropriated in the course of the Cuban revolution. On 26 September 2000, a WTO panel was established to rule on the compatibility of Section 211 with the obligations of the US under the TRIPs Agreement. The panel report was issued on 6 August 2001. The Appellate Body issued its report on 2 January 2002. It substantially reversed the reasoning of the panel. It ruled that trade names are protected by the TRIPs Agreement. On appeal, it was found that Section 211 violates both the national treatment and the MFN obligations of the TRIPs Agreement. It however reversed the finding of the panel on Article 42 TRIPs and maintained the finding of the panel that the TRIPs does not govern the issue of the determination of ownership of IP rights.

The DSB adopted the Panel's and the Appellate Body's reports at the regular DSB meeting on 1 February 2002. The reasonable period of time for implementation, extended several times, expired on 30 June 2005. The EC has decided not to request authorisation to retaliate at this stage and reached an agreement with the US preserving each other's rights in the future. If the EC decides at some future date to request from the DSB authorisation to retaliate, the United States has undertaken not to block that request on the ground that such DSB action would not be within 30 days of the expiry of the implementation period. The United States retains the right to object to the level of suspension proposed, or to claim that the principles and procedures set forth in Article 22.3 of the DSU have not been followed, and to have the matter referred to arbitration under Article 22.6 of the DSU. This agreement was endorsed by a decision of the DSB at its meeting of 20 July 2005.18

(8) DS 317 – Aircraft (procedural stage: Annex V information-gathering procedure largely completed / panel) On 6 October 2004, the European Communities requested consultations with the United States pursuant to Articles 4, 7 and 30 of the SCM Agreement, Article XXIII of the GATT 1994 and Article 4 of the DSU regarding subsidies granted to Boeing. The EC considers that the US Government has been following now for a number of years a policy of systematic and persistent subsidization of Boeing through a number of measures involving, inter alia, paying research and development costs through NASA, the Department of Defence, the Department of Commerce and other government agencies. Moreover, the US Government continues to grant Boeing around USD 200 million in export subsidies under the Extraterritorial Income Exclusion Act (the successor to the 'FSC' – Foreign Sales Corporation legislation) despite a WTO ruling expressly declaring these subsidies illegal. The latest and most flagrant violation consists in massive subsidies in the form, inter alia, of tax reductions and exemptions and infrastructure support for the development and production of Boeing's 747. The EC considers that the above mentioned subsidies are in violation of Articles 3, 5, and 6 of the SCM Agreement and Article III of the GATT 1994. Consultations were held in Geneva on 5 November 2004. On 12 January 2005, the US and the EC agreed to suspend WTO action for 3 months pending discussions towards the conclusion of a new bilateral agreement on subsidies for Large Civil Aircraft. In parallel to the US request for the establishment of a panel on 31 May 2005, the EC submitted a similar request the same day.

During the DSB meeting on 13 June 2005, the US argued that a number of the measures referred to in the EC panel request of 31 May 2005 were not listed in the consultation request of October 2004. The EC on 27 June 2005 filed a supplementary consultation request which explicitly lists all the measures in question. The US has accepted the request for consultations, which were held in Geneva on 3 August 2005. The panel was established on 20 July 2005 and composed on 17 October 2005. The first phase of the fact-gathering ("Annex V") procedure was completed by 22 December 2005 with the

submission of replies by the parties to follow-up questions posed on information submitted on 18 November. The Facilitator is expected to submit his report on the above procedure to the Panel by early March 2006. The actual panel stage of the litigation will then begin: according to the current timetable for the panel, the EC will be submitting its first written submission in March 2006, with the first substantive meeting of the panel scheduled in June 2006.

(9) DS 319 – AD measures on steel bars (Firth Rixson) (procedural stage: consultations) In March 2002, the US Department of Commerce (DOC) imposed an anti-dumping duty of 125.77% on imports of stainless steel bars from the United Kingdom made by Firth Rixson Special Steels Limited (FRSS). This very high duty rate is the direct result of DOC's rejection of the data provided by FRSS during the investigation; DOC then refused to conduct a verification visit and established a duty on the basis of adverse facts available, i.e. the margin of dumping alleged by the complainant. To justify this harsh 19 treatment, the DOC alleged that FRSS had failed to comply to the best of their ability with DOC's requests for information. DOC's rejection of FRSS' data was motivated by FRSS' alleged failure to provide detailed cost data for a small number of sales made by a factory which it had acquired in a merger and had then closed and dismantled long before the investigation was started (the investigation period was 1 October 1999 to 30 September 2000, the proceeding being initiated on 2 January 2001). Not knowing there would be an anti-dumping case, the company did not keep detailed costing data, since this was not legally required. The DOC, without checking any of the facts or conducting an on-site visit, simply chose not to believe FRSS. For the vast majority of its US sales i.e. other than those made from the factory in question, FRSS cooperated fully to the satisfaction of the DOC.

FRSS has tried and failed to obtain relief in the US Court of International Trade. In this regard, the US law on the application of "adverse facts available" which gives to DOC a very wide margin of discretion is of some concern. In addition, it is clear that the DOC has breached the WTO Anti-Dumping Agreement (notably the provisions of Article 6 and Annex II thereof) by applying adverse facts available in this case. The anti-dumping duty imposed bears no relationship to any margin of dumping found for any exporter during the proceeding. Furthermore, this is not a one-off problem, since the misuse of "facts available" has been a feature of US dumping cases for many years. Given the egregious nature of the case in question, and the recurring aspect of the problem, on 5 November 2004 the EC requested WTO dispute settlement consultations. WTO consultations took place on 11 January 2005 in Geneva but failed to resolve the issue. Upon US request, the EC held a second round of consultations on 18 May 2005 (videoconference). In light of new argumentation used by the DOC in recent discussions, the Commission has requested the US to hold another round of consultations.

(10) DS 320 – US – Continued suspension of obligations in the *Hormones* dispute (procedural stage: panel)On 8 November 2004, the EC requested consultations with both Canada and the US against the application of countermeasures. The EC's challenge is directed against the United States' continued suspension of obligations and its continued imposition of import duties in excess of bound rates on imports from the European Communities despite the EC's removal of the inconsistent measures. The challenge is secondly directed against the United States' unilateral determination that the new EC legislation is in violation of obligations under the WTO Agreement. Thirdly, the EC challenges the United States' failure to have recourse to dispute settlement proceedings as required by Article 21.5 of the DSU in order to resolve the disagreement over whether the new EC legislation is WTO-consistent. The EC considers that these measures are inconsistent with the United States' obligations under Articles I and II of GATT 1994 and Articles 23.1; 23.2(a) and (c); 22.8 and 21.5 of the DSU.

WTO consultations took place on 16 December 2004 in Geneva, but failed to resolve the issue. The DSB established the panel on 17 February 2005 and on 6 June 2005, the Director-General of the WTO decided its composition (Tae-yul Cho, William Ehlers and Claudia Orozco). The first public hearing in this dispute as well as the parallel one with Canada took take place from 12 to 15 September 2005. For the first time in the history of the GATT/WTO dispute settlement system and based on the parties' (EC, US, CDN) joint request, the hearing was open to the public according to the Panel's decision of 1 20 August 2005 (via a closed-circuit TV broadcast). The panel postponed its second hearing (also foreseen to be open) from November 2005 to March 2006 because it decided that it needed to hear scientific experts. The parties and the panel are presently preparing for this upcoming consultation of experts.

DEFENSIVE CASES

(1) DS 48 + DS 26 - Hormones (procedural stage: implementation has occurred, but US and Canada are maintaining their sanctions against EC exports) On the basis of the studies reviewed by the Scientific Committee on Veterinary Matters relating to Public Health ("SCVPH"), on 5 May 2000 the Commission adopted a proposal to amend the "hormones directive." This proposal provides for a permanent ban of 17ß oestradiol, which carcinogenic and genotoxic effects have been clearly demonstrated, and a provisional ban for the other 5 hormones. The new directive entered into force on 14 October 2003. The adoption of new rules based on a revised risk assessment brings the EU into conformity with its WTO obligations. At the Dispute Settlement Body meeting of 7 November 2003 the EC notified the new Directive as compliance in this case. Both Canada and the US disagreed and stated that they will keep their sanctions. At the DSB on 1 December 2003, the EC noted that this disagreement on compliance should be solved through multilateral DSB procedures. In this regard, the EC has informed Canada and the US its readiness to discuss procedural matters further with a view to agree on appropriate action. However, the United States and Canada refused to initiate proceedings under Article 21.5 of the DSU or to agree on other procedures in order to resolve the issue of compliance through a multilateral ruling. On 8 November 2004, the EC has requested consultations with both Canada and the US against the application of countermeasures. The object of this case are the sanctions, not WTO-compliance of the new Hormones Directive. The case is therefore listed separately as a new, offensive case (see above).

(2) DS 174 – Trademarks & geographical indications (procedural stage: implementation) Following WTO consultations in June 1999 and April 2003, the US requested the establishment of a panel on 29 August 2003. Before the panel, the US argued that Regulation No 2081/92 on geographical indications is contrary to the TRIPs Agreement was contrary to Articles 1, 2, 3, 4, 16, 22, 24, 41, 42 and 63), Articles I and III:4 of the GATT.

The panel report was adopted by the DSB on 20 April 2005. The Panel upheld the claim that EC Regulation No 2081/82 is discriminatory, contrary to Article III of the TRIPs Agreement, since it does not sufficiently clearly provide that the EU will *register foreign GIs* on the same conditions as EU GIs. It accordingly recommended the EU to clarify the text of the Regulation on this point. The Panel rejected claims relating to the EC system for resolving *conflicts between GIs and trademarks*: it found that the provisions of EC Regulation No 2081/82 which establish a system of "co-existence" between GI and earlier-in-time trademarks is fully justified, as a limited exception to trademark rights, under Article 17 of the TRIPs Agreement. The reasonable period of time for complying 21 expires on 3 April 2006. On 23 December 2005, the Commission adopted a proposal for a Council Regulation COM (2005) 698) under Article 37 of the Treaty to implement the recommendations and rulings of the DSB.

(3) DS 291 – Measures affecting the approval and marketing of certain biotech products (GMOs) (procedural stage: panel) On 13 May 2003, the US, Argentina and Canada requested consultations on certain measures concerning GMOs. The US argues that there is a suspension of approvals in the approval of GMOs and GM food in the EU, which is contrary to several WTO agreements (GATT, SPS, TBT, and AoA). In this connection, the US also complains about the failure to consider for approval a number of specific products listed in the consultations request. Furthermore, the US considers that the restrictions imposed by several Member States on the sale or use of approved GMOs and GM food are inconsistent with WTO rules. Consultations were held on 19 June 2003 and a panel was established on 29 August 2003 and composed by the WTO Director General on 4 March 2004. The release of the interim report has been postponed and is expected in February 2006.

(4) DS 315 – Customs procedures (procedural stage: panel) On 21 September 2004, the US requested consultations regarding certain aspects of the EC customs regime. The US argues that the EC fails to apply customs measures in a uniform manner, which is contrary to Article X:3(a) of the GATT 1994, and that the EC has failed to institute judicial, arbitral or administrative procedures for the prompt review of decisions on customs matters, which is contrary to Article X:3(b) of the GATT 1994. WTO consultations took place on 16 November 2004 in Geneva but have failed to resolve the issue. A panel was established at the DSB meeting of 21 March 2005. On 30 May 2005, the WTO DG announced the composition of the panel. The second substantive meeting took place on 22-23 November 2005.

In the Panel proceedings, the US has made very systemic allegations, arguing that the EC system lacks mechanisms to prevent and reconcile divergences in the administration of EC customs legislation by the Member States' customs authorities. The US has defined the existing EC mechanisms as too general, non-binding and discretionary and therefore not enable to ensure uniform administration pursuant to Article X:3(a) GATT. The US has referred explicitly to a number of areas (classification and valuation of goods; customs procedures; penalties) and has put forward a few concrete examples of presumed lack of uniformity in these areas. Nevertheless, the US has argued that the alleged deficiencies of the EC system are applicable to all areas of EC customs legislation. With respect to Article X:3(b), the US has defended an ambitious interpretation of this provision, as requiring a WTO Member to provide for judicial review of administrative decisions with effect across the territory of the WTO Member. The US has argued that the review of customs decisions by Member States' authorities does not comply with such requirement. According to the indicative timetable presented by the panel, the final report will be circulated in April 2006.22

(5) DS 316 – Aircraft (procedural stage: Annex V information-gathering procedure largely completed / panel) On 6 October 2004, the US requested WTO consultations with Germany, France, the United Kingdom and Spain, and with the EC on alleged support to AIRBUS pursuant to Articles 4, 7 and 30 of the SCM Agreement, Article XXIII of the GATT 1994 and Article 4 of the DSU. On the same day, the US attempted to abrogate the 1992 Agreement. The United States considers that the EC and the Member States provide subsidies that are inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement and Article XVI:1 of the GATT 1994 and that they causing adverse effects to the United States in the sense of Articles 5(a), 5(c), 6.3(a), 6.3(b), 6.3(c), and 6.4 of the SCM Agreement. The EC considers that these measures are fully in line with the 1992 Agreement and with the WTO Agreement. Consultations were held in Geneva on 4 November 2004. On 12 January 2005, the US and the EC agreed to suspend WTO action for 3 months pending discussions towards the conclusion of a new bilateral agreement on subsidies for Large Civil Aircraft.

On 31 May 2005, the US requested the establishment of a panel on the ground that subsidies are granted by the EC and the Member States to Airbus in violation of Articles 3, 5 and 6 of the SCM Agreement and Article XVI of the GATT 1994. The EC considers that the scope of the panel request exceeds that of the consultation request. The panel was established on 20 July 2005.

As in the parallel case against the US DS (317), the panel was composed on 17 October 2005. The first phase of the fact-gathering ("Annex V") procedure was completed by 22 December 2005 with the submission of replies by the parties to follow-up questions posed on information submitted on 18 November. The Facilitator is expected to submit his report on the above procedure to the Panel by early March 2006. The actual panel stage of the litigation will then begin: according to the current timetable for the panel, the EC will be submitting its first written submission in March 2006, with the first substantive meeting of the panel scheduled in June 2006.

The EC has submitted to the panel a request for preliminary ruling as regards a number of measures, including support for Airbus A350, which in the view of the EC, are not properly before the panel.

COMMISSION WORKING DOCUMENT SEC(2006)

Competition and Partnership – A Policy for EU-China Trade & Investment.

[Executive Summary & Conclusion]

24 October 2006

http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130791.pdf

China is the single most important challenge for EU trade policy. EU-China trade has increased dramatically in the past few years, doubling between 2000 and 2005. Europe is China's largest export market; China is Europe's largest source of imports. This trade policy paper addresses the economic and competitive challenges that flow from this change and the responses the EU should adopt in the area of trade and investment. It is part of the broader partnership with China and the approach set out by the Commission in its Communication on relations with China: "*Closer Partners, Growing Responsibilities*".

The EU's open market has been a large contributor to China's export-led growth. The EU has also benefited from the growth of the Chinese market: EU exports to China have more than doubled in the past five years. Competitively priced Chinese products have helped keep inflation and interest rates in Europe lower. European companies have gained from their investments in China. But competition from China has raised serious challenges for Europe in some important manufacturing sectors.

If we strike the right balance, there is ample scope for a continued mutually beneficial trade partnership between Europe and China. Political leaders on both sides should continue to argue for open economic engagement. Europe should continue to offer open and fair access to China's exports and to adjust to the competitive challenge, while pursuing policies to support those bearing the burden of economic adjustment at home. China itself should reciprocate by strengthening its commitment to economic openness and market reform. It should strengthen legal protection for foreign companies and the enforcement of this protection and reject anticompetitive trading practices and policies.

In pursuing this relationship the European Commission will strongly defend openness in European trade with China. But it will also seek to ensure that China meets its WTO obligations and continues to liberalise access to its goods, services, investment and public procurement markets. It will seek the end of forced technology transfers for European investors and imposed export requirements. The EU will seek tougher protection of the legal rights of EU companies, especially in the area of intellectual property and urge China to end the unfair subsidisation or protection of strategic industries. It will seek to ensure that these issues are taken forward within the overall process of dialogue and co-

operation between Europe and China and are clearly and comprehensively covered in the new Partnership and Cooperation Agreement including the updating of the 1985 Trade and Co-operation Agreement. To assist European businesses in China, the Commission will oversee the establishment of new commercial resources in China and Europe to support European business and promote language learning.

Conclusion.

China's re-emergence will continue to have a major impact on every part of the global economy. It will be felt in people's daily lives, from the cost of petrol to the price we pay for our clothes. It entails major challenges for global sustainable development. Adjusting to the competitive challenge and driving a fair bargain with China will be a central political and economic challenge of EU trade policy in the decade to come. Europe and China will be increasingly compelled to cooperate on global issues as responsible trade and economic global leaders.

China's WTO accession in 2001 has provided it with extensive and stable access to foreign markets, notably in Europe. However, European companies, while gaining from China's growth, continue to face serious barriers to access China's market. There is a growing risk that the EU-China trading relationship will not be seen as genuinely reciprocal. Political pressure in the EU to resist further openness to Chinese competition is likely to increase if these problems are not addressed, as we are already seeing in the United States.

European trade policy towards China will seek to promote openness and cooperation to mutual benefit, taking into account the significant domestic challenges China faces. Europe seeks reciprocity from China in a trade partnership of equals. It should be accompanied by strong policies to assist those bearing the burden of economic adjustment in Europe. Europe should accept fierce competition. China should ensure that it is fair competition.

EC PRESS RELEASES -- EU – U.S. & THE WTO.

EU Requests WTO consultations with US on 'zeroing' in anti-dumping cases.

EC Press Release (22 September 2006)
http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_130283.pdf

The European Union has today requested WTO consultations with the United States regarding the continued use of "zeroing" in its dumping calculations. "Zeroing" is a calculation methodology which ignores negative margins of dumping and therefore results in an unfair increase of the dumping liability of EU exporters. The use of zeroing by the United States was first condemned by the WTO in 2004, and more recently in May 2006 at the request of the European Union, and again in August 2006 at the request of Canada. However, these previous rulings left open a number of issues which are now covered by the new request for consultations.

On 9 May 2006, following a complaint of the European Union, the Dispute Settlement Body of the WTO condemned the United States for having used zeroing in 31 specific Anti-Dumping measures and for maintaining a zeroing methodology in original investigations leading to the imposition of anti-dumping measures. The United States has now until 9 April 2007 to revise the 31 specific measures and to stop the use of zeroing in future original investigations. However, the dispute has left open a number of issues and the implementation of the 9 May ruling will not necessarily provide an adequate remedy. The United States has used Zeroing in 37 anti-dumping measures taken after the initiation of the WTO dispute and therefore not covered by it. Also, in respect of reviews (*i.e.* investigations conducted after the imposition of the anti-dumping measure to review the necessity to maintain it or the level of the duty), the Appellate Body, being limited to issues of law, concluded that there were not a basis for a decision on whether the US zeroing methodology was WTO compatible or not. The new request for consultations covers all those issues.

The most recent rulings of the WTO Appellate Body leave no doubt that the United States will be found in breach of its WTO obligations. The European Union therefore hopes that the United States will accept the inevitable and respond positively to the request for consultations making further actions unnecessary.

Consultations are the first steps in the WTO dispute settlement process. If they prove unsuccessful after 60 days, they entitle the EU to ask for a WTO Panel to be set up to rule on the legality of US practice.

Background.

In the above example, model A is sold in the US at above its EU price, while model B is sold for less than its EU price. In establishing a dumping margin for the whole product, WTO rules require a weighted-average of the prices of both models to be made. On this basis (Total 1), there is no dumping. However, the US "zeroing approach" (Total 2) takes the US price of model B, but considers the US price of model A to be the same as the EU price. By considering the US price of model to be less than it really is, the US finds a dumping margin of 2 and could therefore impose an anti-dumping duty of 10%, even though a normal weighted average calculation reveals no dumping.

This practice of zeroing was first condemned in the *Bed Linen* case (WTO ruling in March 2001) and led to its abandonment by the EU except in the limited circumstances of "targeted dumping" in which it is authorised. With the condemnation of its anti-dumping duty for use of zeroing in the *Softwood Lumber* case (WTO ruling in August 2004), the US was confronted with the same situation, but continued zeroing leaving no option but to multiply the challenges in the WTO. Currently, the use of zeroing by the United States is being challenged in seven disputes initiated by different WTO Members.

In the *Zeroing* dispute initiated by the EU (DS 294, ruling of May 2006) and in a follow-up of the *Softwood Lumber* dispute (DS 264, ruling of August 2006), the Appellate Body concluded that zeroing is in contradiction with the concept of "margin of dumping" and the obligation to make a fair comparison between export prices and normal value. As both rules are applicable through the whole Anti-Dumping Agreement, the end of zeroing is inevitable in all AD investigations or reviews. The recent Panel report which found zeroing WTO compatible in reviews in a challenge by Japan (dispute DS 322) is thus bound to be reversed.

The US "zeroing" practice is having a significant adverse economic impact on EU exporters in various sectors including steel, chemicals and pasta. In most cases, without "zeroing", the dumping margin would have been *de minimis* or even negative and, therefore, no antidumping duty would have been imposed. Several hundred million dollars of trade volume is involved. Some of the products - hot-rolled steel, stainless steel bars, ball bearings – are major export items and other important products will inevitably be involved in the future if the US is allowed to continue "zeroing".

On 6 March 2006, the US Department of Commerce published a notice in the Federal Register requesting comments on its intention to cease the practice of "zeroing". However, this initiative is very limited in scope and is far from solving all issues raised by US zeroing. Notably, it does not deal at all with zeroing in reviews.

EU requests establishment of WTO panel on Chinese auto parts tariffs.

EC Press Release (5 September 2006)
http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_130206.pdf

The EU will today ask that its request for a WTO panel in the China auto parts case be placed on the agenda of the regular meeting of the Dispute Settlement Body on September 28. The US and Canada are also expected to request the establishment of a panel on the same issue today.

EU Trade Commissioner Peter Mandelson said: "We have tried again and again to find an acceptable negotiated solution to this issue and without Chinese engagement we have no alternative but to take this course of action."

What is the issue?

Chinese rules on tariffs for the import of auto parts impose a duty for "complete vehicles" on specific combinations of imported parts, even when those parts do not in any way constitute a completed automobile (see schematic attached). These rules raise the duty on the import of many auto parts to China from the 10% levied on auto parts to the 25% rate charged for whole vehicles. The rules oblige EU car makers who wish to avoid higher duties to source car parts in China. The EU believes this contravenes WTO rules that do not permit the imposition of obligations to use 'local content'.

At the time of its WTO accession, China committed not to treat parts as complete vehicles, to limit the duty on most auto parts to 10% maximum, to refrain from discriminatory taxes and not to apply measures which impose the obligatory use of locally produced parts or materials. The EU has successfully challenged similar local content measures at various occasions at the WTO.

China claims that the measures are designed for consumer protection and to avoid import tariff circumvention (i.e., to prevent that whole vehicles are imported as auto parts to avoid the higher tariff rates for complete vehicles). However, the rules appear to go well beyond this objective and it is clear that combinations of auto parts attracting the 25% duty are far from constituting a whole vehicle. Whereas it will be a natural trend for the industry to increase the local sourcing of parts, the Chinese measures are creating a costly distortion by forcing artificially the local sourcing of components.

These rules undermine the competitiveness of EU manufacturers which have to face a 15% additional charge when importing parts. About €3 billion worth of auto parts are exported to China each year and an important percentage of this export is now subject to discriminatory charges. The EU car manufacturers account for about 25% of the automobile production in China.

The EU first raised the issue of China's tariffs on auto parts in 2004.

The EU relationship with China is based on cooperation and dialogue. The EU has repeatedly expressed to China its interest in a co-operative solution. The issue has been continuously raised with the Chinese since 2004, stressing our concern about incompatibility with WTO rules. Unfortunately, the WTO consultations launched in March 2006 have not provided a solution. Although China has recognised the seriousness of the problem for the EU, it has not provided reassurance that the problem is being addressed. The EU therefore has no other choice than to proceed to a panel request.

What are the next steps?

The request for the establishment of a Panel will be discussed in the meeting of the Dispute Settlement Body on 28 September 2006 for the first time. Under WTO rules, China may block this first request, in which case the request will have to be presented a second time some time in October 2006. The establishment of the panel cannot be blocked at the second meeting and will consequently be automatic. A proceeding before a Panel usually takes an average of 12 months. An appeal before the Appellate Body is then possible, which takes another 3 months.

Can China still avoid a WTO panel?

Of course. We are disappointed not to have been able to resolve this issue by negotiation up to this point. The EU believes that China is in breach of its obligations as a WTO member and its undertakings on joining the WTO. It is for China to act and rectify the problem. The EU remains open to finding a mutually agreed, WTO-compliant solution. It is important that the issue is resolved as quickly, as constructively, and as amicably as possible.

EU requests WTO consultations with China on auto parts tariffs.

EC Press Release (30 March 2006).
http://trade-info.cec.eu.int/doclib/html/128069.htm

The EU has today asked China to participate in consultations at the WTO in Geneva on China's tariff rules on parts for automobiles, which the EU believes are not compatible with China's WTO obligations. The consultations are a procedural step that will allow all parties to clarify legal issues and seek a constructive solution to the issue.

EU Trade Commissioner Peter Mandelson said: "Consultations will allow us to clarify the legal issues and find a mutually satisfactory solution. It remains my strong preference and intention to seek an amicable solution to this issue".

The EU first raised the issue of its tariffs on car parts in 2004. The EU requested action to address the problem at the EU-China Joint Trade Committee in October 2005. Although China has recognised the seriousness of the problem for the EU, it has not yet provided sufficient reassurance that the problem is being addressed. WTO consultations would allow all parties to clarify their positions and seek a resolution to the issue.

This is a routine problem in the EU's wide trade relationship with China. The EU has pursued similar local content cases with India, Canada and Indonesia.

The US will also request consultations with China on this issue today.

What is the issue?

The EU believes that Chinese tariff laws for spare auto parts are WTO-incompatible. Chinese rules apply the tariffs for "whole vehicles" to the import of spare parts making up 60% or more of the value of a final vehicle. The EU believes that this may contravene China's WTO obligations not to impose obligatory 'local content' rules: to avoid the 'whole car' tariff rates a car-maker has to source 40% or more of the spare parts by value in China. The EU believes it may constitute an internal tax on imported goods - because the tariff is levied on a finished product constructed with imported parts and the same rates are not applied to cars produced with local spare parts.

This can be problematic for EU producers in China who are not able to import parts from their own factories in Europe without unfair tariffs. The EU has about 20-25% of the car production market in China.

China claims that the measures are designed to avoid circumvention (ie, the prevention of the importing whole cars as spare parts to avoid the higher tariff rates for whole cars). However the WTO has found in the past that the objective of measures does not justify their form - and in this case the measures appear to the EU to be WTO-incompatible. At the time of its WTO accession, China committed itself not to treat parts as whole cars.

What happens now?

The request for consultations has been filed with the WTO in Geneva today. China has 10 days to respond to the request and is obligated by WTO rules to enter in consultations in good faith within 30 days. If the issue cannot be resolved in consultations within 60 days then the parties have the option of requesting a WTO panel to hear and rule on the dispute.

The EU and the US are both parties to the request. Other WTO members have the right to request participation in the consultations.

The EU is committed to finding a constructive and amicable solution to this issue.

21st Annual EU Report on US Trade Barriers highlights behind-the-border & WTO issues; progress on Byrd Amendment, telecoms procurement.

EC Press Release (1 March 2006)
http://trade-info.cec.eu.int/doclib/html/127635.htm

The European Commission today released its twenty-first annual report on barriers to trade and investment in the US, detailing the obstacles that EU exporters and investors face in the US market. The report highlights non-tariff barriers in investment and public procurement and addresses some long running WTO problems such as issues concerning the US Jobs Act (FSC) and the repeal of the Byrd Amendment.

The report comes out on the day the EU and US are lifting telecoms procurement sanctions against each other, bringing to an end a more than a decade-long dispute. The Transatlantic Economic Initiative is also offering new possibilities to advance trade, and tackle the regulatory and non-tariff barriers identified in this report. The report shows that non-tariff barriers are now the major obstacle to increased EU-US trade. Barriers to free and fair government procurement are particularly prevalent once again in this report. A wide variety of discriminatory Buy America provisions are highlighted as well as those impacting on federally funded infrastructure programmes.

Investment issues also remain important, given the huge flows of investment across the Atlantic. But US restrictions remain, notably in the shipping, energy and telecoms areas. These problems are often compounded by the plethora of different state level laws and regulations which make overcoming US barriers a very complex operation.

Progress has been made in a number of areas recently. Government procurement sanctions are being withdrawn simultaneously by both sides today, healing a dispute that has dogged both sides of the Atlantic for over a decade. Last month's repeal of the Byrd amendment by the US Congress has already been welcomed by the Commission, with EU sanctions now being reduced in tandem with remaining Byrd payments.

Ongoing WTO problems.

Nevertheless, US failure to comply with a number of World Trade Organisation (WTO) dispute settlement findings still continues to be a major EU concern. For instance, the repeal of the US FSC/ETI export-contingent tax scheme includes transitional and grandfathering provisions which have been repeatedly ruled WTO-incompatible. The EU will continue to raise compliance concerns with the US authorities. In addition, unfair anti-dumping measures taken by the United States against the EU continue to be a major trade irritant. In over 50 antidumping cases and reviews since 1995, US duties have been inflated using the zeroing methodology which has already been found WTO-incompatible and is currently subject to further litigation.

The Transatlantic Economic Initiative.

The Transatlantic Economic Initiative, born from the 2005 EU-US summit, is working on promoting regulatory and standards cooperation; stimulating open and competitive capital markets; anti-money laundering and terrorist financing cooperation; spurring innovation and the development of technology; enhancing trade, travel and security; promoting energy efficiency; intellectual property rights; investment; competition policy; procurement and services. The Transatlantic Economic Initiative brings together EU and US regulators to look at how to deal with existing regulatory barriers and trying to avoid new ones. Both sides are also trying to strike the right balance between trade and security.

The EU and the US are the two biggest economies in the world – accounting for a combined total of 57% of world GDP. They have much to gain from greater trade and investment and reducing barriers to trade. The EU and the US have by far the largest bilateral trade relationship in the world, being responsible together for about two fifths of global trade. Trade flows across the Atlantic are running at around €1.7 billion a day. In 2003, total two-way investment amounted to over €1.5 trillion. 12-14 million jobs in the EU and US depend on transatlantic trade and investment.

WTO condemns US tax subsidies; EU calls to end illegal tax breaks for Boeing.,

EU Press Release (13 February 2006).
http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_127479.pdf

The WTO Appellate Body has today backed EU condemnation of US federal tax subsidies for exporters in the FSC dispute. A WTO Panel had previously found in favour of the EU by concluding that despite some changes to its domestic legislation the US has yet to abide by earlier rulings and recommendations of the WTO Dispute Settlement Body on its payments of export tax subsidies preserved in the "transition" and "grand-fathering" provisions of the revised Jobs Act that have been judged to violate WTO rules. Once the Appellate Body report has been adopted by the WTO in thirty days time the US will have 60 days to bring its legislation into line with its WTO obligations. After that time EU retaliatory measures will be re-imposed, unless the US has complied in the meantime.

EU Trade Commissioner Peter Mandelson said, "The US now has three months to act to avoid the re-imposition of retaliatory measures in this case. The tax benefits preserved by the Jobs Act have been repeatedly declared in violation of WTO rules. The responsibility now lies squarely with the US. I stand ready to work closely with the US toward finding a solution to this dispute. But the EU will not accept a system of tax benefits which give US exporters including Boeing an unfair advantage against their European competitors. We are seeking nothing more than the reestablishment of a level playing field."

Biggest beneficiaries of illegal tax subsidies include Boeing and GE.

The American Jobs Creation Act ("Jobs Act") contains a 'Grandfathering Clause' that says that the repeal of the Foreign Sales Corporation and Extra Territorial Income (FSC/ETI) legislation "shall not apply to any transaction in the ordinary course of a trade which occurs pursuant to a binding contract" entered into before 17 September 2003 and contains the following clarification: "a binding contract shall include a purchase option, renewal option, or replacement option which is included in such contract and which is enforceable against the seller or lessor."

Consequently, in practice all standard commercial contracts are covered as all such contracts bind their signatories and are enforceable. It should also be noted that the clause applies to both sales and lease contracts (and their options) which typically run for a number of years from the moment they are signed until final delivery of the goods.

The aim of the grandfathering clause is to ensure that certain US exporters will continue to obtain WTO-prohibited FSC/ETI export subsidies many years into the future on products that have not yet been built or exported, even beyond the expiry of the FSC/ETI transitional period in 2006. Some of the biggest beneficiaries of the grandfathered tax-breaks include Boeing and General Electric.

The WTO has repeatedly condemned the measures.

The US FSC/ETI tax subsidies have been declared in violation of WTO rules by a WTO panel, the two WTO Appellate Body reports and two WTO compliance panels. On 7 May 2003, the WTO authorised the EU to impose trade sanctions at the level of US $ 4 billion (the estimated value of the subsidy in 2000) by increasing the customs duties on certain selected products up to 100%. Countermeasures on certain US products gradually started entering into force on 1 March 2004 from a much lower level (5%).

On 31 January 2005 the EU Council adopted a regulation*1* suspending sanctions as from 1 January 2005 when the EU initiated a second compliance panel following the passing of the American Jobs Creation Act. That panel found that the Jobs Act continued to breach WTO rules: a finding that the Appellate Body has now endorsed.

That 2005 Council Regulation provides for the reintroduction of customs duties at a 14% level 60 days following a final WTO ruling that the Jobs Act is WTO incompatible. Those 60 days will begin when the WTO Dispute Settlement Body adopts the Appellate Body report in about one month from now.

EU welcomes repeal of Byrd Amendment and regrets transition period.

EC Press Release (2 February 2006)
http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_127327.pdf

On February 1 2006 the United States Congress passed the "Deficit Reduction Act 2005", which among other provisions repeals the Continued Dumping and Subsidy Offset Act, more commonly known as the "Byrd Amendment". The Deficit Reduction Act will enter into force once the President signs it into law. The European Commission welcomes the move, and the leadership of House Ways and Means Committee Chairman Bill Thomas, Senate Finance Committee Chairman Charles Grassley and USTR Rob Portman. The Byrd Amendment has been a persistent source of tension between the United States and some of its main trading partners and benefits only of a handful of US companies. Today's vote is a significant step towards bringing the United States into compliance with its WTO obligations and removing a serious trade problem.

However, the European Commission regrets that repeal of the Byrd Amendment will not be effective immediately. Under a transition clause, duties imposed on goods imported into the United States up to 30 September 2007 will still be distributed after their collection, which in turn, under US practice, can take place several years after the import. That means that distribution of collected anti-dumping and anti-subsidy duties to US companies will continue to distort the conditions of competition on the US market at the expense of imported goods for a number of years.

EU Trade Commissioner Peter Mandelson said: "I welcome the fact that the US Congress has chosen to bring US law into compliance with its international obligations. I think that this is a constructive step, although I regret that the US has chosen to provide a transition period rather than ending these payments at once." The Commission will carefully review the details of the compromise reached in Congress and its implications for EU companies. In so doing, the EU will work in close coordination with the other complainants.

Background

The Continued Dumping and Subsidy Offset Act (CDSOA or the so-called "Byrd Amendment"), signed into law in October 2000, provides that proceeds from anti-dumping and countervailing duties shall be paid to the US companies responsible for bringing the case at the origin of the measure. The enactment of this legislation raised immediate and widespread concerns not only in the EU but in the whole WTO membership as it imposes a "double hit" on dumped or subsidised imports and provides a direct financial incentive to file anti-dumping and anti-subsidy complaints. The EU and 10 other WTO members (Australia, Brazil, Canada, Chile, India, Indonesia, Japan, Korea, Mexico and Thailand) brought a complaint to the WTO dispute settlement system. This unprecedented joint action is a clear indication of the important systemic concerns that the legislation raises.

In January 2003, the WTO ruled the Act as an impermissible response to dumping and subsidisation, thus upholding the core of the complainants' claims. The United States had until 27 December 2003 to comply with the WTO ruling, but failed to do so.

Faced with US inaction, the EU has applied retaliatory measures in the form of a 15% additional import duty applicable since 1 May 2005 on a range of US products including paper and textile products, machinery and sweet corn. Three other WTO members have also applied retaliation: (1) Canada also from 1 May 2005 (a 15% additional import duty on live swine, tobacco, oysters, specialty fish) (2) Mexico from 18 August 2005 (additional duties of 30% on dairy products, 20% on wine and 9% on candy and chewing gum) and (3) Japan from 1 September 2005 (a 15% additional import duty on ball bearings, different steel products, printing machines, fork lift trucks). Brazil, Chile, India and Korea have also completed all required steps in the WTO allowing them to apply retaliation.

Since the enactment of the CDSOA, the US authorities have distributed to domestic petitioners more than US $ 1,2 billion. Further, a very limited number of recipients received a major part of the payments. Of the total disbursed so far, 40% went to one company and its subsidiaries and two thirds to three industries (bearings, candles and steel). Every year half of the payments went to a very limited number of companies (4 in 2001, 3 in 2002, 2 in 2003, 9 in 2004 and 4 in 2005).

This concentration of the CDSOA benefits into the hands of a few companies was one of several flaws underlined in a critical report released by the US General Accountability Office (GAO) on 26 September 2005. The GAO also stressed the substantial overstatement of the eligible claims since their accuracy is, in practice, not verified or the distortion of competition generated by the Act, including at the expense of US producers who cannot receive any payments for not having supported the investigation at the origin of the anti-dumping or anti-subsidy measure. The CDSOA is an “added piece” to the US system of protection against dumping or subsidisation. Repealing it leaves this system unaffected and therefore does not affect the United States’ ability to provide to its companies and workers with protection against unfair competition.

Positive result for EU in WTO case as to anti-subsidy duties on Korean DRAMS.

EC Press Release (17 June 2005)
http://trade.ec.europa.eu/doclib/docs/2005/june/tradoc_123831.pdf

A WTO panel upheld the EC's finding that Korea unfairly subsidized Hynix Semiconductor, rejecting most of Korea's claims against the 34,8% countervailing duty on imports of dynamic random access memories (DRAMS) from Korea, imposed in August 2003. This ruling will allow the EC to maintain a level of countervailing duty necessary to offset continuing injurious subsidization by Korea.

The panel findings are the latest development in a dispute which started when, in August 2003, the EC imposed 34,8% duties on imports of DRAMS from the Korean company Hynix following massive subsidisation by the Korean government. The EC's investigation revealed that the Korean government directed a number of Korean banks to bail-out Hynix when the company was virtually bankrupt in 2001. This conferred an unjustified advantage to Hynix which in turn inflicted heavy losses on the European chip industry. In the WTO panel proceeding, Korea contested several aspects of the EC's findings.

The central question was whether the Korean government had directed nominally private banks to bail-out Hynix and whether this action constituted a subsidy within the meaning of the WTO Subsidies Agreement. The panel confirmed that Korea had granted subsidies in this manner and broadly confirmed the findings of the EC investigation; it ruled that the EC had correctly found that four out of the five bail-out programmes investigated were subsidies conferring a specific benefit to Hynix and causing injury to the EC industry. The remaining programme, which the panel acknowledged conferred a benefit to Hynix but was not directed by the Korean government, involves only a very small amount of subsidy. The Panel's only reservations were recommendations that the EC should fine-tune its methodology for calculating the benefit conferred to Hynix, re-evaluate one injury factor out of the 15 subject to investigation and refine some technical aspects of the analysis concerning the causal link between the subsidies and the injury. The EC is confident that the panel findings will allow it to continue to offset the highly unfair practice put in place by Korea.

The report will be adopted by the WTO Dispute Settlement Body within 60 days unless the EC or Korea appeal within that period. The case would then have to be decided by the WTO Appellate Body within a maximum of 90 days from the lodging of the appeal. A parallel WTO case concerning measures imposed by the US on imports of DRAMS from Korea is already at the stage of appeal; the report of the Appellate Body is due at the end of June 2005.

US Byrd Amendment: Commission proposes sanctions on US products.
EC Press Release (31 April 2005)
http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122080.pdf

In application of a WTO ruling, the Commission has today adopted a proposal to impose sanctions on certain products from the United States. The Commission took this latest step in the dispute over the Byrd Amendment in light of the continuing failure of the United States to bring its legislation in conformity with its international obligations. The Commission proposes that an additional duty of 15% applies as of 1 May 2005 on a range of products which include paper, agricultural, textile and machinery products. In taking this action the Commission has acted in close coordination with seven other co-complainants.

The Commission's proposal comes in application of the authorisation granted in November 2004 by the WTO to impose retaliatory measures against the United States for its failure to respect its international obligations. The Byrd Amendment which was first ruled illegal by the WTO in January 2003 should have been repealed by 27 December 2003. More than a year later, the United States has still not respected its international obligations.

The sanctions would take the form of additional duties imposed on a list of products imported from the US.

The level of retaliation applied as from 1 May 2005 is based on the latest distribution of duties made under the Byrd Amendment and is slightly below US $ 28 million.

This level will be revised annually to adjust to the level of damage caused to EU companies. This is motivated by the important variation in the Byrd disbursement made each year by the United States. The Commission's proposal includes a first list of products that would be subject to the additional duty as from 1 May 2005. In order to allow for eventual revision in the amount of sanctions, a 'reserve list' has been added. The products included in this reserve list could become subject to the additional import duty in case the level of suspension increases in the future.

Background.

The Continued Dumping and Subsidy Offset Act of 2000 (so-called Byrd Amendment) provides that anti-dumping and countervailing duties collected following a complaint from US companies are distributed to those companies that brought or supported the complaints.

In the four annual distributions that have taken place since 2000, more than US $1 billion has been distributed. The main recipients have been in the bearing, steel and other metal, household item and

food (in particular pasta) sectors. A substantial increase is foreseen for the next distribution that could start on 1 October 2005 if the Byrd Amendment is not repealed. That distribution alone could amount to US $1,6 billion.

A Panel in September 2002 and the Appellate Body in January 2003 confirmed that the Byrd Amendment is an illegal response to dumping and subsidisation. The US had until 27 December 2003 to bring its legislation into conformity with the WTO rules. Eight WTO members (Brazil, Canada, Chile, the EU, India, Japan, Korea and Mexico) then requested the WTO to authorise retaliation on 26 January 2004. Following an arbitration decision on the appropriate level of retaliation, the eight complainants were authorised at the end of 2004 to apply sanctions to the United States. It is the first time that so many members have been authorised to apply retaliation in the same dispute. The eight members represent altogether 71% of total US exports and 64% of total US imports.

The EU and the seven other WTO members are maintaining a close cooperation. To this end, the EU understands that Canada will be announcing retaliatory measures against certain products from the United States and expects that other co-complainants will soon join it in applying retaliation.

Despite calls by the US administration to repeal the law, the US Congress has not yet implemented the WTO ruling and repealed the Byrd legislation.

EU/US Agreement for Negotiation to end Subsidies for Large Civil Aircraft.

EC Press Release (11 January 2005)
http://trade.ec.europa.eu/doclib/docs/2005/january/tradoc_120978.pdf

The Agreement.

1. The objective is to secure a comprehensive agreement to end subsidies to large civil aircraft producers in a way that establishes fair market competition for all development and production of LCA in the European Union and the United States.

2. At present, the companies concerned in the EU are Airbus and its principal shareholders, and in the US, Boeing.

3. The agreement will be negotiated within three months.

4. (a) The agreement will be negotiated between and apply to the United States and the European Union.
(b) These parties will subsequently work together to broaden the agreement to include as parties other countries with civil aircraft industries, or countries with risk sharing roles relevant to the objective of the agreement.

5. (a) During the negotiations the parties will not request establishment of WTO panels relating to the pending disputes.
(b) During the negotiations, within the time frame foreseen in paragraph 3 above, the parties will make no new government support commitments for LCA development or production.

6. The Parties will use the definition of subsidies in the ASCM. The parties will agree an illustrative list of subsidies to be covered by the agreement which elaborates the ASCM definition. They will use this list to reach agreement on which form of subsidy should be prohibited, actionable or permitted.
7. The agreement will be enforced through transparency and strong dispute settlement procedures.

8. In negotiating the agreement the parties will establish agreed terms and conditions under which either may withdraw at a future date. On the one year anniversary of the agreement, the parties will review its operation, including whether progress on international participation in it is sufficient to prevent circumvention of its objectives and to justify its continuation.

US Byrd Amendment: WTO authorises retaliation – US urged to conform to ruling.

EC Press Release (26 November 2004)
http://trade.ec.europa.eu/doclib/docs/2005/january/tradoc_120374.pdf

The EU, alongside six WTO members (Brazil, Canada, India, Korea, Japan and Mexico), today received WTO authorisation to impose retaliatory measures against the US for failing to bring its legislation into conformity with its international trade obligations. This was a formal step before retaliatory measures could be imposed. These measures will take the form of additional import duties on wide variety of US products from an indicative list approved by the WTO that includes machinery, foodstuffs, textiles and paper products (see below). The EU has urged the US to avoid retaliation by complying with its international obligations.

The Continued Dumping and Subsidy Offset Act of 2000 (the 'Byrd Amendment') mandates the distribution of anti-dumping and countervailing duties to the US companies that brought or supported the complaints. It creates an undue incentive for US industries to seek the imposition of duties on imported goods, improving their competitive position and assisting them in the form of cash payments. The WTO ruled that this constituted a double penalty on non-US competitors; it ruled the Byrd Amendment illegal in January 2003.

A total of US $ 231 million was distributed in 2001 and around US $ 330 million in 2002. Information published indicates that distribution for 2003 would amount to about US $ 240 million.

If the US does not bring its legislation into conformity with its international obligations the EU would impose retaliatory measures early in 2005.

Subsidies – EU to lift sanctions and ask for check on WTO compatibility.

Foreign Sales Corporations (FSC): EU welcomes US repeal of illegal export

Press Release (25 October 2004)

http://trade.ec.europa.eu/doclib/docs/2004/october/tradoc_119759.pdf

The European Commission strongly welcomed the signature, by the US President of the Bill repealing the illegal FSC/ETI export subsidies, which thus becomes US law. This is the latest act in an effort from the US to comply with several WTO rulings which had found the legislation in question to provide illegal subsidies to US exporters to the tune of $US 4 billion per year. The law, however, provides that FSC/ETI benefits will still be available to US exporters up to the end of 2006 and in some cases for an unlimited period thereafter.

Upon signature of the Bill by the US President, EU Trade Commissioner Pascal Lamy said: "I am extremely pleased that this Bill now has become law. It is a victory for multilateralism and for the rule of law in foreign affairs and I want to thank leaders of the US Congress and Bob Zoellick for their efforts in this respect. Obviously, I am very satisfied that our efforts have been rewarded after five years, right before the end of the mandate of the current European Commission.

In recognition of the progress that has been made, I will now propose to the Council the lifting of the FSC sanctions currently in force. As there remain some problems with the Bill, which we have previously discussed both with the US Administration and Congress, we intend to resolve these issues in the WTO. ."

He added: "We have been trying to put FSC to bed for a long time. It is now in bed, but we need to just check before the lights go out".

The US law, which applies only as from next year, provides for a 2-year transitional period; during that period FSC/ETI benefits of more than $US 4 billion and $US 3 billion in 2005 and in 2006 respectively will still be available to US exporters. Furthermore, and more worryingly for EU operators, FSC/ETI benefits will continue to be available without any limitations to all exporters who have entered binding contracts before 17 September 2003 under the so-called grandfathering clause, favouring producers of large capital goods which have long delivery times.

While during discussions with US Congress the EU had signalled its willingness to accept a two year transition period provided all other aspects of the bill were satisfactorily addressed, the EU had also indicated that there remained other problems to resolve, such as the grandfathering clauses which the EU believes are incompatible with WTO rules. The EU will now go to the WTO dispute settlement system as regards the WTO compliance of the new legislation.

Background.

The WTO found the FSC to constitute an illegal export subsidy under both the Subsidies Agreement and (in relation to agricultural products) the Agriculture Agreement. The US was given until 1 November 2000 to withdraw the FSC scheme.

On 15 November 2000, President Clinton signed the ETI Act, which meant to replace the FSC. The ETI Act, however, did not modify the substance of the export subsidy scheme and as a result the EU challenged it before the WTO. In January 2002, the WTO confirmed that the ETI Act also constituted a prohibited export subsidy and that the US had not, therefore, complied with its previous ruling.

On 7 May 2003 the WTO endorsed the EU request for countermeasures for a level roughly equal to the estimated annual US subsidy (i.e. US$ 4 billion).

The Council Regulation imposing countermeasures was published on 17 December 2003 in OJ L 328 p.3. With the clear objective of obtaining withdrawal of the US measures, it provided for a gradual imposition of countermeasures as from 1 March 2004 at the level of 5%, followed by automatic, monthly increases of 1% up to a ceiling of 17% to be reached in March 2005. The current level is 12%. The targeted products cover a wide variety of sectors (e.g. steel, textiles, paper) with the exception of the civil aircraft sector.

Among the major beneficiaries of the FSC/ETI are: Boeing, Caterpillar, General Electric, Microsoft, Intel, Motorola. As a way of an example, Boeing, the major beneficiary, has received an average of $US 178 million in the period 2001-2003 while total benefit from 1992 through 2003 amounts to over $US 1,6 billion. Boeing is also likely to be one of the beneficiaries of the grandfathering clause since long delivery times are common in the aircraft sector; for example, two mega-purchase orders placed with Boeing by General Electric's subsidiary GECAS in January 1996 and July 2000 respectively (covering nearly 400 aircraft of a total value of $US 9.5 billion) provide for deliveries to take place as late as 2007 and 2008 or possibly even later if options are exercised.

The Commission will now propose to the Council to suspend the sanctions currently in place, as from 1 January 2005, date when the US repeal bill will enter into force. The Commission will also go to the WTO dispute settlement system as regards the WTO compliance of the new legislation.

US-Boeing: EU rejects US unilateral abrogation of the 92 aircraft agreement.

EC Press Release (8 October 2004).
http://trade.ec.europa.eu/doclib/docs/2004/october/tradoc_119409.pdf

In a note verbale dispatched today to the US, the EU rejects the US unilateral abrogation of the EU-US 1992 agreement on large civil aircraft as being invalid under international law. The EU refutes the arguments used by the US for terminating the agreement as "groundless and unsubstantiated" and in particular the allegations of EU non-compliance with the terms of the agreement. The EU also reiterates its strong concerns regarding the massive subsidies to be granted by the US to the Boeing 7E7 in violation of the 1992 Agreement and rejects the unilateral abrogation as an attempt by the US to escape from its obligations under the Agreement. The EU requests that both parties hold consultations before any definitive decision in the US is made in respect of the granting of support to the Boeing 7E7. Finally, the EU expects the US to take the necessary steps to ensure full compliance with its international obligations under the Agreement.

The letter in detail:

- The EU considers the abrogation invalid and consequently, the Agreement is still in force. The US has provided no evidence of EU non-compliance but groundless and unsubstantiated general allegations. For more than two and a half years and despite repeated reminders, the US has declined to hold the mandated bi-annual meetings envisaged under Article 11.1 of the Agreement, at which any concern could have been discussed. Nor has the US requested consultations under Article 11.2 of the Agreement on matters related to its functioning. Finally, the United States did not raise such allegations at the meetings with the European Commission on government support to the aerospace sector on 22 July 2004 and 16 September 2004, the only occasion on which there have been any substantive exchanges on aircraft subsidy matters for a considerable time.

- The EU expresses its concerns regarding the infringements by the US of the Agreement (in particular of Articles 3 and 5) regarding support provided to Boeing, which have been already communicated to the US on several occasions before. In particular, during the meetings in July and September the EU raised strong objections to the subsidies granted to Boeing 7E7 and provided evidence in support of this.

- The EU therefore requests consultations on public support in the United States for the 7E7 programme under Article 11.2 of the Agreement before any definitive decisions are made in the United States to grant such support.

US-Boeing: EU takes US to the WTO over subsidies granted to Boeing.

EC Press Release (6October 2004)
http://trade.ec.europa.eu/doclib/docs/2004/december/tradoc_119238.pdf

Today, the EU has requested consultations with the United States in the World Trade Organization (WTO) on massive subsidies granted to Boeing. The EU believes that these subsidies are in serious violation of the WTO Agreement on Subsidies and Countervailing Measures. The US launched a case regarding European support to Airbus earlier in the day. EU Trade Commissioner Pascal Lamy stated: "The US move in the WTO concerning European support to Airbus is obviously an attempt to divert attention from Boeing's self-inflicted decline. It also shows that the US were never seriously interested in seeking to renegotiate the existing 92 EU-US Bilateral Agreement. . If this is the path the US has chosen, we accept the challenge, not least because it is high time to put an end to massive illegal US subsidies to Boeing which damage Airbus, in particular those for Boeing's new 7E7 programme. Nonetheless, it is a pity that the US has chosen to go to litigation which could destabilize trade and investment, including in Boeing's 7E7 project. Aerospace workers can rely on the European Commission to defend their interests.

For many years the US Government has subsidised Boeing, mainly by paying research and development costs through NASA, the Department of Defence, the Department of Commerce and other government agencies. Since 1992 Boeing has received around $ 23 billion in US subsidies. Moreover, the US Government continues to grant Boeing around USD 200 million per year in export subsidies under the Extraterritorial Income Exclusion Act (the successor to the "FSC" - Foreign Sales Corporations legislation), despite a WTO ruling expressly declaring these subsidies illegal.
The latest and most flagrant violation consists in massive subsidies of about US $ 3.2 billion, inter alia in the form of tax reductions and exemptions and infrastructure support for the development and production of Boeing's 7E7, also known as "Dreamliner". The evidence the European Commission has collected over the years clearly demonstrates that the above subsidies violate the WTO Agreement on Subsidies and Countervailing Measures.

Moreover, they also violate the 1992 EU-US Agreement on Trade in Large Civil Aircraft which regulates precisely the forms and level of government support the US and the EU provide to Boeing and Airbus respectively.

Despite repeated invitations by the Commission, the US has declined to participate in the bilateral consultations stipulated by the 1992 Agreement for more than two years. Nonetheless, further to a US request only a few weeks ago, the Commission agreed to discuss the question of a possible revision of the 1992 Agreement provided that this would cover all forms of subsidies including those used in the

US, and that the US would bring any subsidies for the Boeing 7E7 into conformity with the 1992 Agreement.

Finally, and just when these discussions were taking place (most recently in a constructive meeting on 16 September), the US requested WTO consultations on European support to Airbus. This suggests that the US request for re-negotiation of the 1992 Agreement was never particularly serious.

WTO consultation and dispute settlement procedures.

The first step in a WTO dispute settlement is a request for consultation from the complaining member. The defendant has 10 days to reply to the request and shall enter into consultation within a period of no more than 30 days (unless otherwise agreed by the 2 parties). The consultation should aim at finding a positive solution to the issue at stake.

If the consultations fail to settle the dispute within 60 days after the date of receipt of the consultation request, the complaining party may request the Dispute Settlement Body (DSB) to establish a Panel (however, the complaining party may request a panel during the 60 day period if the 2 parties considers that the consultations have failed to settle the dispute).

Once the panelists are nominated, the complaining party has normally between 3 and 6 weeks to file its first written submission and the party complained against another 2/3 weeks to respond. Two oral hearings and a second written submission follow. On average a panel procedure lasts 12 months. This can be followed by an appeal that should not last longer than 90 days.

US Byrd Amendment – WTO says eight WTO Members may retaliate against the US – Joint Press statement by Brazil, Canada, Chile, the EU, India, Japan, Korea, and Mexico.

Press Release (Brussels, 31 August 2004)
http://trade.ec.europa.eu/doclib/docs/2004/september/tradoc_118727.pdf

The WTO arbitrators have today given a green light for eight WTO Members to retaliate up to more than $150 million against the U.S. for failing to comply with its international trade obligations. In January 2003, the WTO ruled as illegal a piece of U.S. legislation commonly known as the "Byrd Amendment", under which anti-dumping and countervailing duties are distributed to the domestic companies that had requested or supported the imposition of those duties. The WTO gave the U.S. until December 2003 to comply with the WTO ruling but the U.S. missed this deadline. The failure by the U.S. to bring its measure into conformity with WTO rules prompted eight WTO members - Brazil, Canada, Chile, the EU, India, Korea, Japan and Mexico – to request authorisation from the WTO to impose additional import duties on US products or to suspend other obligations to the US. Further to today's award, the co-complainants may exercise their retaliatory rights, at any time deemed appropriate, in accordance with the award and the requirements of the WTO rules on the settlement of trade disputes. The award of the Arbitrators cannot be appealed. The eight WTO Members strongly urge the US to act immediately to repeal the illegal "Byrd Amendment".

In today's decision, the WTO has taken the approach to calculate the level of the additional import duty or other countermeasures based on the amount of payments disbursed to the US industry in the latest annual distribution. Specifically, the authorized level of retaliation is based on the trade effects of the most recent payments distributed from anti-dumping or countervailing duties collected on the products originating from each Member. Accordingly those payments shall be multiplied by a factor of 0.72, which is based on an economic model developed by the arbitrator to determine such trade effects.

The level of sanctions may vary every year so as to reflect the wide variations in the amount of payments made under the Byrd amendment from one year to the other.

Background.

The Continued Dumping and Subsidy Offset Act of 2000 (so-called Byrd amendment) mandates the distribution of the anti-dumping and countervailing duties to the companies that brought or supported the complaints. It therefore creates an undue incentive for U.S. industries to seek the imposition of duties on imported goods, thereby improving their competitive position and receiving cash payments.

A total of US $ 231 million was distributed in 2001 and around US $ 330 million in 2002. The main recipients have been in the bearing, steel and other metal, household item and food (in particular pasta) sectors. Though 2003 data regarding disbursements has yet to be finalised, information published so far indicates that distribution for that year would amount to about US $ 240 million. Eleven WTO Members (Australia, Brazil, Canada, Chile, EU, India, Indonesia, Japan, Korea, Mexico and Thailand) combined forces to challenge the WTO compatibility of the legislation in 2001. A Panel in September 2002 and the Appellate Body in January 2003 confirmed that the Byrd amendment is an illegal response to dumping and subsidisation. The US had until 27 December 2003 to bring this legislation into conformity with the WTO rules. Eight WTO members (Brazil, Canada, Chile, the EU, India, Korea, Japan and Mexico) then requested the DSB to authorize the countermeasures on 26 January 2004. The US objected to these requests and the issue of the level of countermeasures was referred to arbitration.

THE EU DEFENDS ITS GMO POLICIES AT THE WTO.

EC Press Release (5 June 2004)
http://trade.ec.europa.eu/doclib/docs/2004/june/tradoc_117666.pdf

The US, Canada and Argentina have brought a WTO challenge against the EU concerning the EU actions and behaviour with regard to genetically-modified organisms (GMOs). In a first written submission to the WTO, the EU has strongly rejected the allegations that such actions and behaviour are in contrast with WTO obligations. In this WTO dispute, the EU is defending the legitimate right of each State to establish and apply a regulatory regime to ensure that GMOs are only put on the market on the basis of a careful assessment of risks, appropriate control and monitoring measures, and proper information to consumers.

The allegations of the US, Canada and Argentina that the EU has not acted diligently with regard to the assessment of GM products are totally unfounded. As a matter of fact, the EU has made a huge effort over the past years to review its system in the light of scientific evidence, social concerns, and internationally agreed principles, and it has introduced an improved legal framework to decide on the release of GMOs into the environment. That is the right way to respond to the citizens' demands for open and responsible decision-making with regard to GM products.

In line with the precautionary principle, each GM product has to undergo a strict assessment procedure at national and EU level before it can be marketed in the EU. GM products that raise concerns over their effects on health or the environment cannot be authorised. Furthermore, consumers must be informed through clear labelling of the presence of GM ingredients in food products.

There is no basis to claim that there is a 'moratorium' in the EU. The assessment procedures of new GM products have never been stalled: on the contrary, there have been great efforts to make progress even in a period when the EU was reframing its assessment procedures in the light of scientific developments and social concerns. Every application for approval is thoroughly assessed on its merits. Whenever the EU is satisfied about the safety of a GM product, an authorisation is granted in accordance with EU legislation.

That is precisely what happened on 19 May, when the EU authorised a new variety of sweet corn. However, the Panel cannot ignore the fact that modern techniques of genetic modification are a recent development. Therefore, most States have adopted a precautionary approach with a view to achieving their preferred level of protection, which may of course vary from country to country. The EU is engaged in a process to harmonise the remaining divergences between different EU Member States, some of which have adopted temporary restrictions on the marketing of some GM products. This process will result in a coherent European-wide treatment for all those products.

The EC is confident that the Panel will judge that its course of action is that of a prudent government in line with its obligations under WTO law.

Despite calls by the US administration to repeal the law, the US Congress has not yet implemented the WTO ruling. Two bills are pending, but neither has so far reached the discussion stage.

WTO arbitrators agree on EU request for sanctions in dispute over US 1916 Anti-Dumping Act.

EC Press Release (24 February 2004)
http://trade.ec.europa.eu/doclib/docs/2004/april/tradoc_115969.pdf

Today, the WTO arbitrators have accepted the EU request seeking authorisation to impose sanctions on the US given its non-compliance with a WTO ruling condemning the US 1916 Anti-dumping Act in 2000. The sanctions would take the form of a specific legislation applicable to dumped imports from the US and mirroring the US 1916 Anti-Dumping Act. The EU may now adopt a mirror regulation at any time, but it strongly hopes that rapid action by Congress will make such a step unnecessary. EU Trade Commissioner Pascal Lamy commented: "The decision of the arbitrators is a welcome reaffirmation that the WTO is a rule-based system and members may not ignore their obligations with impunity. I welcome the recent move the US Congress to bring legislation forward to implement the WTO ruling. I hope that rapid action from Congress will make sanctions unnecessary."

With today' s decision, the arbitrators have given green light to the European Union to adopt a regulation mirroring the US 1916 Anti-Dumping Act. This regulation would be applicable exclusively to products originating in the United States. Today's decision cannot be appealed but still needs to be endorsed by a formal decision of the Dispute Settlement Body (DSB). The DSB decision is acquired unless all Members, including the EU, vote against it.

Three repealing bills are pending in Congress and one was finally referred by the Congressional Committee for consideration to the House of Representatives in January 2004. However, there has not been any indication so far that full implementation would promptly follow.

The US 1916 Anti-Dumping Act provides for damages to the complainant equivalent to three times the damage suffered, fines up to US $ 5,000 or imprisonment up to one year.

The EU mirror legislation would entitle companies in the EU to bring complaints against US companies under the same basic conditions as those required under the 1916 Anti-Dumping Act, i.e. if products from the US are being dumped with an intent to harm an EU industry or to restrict trade in the EU and if damage is being caused to the complainant.

The complaint would trigger an investigation by the Commission and would eventually lead to the imposition of a duty on imports of the product concerned from the US. The level of the duty would be set so as to collect over its 5 year anticipated lifetime three times the damage caused.

Background.

In September 2000, the WTO condemned the 1916 Anti-Dumping Act for allowing sanctions against dumping not permitted under the WTO agreements. The Anti-Dumping Agreement limits the action against dumping to the imposition of duties or minimum import prices.

As a result of this condemnation, the US had to repeal the Act by December 2001. But more than 3 years after the WTO ruling, the 1916 Anti-Dumping Act is still in force threatening EU companies with business activities in the US. Since the matter was referred to the WTO in June 1998, four new complaints were brought against EU companies in the steel or newspaper printing machines sectors, involving large

litigation costs. The threat represented by the 1916 Act is further evidenced by a recent jury verdict of 3 December 2003 condemning a Japanese company to US $ 31,5 million damages.

The EU made all efforts to accommodate the US difficulty in complying with the WTO decision. The period of time within which the US was to repeal the Act was extended for 5 months and the arbitration on the EU request for sanctions suspended for more than a year and a half. But, the persisting inaction of the US left no other option than to seek the authorisation to apply sanctions in the hope that this would trigger action from Congress.

The US defended that the EU could not impose any sanctions on the allegation that the 1916 Anti-Dumping Act would not have affected EU exports to the US. Today's decision rejected the US proposition that only trade flows may measure the harm inflicted and clearly confirmed that the 1916 Anti-Dumping Act is already nullifying benefits accruing to the EU under the WTO.

In parallel to the reactivation of the arbitration, the Council adopted on 15 December 2003 a Regulation to provide relief to the EU companies facing claims based on the 1916 Anti-Dumping Act. This Regulation entered into force on 9 January 2004 and merely seeks to neutralise the effects of the 1916 Anti-Dumping Act in the EU. Thus, it prohibits the recognition and enforcement in the EU of Court or administrative decisions based on the 1916 Anti-Dumping Act. It also allows EU companies or individuals to counter-sue the US plaintiff in order to recover any outlays, costs, damages and expenses caused by the application of the Anti-Dumping Act of 1916. This Regulation does not affect

EC – Links to Foreign Ministries & Trade Ministries Worldwide.

http://ec.europa.eu/trade/gentools/links_en.htm

Albania	http://www.mfa.gov.al
Algeria	http://www.mae-dz.org
Andorra	http://www.govern.ad/
Angola	http://www.angola.org/politics/index.htm
Antigua and Barbuda	http://www.antigua-barbuda.com
Argentina	http://www.minproduccion.gov.ar/sicym/comercio/default1.htm
Armenia	http://www.armeniaforeignministry.com
Australia	http://www.dfat.gov.au
Austria	http://www.bmwa.gv.at
Bahamas	http://www.bahamas.gov.bs
Bahrain	http://www.commerce.gov.bh
Bangladesh	http://www.epb.gov.bd/
Barbados	http://www.bgis.gov.bb
Belarus	http://mintorg.gov.by/site/en/
Belgium	http://diplobel.fgov.be/default_en.htm
Belize	http://www.belize.gov.bz
Benin	http://www.gouv.bj/conseil_des_ministres/conseil_top.php
Bhutan	(none)
Bosnia and Herzegovina	http://www.fbihvlada.gov.ba/engleski/index.html
Botswana	http://www.gov.bw
Brazil	http://www.mdic.gov.br
Brunei Darussalam	http://www.mfa.gov.bn
Bulgaria	http://www.mi.government.bg/eng/index.html
Burkina Faso	http://www.primature.gov.bf
Burundi	http://www.burundi.gov.bi
Cambodia	http://www.moc.gov.kh
Cameroon	http://www.spm.gov.cm/acceuil.php?lang=en

Canada	http://www.dfait-maeci.gc.ca
Cape Verde	http://www.governo.cv/
Central African Republic	http://www.rca-gouv.net/gouvernement/gouvernement.htm
Chad	http://www.chadembassy.org
Chile	http://www.direcon.cl
China	http://english.mofcom.gov.cn/
Colombia	http://www.sic.gov.co
Congo	http://www.gouv.cg
Congo Democratic Republic	http://www.rd-congo.com/government.html
Costa Rica	http://www.comex.go.cr
Croatia	http://www.mfa.hr/MVP.asp?pcpid=1612
Cuba	http://www.cubagob.cu
Cyprus	http://www.cyprustrade.gov.cy
Czech Republic	http://www.mpo.cz/eng/
Denmark	http://www.um.dk/en/
Djibouti	http://www.republique-djibouti.com
Dominica	http://www.dexiaexport.com
Dominican Republic	http://serex.gov.do
Ecuador	http://www.mmrree.gov.ec
Egypt	http://www.sis.gov.eg
El Salvador	http://www.rree.gob.sv
Eritrea	http://www.eriemb.se/addresslinks.html
Estonia	http://www.mkm.ee/index.php?id=8544
Ethiopia	http://www.ethioembassy.org.uk/government/government.htm
F.Y.R. of Macedonia	http://www.vlada.mk/english/index_en.htm
Faroe Islands	http://www.tinganes.fo
Fiji Islands	http://www.foreignaffairs.gov.fj
Finland	http://www.vn.fi/etusivu/en.jsp
France	http://www.commerce-exterieur.gouv.fr/Sommaire.htm
Georgia	http://www.mfa.gov.ge
Germany	http://www.bmwi.de/English/Navigation/root.html
Ghana	http://www.ghana.gov.gh/index.php
Greece	http://www.mfa.gr
Grenada	http://www.belgrafix.com/Government/gov_frame.htm

Guatemala	http://www.mineco.gob.gt
Guinea Republic	http://www.guinee.gov.gn
Guyana	http://www.sdnp.org.gy/mtti
Haiti	http://www.haitifocus.com/haitie/exec.html
Honduras	http://www.sre.hn
Hong Kong (S.A.R.)	http://www.gov.hk/tid/e-index.htm
Hungary	http://en.gkm.gov.hu/feladat_en/foreign/foreign_trade
Iceland	http://www.mfa.is
India	http://commerce.nic.in/
Indonesia	http://www.deplu.go.id
Iran	http://www.mfa.gov.ir
Iraq	http://www.motiraq.org/
Ireland	http://www.entemp.ie/
Israel	http://www.tamas.gov.il/NR/exeres/B0B48981-357D-446F-AFAC-91A358E93C87.htm
Italy	http://www.mincomes.it/
Ivory Coast	http://www.pr.ci/gouvernement/index.html
Jamaica	http://www.mfaft.gov.jm
Japan	http://www.meti.go.jp/english/index.html
Jordan	http://www.mit.gov.jo
Kazakhstan	http://www.mfa.kz/eng/index.php
Kenya	http://www.kenyaweb.com/government/ministries/trade.html
Korea (Republic of)	http://www.mofat.go.kr/en/index.mof
Kuwait	http://www.moci.gov.kw
Kyrgyz Republic	http://www.mvtp.kg/main.php?lang=en
Laos	(none)
Latvia	http://www.am.gov.lv/en/
Lebanon	http://www.economy.gov.lb
Lesotho	http://www.lesotho.gov.ls/mnforeign.htm
Liberia	http://www.liberiaemb.org/govt.html
Liechtenstein	http://www.liechtenstein.li/en/eliechtenstein_main_sites/portal_fuerstentum_liechtenstein/fl-staat-staat.htm
Lithuania	http://www.urm.lt/index.php
Luxembourg	http://www.gouvernement.lu/gouv/fr/gouv/minist/aececd.html http://www.etat.lu/ECO/index.htm

Macao (S.A.R.)	http://www.economia.gov.mo
Madagascar	http://www.mefb.gov.mg/
Malawi	http://www.malawi.gov.mw/Trade/Home%20%20Trade.htm
Malaysia	http://www.miti.gov.my
Maldives	http://www.investmaldives.com/home.htm
Mali	http://www.maliembassy-usa.org/politics_en.html
Malta	http://www.metco.net/
Mauritania	http://www.mauritania.mr/
Mauritius	http://industry.gov.mu
Mexico	http://www.economia.gob.mx
Moldova	http://www.trade.moldova.md
Morocco	http://www.mcinet.gov.ma
Mozambique	https://www.govnet.gov.mz/
Myanmar	http://www.commerce.gov.mm/moc/index.html ministry/moc_web/index.html
Namibia	http://www.mti.gov.na
Nepal	http://www.tpcnepal.org.np
New Zealand	http://www.mfat.govt.nz
Nicaragua	http://www.mific.gob.ni
Niger	http://www.nigerembassyusa.org/govt.html
Nigeria	http://www.nopa.net/index.html
Norway	http://odin.dep.no/ud/engelsk
Oman	http://www.mocioman.gov.om/english/home.html
Pakistan	http://www.paktrade.org
Palestine	http://www.paltrade.org
Panama	http://www.mici.gob.pa/
Papua New Guinea	http://www.pngonline.gov.pg
Paraguay	http://www.mic.gov.py
Peru	http://www.mincetur.gob.pe/index_f.asp?cont=1025132
Philippines	http://www.dti.gov.ph
Poland	http://www.mgip.gov.pl/English/ECONOMY/
Portugal	http://www.min-economia.pt/
Qatar	http://www.planning.gov.qa
Romania	http://www.mae.ro/index.php?lang=en
Russia	http://www.ln.mid.ru/website/bul_ns_en.nsf/kartaflat/en01
Rwanda	http://www.gov.rw

San Marino	http://www.interni.segreteria.sm/Dipartimenti/dipartimenti.htm
Saudi Arabia	http://www.mofa.gov.sa/
Senegal	http://www.gouv.sn/ministeres/mpme/contacts.cfm
Seychelles	http://www.sey.net/gen_govt.htm
Sierra Leone	http://www.statehouse-sl.org/ministrytrade.htm
Singapore	http://www.mti.gov.sg
Slovakia	http://www.government.gov.sk/english/
Slovenia	http://www.sigov.si/mzz/eng/index.html
Solomon Islands	http://www.commerce.gov.sb
Somalia	http://www.somaligov.com
South Africa	http://www.dti.gov.za
Spain	http://www.mcx.es/
Sri Lanka	http://www.priu.gov.lk/Ministries/Min_Trade_Commerce_Con_Affairs_Markt_Dev.html
St Lucia	http://www.stlucia.gov.lc/agencies/
St Vincent and The Grenadines	http://www.gov.vc/Govt/Government/Executive/Ministries/FAffairsCommerce&Trade/Commerce&Trade/Commerce.asp?z=0
Sudan	http://www.sudan.net/govt.shtml
Swaziland	http://www.swazi.com/government/ministries/min-for.html
Sweden	http://www.utrikes.regeringen.se/inenglish/index.htm
Switzerland	http://www.evd.admin.ch
Syria	http://www.syrecon.org
Taiwan	http://eweb.trade.gov.tw/
Tajikistan	(none)
Tanzania	http://www.tanzania.go.tz/indexE.html
Thailand	http://www.moc.go.th/
The Netherlands	http://www.minez.nl/
Togo	http://www.republicoftogo.com
Tonga	http://www.pmo.gov.to/
Trinidad and Tobago	http://www.tradeind.gov.tt
Tunisia	http://www.cepex.nat.tn/
Turkey	http://www.dtm.gov.tr/engmenu.htm
Uganda	http://www.mofa.go.ug
Ukraine	http://www.kmu.gov.ua/control/en

United Arab Emirates	**http://www.government.ae/gov/en/gov/index.jsp**
United Kingdom	**http://www.dti.gov.uk/**
Uruguay	**http://www.mrree.gub.uy/mrree/cuadro2.htm**
USA	**http://www.ustr.gov**
Uzbekistan	**http://www.gov.uz**
Venezuela	**http://www.mre.gov.ve**
Vietnam	**http://www.mofa.gov.vn/en/**
Yugoslavia (Federal Rep.)	**http://www.gov.yu/start.asp?je=E**
Zambia	**http://www.state.gov.zm**
Zimbabwe	**http://www.gta.gov.zw**

Government of India, Ministry of Commerce & Trade, Department of Commerce.

INDIA -- WTO & ITS IMPLICATIONS FOR INDIA.

(From *"India and the WTO*" (March – April 2006). Based on Kamal Nath's address at the National Defence College Course on "WTO & Its Implications for India ", New Delhi , 3/3/2006)

http://commerce.nic.in/mar-apr06/main.htm#5

GATT to WTO……..….

- **Since the creation of the GATT, in 1948 - with 23 founding members (India was a founder member of the GATT) - there have been significant changes in the political and economic landscape of the world. Technology is linking us together in an unprecedented manner through communications, information technology, and ideas, as well as trade, services and investments. This has generated unprecedented potential for an inter-dependent world.**
- **The General Agreement on Trade and Tariff (GATT), which came into force on January 1, 1948, had been established as an attempt to create an effective rules-based system in multilateral trade. Rapid tariff increases, unimpeded by multilateral obligations, had been the order of the day.**
- **Unconditional MFN is one of the fundamental principles of the multilateral system. The great economic depression was partly seen as a consequence of closed and unruly markets. One of the most important principles of the WTO is the most-favoured nation (MFN) provision. Thus, any tariff or other advantage given by a WTO Member to any other Member automatically becomes available to all other Members. This is particularly useful for developing countries, like India , as obtaining such an advantage on a bilateral basis particularly from developed countries would be a much more difficult task.**
- **The WTO ensures that all Members extend to imported goods, treatment which is not more restrictive than what is applicable to domestic goods. Such national treatment ensures, for instance, that India 's exports are not subject to any unfavourable restriction in terms of sale, purchase, transportation or distribution in the market of the importing country.**
- **The establishment of WTO in 1995 reflected a recognition that the process of trade liberalisation in an increasingly economically inter-dependent world would require an institutional set up going beyond what was provided by the GATT. This became particularly necessary because the Uruguay Round had considerably expanded the ambit of trade negotiations into new areas of domestic economic policy making.**
- **The number of WTO members has now increased to 150. 28 more countries, including Russia & Vietnam are in various stages of their accession negotiations. This enormous**

increase in its Membership clearly demonstrates the significance and value attached to the WTO by the world community.

Trade, growth and development……...

- **The current negotiations at the WTO under the Doha Work Programme are broadly under the major areas of agriculture, manufactured goods, services and the broad category of Rules which deal with disciplines governing determination and levy of anti-dumping, countervailing duties or in simplification of customs procedures and regional trading arrangements, trade and environment and TRIPS related issues.**
- **Of these, the negotiations in agriculture are the most wide-ranging and critical as these affect the livelihood of millions of farmers, particularly in poor developing countries. In agriculture, it remains critical to our collective interests that the trade-distorting subsidies and protection provided by a few developed countries are eliminated so that a level playing field is established. While striving for removal of distortions and protection in developed world, it is also a fact that agriculture supports and provides livelihood to the bulk of the farming community in the developing world. The bulk of the rural poor in countries like India are vulnerable to external developments. Protection of their interests is cardinal for India .**
- **In non-agricultural market access (NAMA) negotiations, India seeks significant market access for developing countries through the reduction in tariff peaks, tariff escalation, high tariffs and non-tariff barriers in the developed countries on products of their export interest. Regarding the tariff commitments to be undertaken by the developing countries, these should reflect their developmental needs and should include the provision of adequate policy space. It also needs to be recognised that India has autonomously been liberalising its tariff regime over the last few years. This has provided significant market access to other countries in the Indian markets. On the other hand, we have not seen such autonomous liberalisation in tariffs in developed countries, particularly on products of export interest to developing countries.**

Doha Round……...

- **In Services, our negotiating objectives have evolved keeping in mind our strengths and the vibrance of services sector as witnessed in the past few years. Negotiations in the Services area follow a pattern slightly different from those relating to goods trade. The request and offer pattern is adopted where a Member makes request to another Member or group of Members (plurilateral) for providing access to its services in a particular sector. In response, Members make offers indicating the service sector which they are willing to open to other Members subject to conditions which apply across the board. India is particularly interested in ensuring opening of sectors for Indian professionals going abroad or Indian firms providing cross border services - Mode 1 and Mode 4.**
- **India has also been pushing to ensure that our concern for providing affordable medicines for the poor is ensured through linking of public health concerns in the TRIPS Agreement. The General Council brought in flexibilities to address the public health problems, resulting from HIV/AIDS, tuberculosis, malaria and other epidemics, and to enable to manufacture and export pharmaceutical products under compulsory license to countries with limited or no manufacturing capacities in the pharmaceutical sectors. In this regard, the amendment to the TRIPS Agreement has also been made and reaffirmed by the Hong Kong Ministerial**

Conference. Specific provisions for compulsory licensing have been provided in our own patent law.

- **India has also been at the forefront of an effort of many developing countries striving to guard against bio-piracy by incorporating suitable provisions in the TRIPS Agreement to ensure that our biological/genetic material and traditional knowledge is adequately compensated through reasonable benefit-sharing. We are facing immense opposition from developed countries in these efforts, but we have emphasized that this is an essential component of the development dimension of the Doha Round. In this regard, India is raising the issue of bringing appropriate harmony between the objectives of the TRIPS Agreement and the objectives of the Convention on Biological Diversity (CBD).**
- **Negotiations in the area of Rules (anti-dumping and subsidies agreement) also need to deliver on pro-development outcome and lead to such strengthening in disciplines as may be necessary to ensure that these instruments are used to check unfair trade practice only and not used to restrict market access for developing countries exports.**
- **The Hong Kong Ministerial was an important milestone. The outcome of the Ministerial envisages that the negotiations must be concluded in 2006 and establishes time-lines and targets in specific negotiating areas. From India's perspective, the Hong Kong Ministerial Declaration addresses some of our core concerns and interests and provides us negotiating space for future work leading up to modalities. Salient elements of the Declaration and gains for India are as follows:**
- **Duty-Free, Quota-Free market access for all LDCs' products by all developed countries. Developing country declaring itself in a position to do so to also provide such access; however, flexibility in coverage and to phase in their commitments provided.**
- **In Cotton, export subsidies to be eliminated by developed countries in 2006; trade distorting domestic subsidies to be reduced more ambitiously and over a shorter period of time.**
- **To establish modalities in Agriculture and non-agricultural market access (NAMA) by 30 April 2006; Draft Schedules by July 31 2006.**
- **In agriculture, to eliminate export subsidies by 2013, with substantial part in the first half of implementation period; elimination of cotton export subsidies by developed countries by 2006.**
- **On their trade distorting domestic support, the three heaviest subsidizers to attract steepest cuts; developing countries like India with no AMS will be exempt from any cuts on de minimis and on overall levels.**
- **Developing countries to have the flexibility to self-designate Special Products; price and quantity triggers agreed on the Special Safeguard Mechanism.**
- **In NAMA, S&DT elements, such as on flexibilities and less than full reciprocity in reduction commitments for developing countries re-affirmed.**
- **In Services, to submit a second round of revised offers by July 31, 2006; Final Draft Schedules by October 31, 2006.**
- **No sub-categorization of developing countries when addressing concerns of small, vulnerable economies.**
- **Further, India has formed broad-based alliance with other like-minded developing countries such as G-20 and G-33 on issues of common interest. The efforts of coalition building by India and other developing countries was reflected in the outcome at Hong Kong Ministerial Conference in December 2005.**
- **On the domestic front, the Government holds periodic consultations with various stakeholders to fine tune its approach to the negotiations. In this regard, the Government also gets analysis done of various negotiating issues and feedback from these studies is again fed into the negotiating strategy.**

- **Our experience of the last more than 10 years shows that on balance, our membership of the WTO is beneficial to us. Since the establishment of the WTO on January 1, 1995, India 's trade has been growing continuously, both in the merchandise goods category as well as commercial services. Total merchandise goods exports of India have increased from US $ 26 billion in 1994-95 to US $ 81 billion in 2004-2005. While total merchandise imports (excluding petroleum products) of India have increased from US $ 23 billion in 1994-95 to US $ 77 billion in 2004-2005. Similarly, India 's total commercial services trade increased from US $ 14 billion in 1994 to US $ 80 billion in 2004.**
- **The Indian economy has averaged a growth rate of about 7% for over a decade and looks poised for achieving even higher growth of 8 to 10 per cent in the next few years. Our trade, both exports and import, have been rising steadily. There is little doubt that sustaining this growth pattern would require even closer integration with the global mainstream. India looks at the ongoing negotiations from the perspective of her development and the economic growth and development requirements.**

Government of India, Ministry of Commerce & Trade, Department of Commerce.

INDIA -- Annual Report on Commerce & Trade (2004-2005).

http://commerce.nic.in/annual2004-05/englishhtml/content.htm

WORLD TRADE ORGANISATION & STATUS OF RELATED ISSUES.

Dispute Settlement Understanding (DSU).

The deadline extended by one year to May 2004 for finalization of DSU amendment proposals and the negotiations on DSU are not a part of single undertaking. As the negotiations could not be completed even within the extended deadline, a decision has been taken for the continuation of work in the Special Sessions of the DSB.

Important Disputes Involving India At The WTO.

EU – GSP Dispute.

India obtained a favourable verdict at the WTO in the dispute with the European Union (EU) on tariff preferences extended by the EC under the Drug Arrangements window of its GSP Scheme. The Appellate Body of the WTO in its report of 7 April 2004 upheld the overall finding of the Dispute Settlement Panel that the EC has violated its GATT/WTO obligations in granting tariff preferences to 12 countries under the Drug Arrangements window of its GSP Scheme. The Appellate Body also held that the EC "failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause". The Panel and Appellate Body report were adopted by WTO's Dispute Settlement Body on 20th April 2004.

EU was required to implement the DSB decision within a "Reasonable period of Time"(RPT) which could have been determined by mutual agreement between India and EC. As the matter could not be resolved amicably, a process of binding arbitration was resorted to. The Arbitrator has determined that the RPT for EC to comply with the DSB decision in the dispute would be up to 1st July 2005.

US – Continued Dumping and Subsidy Offset Act of 2000.

In October 2000 US had enacted Continued Dumping and Subsidy Offset Act (CDSOA), popularly called Byrd Amendment, which provided for the distribution of the anti-dumping and countervailing duties collected by US to the companies that had brought or supported the original complaint. A WTO Panel and the Appellate Body held that the Byrd Amendment to be inconsistent with requirements under the Anti-Dumping Agreement and the Subsidies Agreement. A WTO Arbitrator gave the US a reasonable period of time up to 27 December 2003 for complying with the DSB decision in this dispute. As the US had not complied with the DSB recommendation in this dispute within the reasonable period of time, on 15 January 2004 some of the co-complainants including Brazil, India, Japan, EC, Korea and Mexico sought DSB authorization to retaliate against the US. As the request was objected to by the US the matter was referred to a WTO arbitrator.

In its report, circulated on 1 September 2004, the arbitrator has calculated the level of nullification or impairment based on an economic model and has come to the conclusion that India is entitled to suspend concessions and other obligations against the US to the extent of 0.72 multiplied by amount of disbursements under CDSOA for the most recent year for which data are available relating to anti-dumping or countervailing duties paid on imports from India at that time, as published by the United States' authorities.

EC- Imposition by EC of Anti-Dumping duty on imports of HR Coils from India.

On 5 July 2004 India sought formal consultations with the EC regarding imposition of Anti-Dumping duty on imports of HR Coils from India. According to India, anti-dumping measures are in force against imports into the EC of HR Coils from India, yet no measures are in force against imports the same product from Egypt, Slovakia and Turkey, notwithstanding that the products imported from the latter three countries were found by the EC to be dumped and causing injury to the EC industry and that the EC also considered it to be in the Community interest to impose measures against them. On 13th September 2004 EC terminated the anti-dumping duty on HR Coils.

India – imposition of anti-dumping duties on imports from Chinese Taipei.

On 1st November 2004 Chinese sought request for consultations in respect of provisional and definitive anti-dumping measures imposed by India on certain products from Chinese Taipei. According to Chinese Taipei, the anti-dumping measures at issue appear to be inconsistent with India's obligations with GATT 1994 and the Anti-dumping Agreement.

Department of Commerce & Industry (Directorate General of Antidumping & Allied Duties).

INDIA -- Annual Report on Anti-Dumping 2003 – 2004.

http://commerce.nic.in/dgad/website/cover.htm

Legal framework for anti-dumping and subsidy measures .

The national legislation in respect of anti-dumping was put in place when the Customs Tariff (Identification, Assessment and Collection of duty or Additional duty on Dumped Articles and for Determination of Injury) Rules, 1985 were notified. Sections 9, 9A, 9AA, 9B and 9C of the Custom Tariff Act, 1975 as amended in July 1995 and the Customs Tariff (Identification, Assessment and Collection of Anti Dumping Duty on Dumped Articles and for Determination of Injury) Rules,1995 as amended (in July 1999 vide Notification No.44/1999; in May 2001 vide notification No.28/2001, in January 2002 vide Notification No.1/2002 of 4th January 2002 *and in November 2003 vide Notification No. 101/2003-customs(Non-Tariff) dated 10.11.2003)* and Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995 framed there under form the legal basis for anti-dumping and anti-subsidy investigations and for the levy of anti-dumping and countervailing duties. These laws are in conformity with the WTO's Agreement on implementation of Article VI of the GATT 1994, commonly known as Agreement on Anti-Dumping and Agreement on Subsidies & Countervailing Measures.

Designated Authority.

The Designated Authority is appointed under Rule 3 of the Anti-dumping Rules. The anti-dumping & countervailing measures are administered in India by the Directorate General of Anti-dumping and Allied Duties which was set up on 13th April 1998. The Designated Authority's function is to conduct the anti-dumping and anti-subsidy/countervailing duty investigations and make recommendations to the Central Government for imposition of anti-dumping or countervailing measures where appropriate. These duties are finally imposed/levied (and collected) by Ministry of Finance through a Notification. Thus, while the Directorate General of Anti Dumping and Allied Duties in the Department of Commerce recommends the anti-dumping/countervailing duty, it is the Ministry of Finance, which actually levies the duties. An appeal, if any, against the order of determination or review thereof lies before the Customs, Excise & Service Tax Appellate Tribunal (CESTAT-formerly known as CEGAT) and thereafter to the Supreme Court of India. However, various High Courts of the country also hear these matters under their writ jurisdiction.

Details of anti-dumping investigations.

DGAD received 35 applications during the year 2003-04 from the domestic industry alleging dumping of various products causing injury to the domestic industry. After scrutiny of these applications, the DGAD accepted 14 applications for initiation of investigation. Out of the remaining applications, 8 have not been accepted due to lack of sufficient evidence and documentation. 13 applications were under scrutiny at the end of the reporting period.

The first anti-dumping investigation in India was initiated in 1992. During the period from 1992-93 to 2003-04, the DGAD received large number of applications for initiating anti-dumping investigations. After examination of these applications, anti-dumping investigations were initiated in 167 cases. Between 1997-2004, 31 applications were not accepted by the DGAD for various reasons. Major product categories for which anti-dumping applications have been filed by the domestic industry pertain to chemicals & petrochemicals followed by pharmaceuticals, steel & other metals and fibers/yarns. The countries involved are mainly China PR, the EU, Republic of Korea and Chinese Taipei. While the total number of cases investigated is 167, countries involved in these investigations are 39 (including EU member countries).

Investigations Initiated Against Exports from India.

Indian exports are facing number of anti-dumping and anti-subsidy cases against them from other members of the WTO. The table below shows the details of some of the anti-dumping cases initiated by various WTO members against Indian exports.

This data has been compiled from various sources namely Directorate General of Foreign Trade (DGFT), Export Promotion Councils (EPCs) and Administrative Ministries as the DGAD is not the nodal agency for cases initiated against Indian exporters. The list, however, does not contain all cases initiated against India

EU, USA, Canada and South Africa account for almost 60% of the Anti-Dumping cases initiated against Indian exports. The European Union continues to be on the top of the list with 26 initiations out of a total of 101 initiations against India. USA comes next with 18 initiations followed by South Africa with 16 initiations. Indonesia accounts for 10% of the cases with 10 initiations. China, who has become an active user of AD measures has also initiated two cases against India out of which one has already resulted in definitive measure

Measures in Force against India.

Against a total initiation of 101 cases since 1995, 50 definitive measures have been imposed by other member countries against Indian exports. Country-wise distribution of measures against India also shows a similar pattern. The EU tops the list with 15 measures followed by South Africa with 10 definitive measures imposed against Indian exports.

Distribution of AD Measures.

During the period 1995-2003, on an average 6 measures have been imposed per year against Indian exports.

Product wise analysis of cases against Indian exporters indicates that highest number of anti-dumping cases continue to be on base metals including steel products and engineering products, which account for 32% of the total cases. This follows the global trend also as far as products most targeted by AD measures are concerned. This is followed by chemicals and allied products including drugs and pharmaceuticals which account for about 25% of all AD measures against India.

The table below shows the details of some of the anti-subsidy cases initiated by various WTO members against Indian exports. Since, the DGAD is not the nodal agency for subsidy cases against India, the data has been compiled from various sources. The list, however, does not contain all subsidy cases initiated against India.

EU, USA, and South Africa account for 82% of the anti-subsidy cases initiated against Indian exports. The European Union continues to be on the top of the list with 14 initiations out of a total 39 initiations against India. USA and South Africa come next with 9 initiations each followed by Canada with 5 initiations. Brazil accounts for 5% of the cases with 2 initiations.

Measures in Force against exports from India.

Against total initiation of 39 cases since 1995, 19 definitive measures have been imposed by other member countries against Indian exports. The EU tops the list with 9 measures followed by USA with 4 definitive measures imposed against Indian exports. South Africa and Canada have 3 measures each. Brazil has not imposed any measure out of 2 cases initiated so far.

During the period 1995-2004 on an average 4 initiations and 2 measures have been imposed against Indian exports.

Around 90% of the anti subsidy cases were initiated after the financial year 1997-98.
Product-wise distribution of Anti-Subsidy cases against India.

Product wise analysis of cases against Indian exports indicates that highest number of anti-subsidy cases continue to be on engineering including steel products, which account for 38% of the total cases. This is followed by Chemicals and allied products including drugs and pharmaceuticals and rubber and plastic products which account for about 18% each of anti-subsidy initiations against India.

EXTRACTS FROM THE CUSTOMS TARIFF ACT, 1975.

9. Countervailing duty on subsidized articles

(1) Where any country or territory pays, bestows, directly or indirectly, any subsidy upon the manufacture or production therein or the exportation there from of any article including any subsidy on transportation of such article, then, upon the importation of any such article into India, whether the same is imported directly from the country of manufacture, production or otherwise, and whether it is imported in the same condition as when exported from the country of manufacture or production or has been changed in condition by manufacture, production or otherwise, the Central Government may, by notification in the Official Gazette, impose a countervailing duty not exceeding the amount of such subsidy.

***Explanation.* - For the purposes of this section, a subsidy shall be deemed to exist if –**

(a) there is financial contribution by a Government, or any public body within the territory of the exporting or producing country, that is, where -

(i) a Government practice involves a direct transfer of funds (including grants, loans and equity infusion), or potential direct transfer of funds or liabilities, or both;
(ii) government revenue that is otherwise due is foregone or not collected (including fiscal incentives);
(iii) a Government provides goods or services other than general infrastructure or purchases goods;
(iv) a Government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions specified in clauses (i) to (iii) above which would normally be vested in the Government and the practice in, no real sense, differs from practices normally followed by Governments; or

(b) a Government grants or maintains any form of income or price support, which operates directly or indirectly to increase export of any article from, or to reduce import of any article into, its territory, and a benefit is thereby conferred.

(2) The Central Government may, pending the determination in accordance with the provisions of this section and the rules made thereunder of the amount of subsidy, impose a countervailing duty under this sub-section not exceeding the amount of such subsidy as provisionally estimated by it and if such countervailing duty exceeds the subsidy as so determined, -

(a) the Central Government shall, having regard to such determination and as soon as may be after such determination, reduce such countervailing duty; and
(b) refund shall be made of so much of such countervailing duty which has been collected as is in excess of the countervailing duty as so reduced.

(3) Subject to any rules made by the Central Government, by notification in the Official Gazette, the countervailing duty under sub-section (1) or sub-section (2) shall not be levied unless it is determined that –

(a) the subsidy relates to export performance;
(b) the subsidy relates to the use of domestic goods over imported goods in the export article; or
(c) the subsidy has been conferred on a limited number of persons engaged in manufacturing, producing or exporting the article unless such a subsidy is for-
(i) research activities conducted by or on behalf of persons engaged in the manufacture, production or export;
(ii) assistance to disadvantaged regions within the territory of the exporting country; or
(iii)assistance to promote adaptation of existing facilities to new environmental requirements.

(4) If the Central Government, is of the opinion that the injury to the domestic industry which is difficult to repair, is caused by massive imports in a relatively short period, of the article benefiting from subsidies paid or bestowed and where in order to preclude the recurrence of such injury, it is necessary to levy countervailing duty retrospectively, the Central Government may, by notification in

the Official Gazette, levy countervailing duty from a date prior to the date of imposition of countervailing duty under sub-section (2) but not beyond ninety days from the date of notification under that sub-section and notwithstanding anything contained in any law for the time being in force, such duty shall be payable from the date as specified in the notification issued under this sub-section.

(5) The countervailing duty chargeable under this section shall be in addition to any other duty imposed under this Act or any other law for the time being in force.

(6) The countervailing duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition:

> **Provided that if the Central Government, in a review, is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of subsidization and injury, it may, from time to time, extend the period of such imposition for a further period of five years and such further period shall commence from the date of order of such extension:**
> **Provided further that where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion before such expiry, the countervailing duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year.**

(7) The amount of any such subsidy as referred to in sub-section (1) or sub-section (2) shall, from time to time, be ascertained and determined by the Central Government, after such inquiry as it may consider necessary and the Central Government may, by notification in the Official Gazette, make rules for the identification of such article and for the assessment and collection of any countervailing duty imposed upon the importation thereof under this section.

(8) Every notification issued under this section shall, as soon as may be after it is issued, be laid before each House of Parliament.

9A. Anti-dumping duty on dumped articles.

Where any article is exported from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.

Ministry of Economy, Trade & Industry (METI of Japan).

JAPAN -- The 2005 Report on the WTO Inconsistency of Trade Policies by Major Trading Partners.

http://www.meti.go.jp/english/report/index.html

History of Unilateral Measures

To date, the United States is the most frequent user of unilateral measures, which also tends to cause most problems. While the EU and Canada also have procedures for imposing unilateral measures similar to those of the United States, these procedures were introduced to provide a means of retaliating against unilateral measures imposed by the United States. Moreover, the EU and Canada have applied these measures only with extreme caution.

A review of post-war U.S. trade policy shows two main streams of thought that diverged after passage of the Trade Act of 1974.

Prior to the 1970s, the Trade Expansion Act of 1962 gave the president wide-ranging trade authority. The Kennedy Administration used substantial tariff reductions to pursue trade liberalization and brought new rigor to the application of escape clause measures. The goal was to maintain the principles of trade liberalization and only apply remedy measures for damages incurred through liberalization. Therefore, remedy measures were treated as the "exception" rather than the "rule." However, domestic interests were dissatisfied with the Kennedy Administration trade negotiating process because the Department of State was responsible for conducting trade negotiations and did not necessarily represent the interests of domestic parties. This resulted in the establishment of the Special Trade Representative (STR), the predecessor of the USTR, and laid the groundwork for the system later established with the passage of the Trade Act of 1974.

The increasing U.S. trade deficit and oil crisis of the nineteen-seventies combined to increase protectionist pressure on Congress to relax the conditions for invoking trade remedy measures. In 1971, the United States recorded its first trade deficit of the 20th century. It was against this economic backdrop that the Trade Act of 1974 was passed, relaxing the requirements for relief under the escape clause measures and introducing a new "Section 301" clause that authorized retaliatory measures against unfair trade policies in foreign countries.
In the Reagan Administration of the late 1980s, the United States incurred enormous trade deficits, and Congress' dissatisfaction (symbolized by the "Gephardt Amendment") eventually led to the

passage of the Omnibus Trade and Competitiveness Act of 1988. This law reduced presidential discretion to invoke unilateral trade measures against foreign practices, policies, and customs deemed by the United States to be unfair and, instead, granted wide-ranging authority to the USTR to administer these cases. It also introduced a new "Super 301" clause that automated procedures in unfair trade investigations and made it significantly easier for the United States to impose unilateral measures.

The United States has repeatedly imposed or threatened unilateral measures under Section 301 as a means for settling trade disputes to its advantage. Section 301 allows the United States to unilaterally determine that a certain trade-related policy or measure of another country is "unfair" without following the procedures provided by the relevant international agreements. In the name of rectifying "unfair" practices, the United States has often threatened to use unilateral measures, and occasionally implements such measures to coerce the target country into changing the trade laws or practices at issue.

Why are Unilateral Measures Problematic?

First, unilateral measures are inconsistent with the letter and the spirit of the WTO, which is founded on the principle of multilateralism and the consensus and cooperation that flow from it. Article 23 of the Dispute Settlement Understanding ("DSU") explicitly prohibits Members from invoking unilateral measures that are not authorized under WTO dispute settlement procedures. The multilateral trading system is marked by countries observing international rules, including those provided by the WTO Agreement and its dispute settlement procedures. Disputes occurring within the system should be resolved through the available dispute settlement procedures, not by threatening or imposing unilateral measures.

Second, where agreements are reached through the threat or use of unilateral measures, the multilateral system may suffer. In particular, bilateral agreements secured under the threat or use of unilateral measures tend to deviate from the MFN principle, which is the most fundamental component of the multilateral framework under the WTO.

Unilateral Measures Cannot be Justified

There are two popular rationales for unilateral measures. The first is that, since international rules are incomplete, both substantively and procedurally, defiance of these rules is justified to make existing rules function more effectively. The other rationale, based on economic or political theory, argues that credible threats of unilateral measures are effective in maintaining a free trading system from a strategic viewpoint.

Neither rationale, however, is persuasive. First, as we discuss in more detail below, the WTO Agreement covers a broader spectrum and maintains a stronger dispute settlement process than previous trade agreements. These enhancements destroy whatever rationale there may have once been for "justified" defiance. The second rationale of "strategic justification" also is meaningless with the development of dispute settlement procedures that allow for WTO-controlled retaliatory measures.

Furthermore, bilateral agreements reached in negotiations conducted under the threat of unilateral action have too often departed from the MFN principle. From this standpoint, unilateral measures are not an effective means of achieving enhanced global free trade as envisioned under the WTO.

LEGAL FRAMEWORK..

The WTO dispute settlement mechanism is the only forum for WTO-related disputes. Unilateral measures that are not consistent with WTO obligations, such as unilateral tariff increases and quantitative restrictions, are prohibited. Such measures violate several provisions of the WTO Agreement: Article I (General MFN Treatment), Article II (Schedules of Concessions), Article XI (General Elimination of Quantitative Restrictions) and Article XIII (Non-Discriminatory Administration of Quantitative Restrictions). In addition, the threat of unilateral tariff increases may have an immediate impact on trade, nullifying and impairing benefits accruing to the injured country under the WTO Agreement. In the past, the United States has rationalized its need to use unilateral measures by arguing that the GATT dispute settlement procedures were not effective. Inefficiency, however, can no longer be used as a justification for departing from dispute settlement procedures, because the DSU provides for a strict timeframe and greater automation to ensure quick dispute settlement.

Rules on the WTO Dispute Settlement Procedures

The WTO dispute settlement procedures provides two rules, which go beyond previous dispute settlement systems by clearly prohibiting the use of unilateral measures concerning issues within the scope of the WTO rules. These rules are discussed below.

1. **Clear Obligation to use the WTO Dispute Settlement Procedures**

The new WTO agreement states clearly that all disputes must follow the WTO dispute settlement procedures and explicitly bans unilateral measures not conforming to these procedures. The use of unilateral measures in contravention of these procedures is itself a violation of the WTO Agreement. Article 23 of the DSU, which is a part of the WTO Agreement, stipulates that when a WTO Member seeks redress for a breach of obligations, nullification or impairment of benefits under the covered agreements, or for an impediment to attaining any objective under the covered agreements, the WTO Member shall follow the rules and procedures set forth in the DSU.

Although it should be obvious that the settlement of WTO-related disputes should be governed by the WTO dispute settlement procedures, the fact that this principle has been explicitly stated represents a significant step forward.

2. **Expanded Coverage of the Agreement**

The WTO Agreement expands the GATT coverage from goods alone to include trade in services and intellectual property rights. As discussed later in this chapter, in addition to disputes involving trade in goods, the United States has applied Section 301 in an effort to open markets for services and to increase the level of protection afforded intellectual property rights. Under the WTO Agreement, however, there no longer exists justification for the United States to ignore multilateral processes and to resort to unilateral measures.

In light of the two considerations above, we have categorized unilateral measures based on: (1) the nature of the underlying dispute, (i.e., whether the country imposing the unilateral measures claims damages based on a WTO violation or damages in areas not covered by the WTO; and (2) the nature

of the measures enacted (i.e., whether the measures violate the WTO Agreement – for example, tariff increases within bound rates). Figure 14-1, below, discusses whether these various unilateral measures are consistent with the WTO Agreement. As indicated in the chart, the measures in question, except for item D, may violate Article 23 of the DSU and/or be inconsistent with the WTO Agreement.

In the case of item D, a violation of Article 23 of the DSU (or a unilateral measure) would not itself constitute a violation of the WTO Agreement. For example, a unilateral measure could be taken against "a trading partner's violation of the WTO Agreement," even though in actuality the measure would be taken against a trading partner's measure justified under the WTO Agreement (which would be the case for items A or B). Under this scenario, the enforcing country could unreasonably escape the WTO violation. To avoid this problem, it should be made clear that regardless of whether each case is related to the WTO Agreement, it should be judged objectively according the rules of dispute settlement.

ECONOMIC ASPECTS AND SIGNIFICANCE.

Retaliatory measures that are not based on WTO dispute settlement procedures have enormous potential to distort trade. Tariff hikes and the like are themselves trade distortive measures; their unilateral application is likely to provoke retaliation from the trading partner, leading to a competitive escalation of retaliatory tariffs. Unilateral measures are often based on domestic interests (i.e., protection of domestic industries and profits for exporters), and once procedures are initiated it may be extremely difficult domestically to suspend or terminate them.

It should be clear that unilateral measures reduce trade both for the country imposing them and the country against which they are imposed. They are detrimental to the domestic welfare and economic interests of both countries, and impair the development of world trade. One need only recall the competitive hikes in retaliatory tariffs during the 1930s and the vast reductions in trade and the worldwide economic stagnation that they produced.

MAJOR CASES.

The Japan-U.S. Auto Dispute

The Japan-U.S. Auto Dispute was the first case in which a U.S. Section 301 action was challenged under WTO dispute settlement procedures. The United States initiated a Section 301 investigation against the Japanese aftermarket for auto parts on 1 October 1994, and announced sanctions on 5 May 1995. The United States proposed unilateral measures that would impose 100-percent import duties on Japanese luxury automobiles. In response to this unilateral threat, Japan immediately requested consultations pursuant to GATT Article XXII with the United States. Ultimately, the dispute was settled through bilateral negotiations outside the WTO process, but the fact that the matter was referred to WTO dispute settlement procedures and that negotiations took place before the international community was integral to achieving a resolution in conformity with international norms and to preventing a trade war.

The Japan-U.S. Film Dispute

The United States requested bilateral negotiations with Japan in this case under Section 301, but Japan's adamant opposition to engage in negotiations under such a forum resulted in the case being brought before a WTO dispute settlement panel. The thrust of the U.S. claim was that the actions of the government of Japan in relation to consumer photographic film and photographic paper were in violation of GATT Article XXIII:b. Rather than arguing that the measures taken were themselves violations of the WTO Agreement, the United States argued that the measures nullified and infringed upon the interests of other countries under the Agreement. The panel, however, rejected all U.S. claims.

In this dispute, the United States announced that statements made in the government of Japan's legal submissions to the WTO dispute settlement panel are "commitments" subject to monitoring to ensure their implementation. Based on this position, the United States released its first "Monitoring Report" in August 1998. The U.S. position is untenable. Like all submissions to the WTO dispute settlement panels, Japan's submissions in the Film Dispute presented of historic factual circumstances and legal principles at issue in the particular case. The U.S. characterization of these factual representations about the past as future "commitments" represents a unilateral attempt to create new future obligations. Such an approach is unreasonable and could be viewed as a derivative of Section 301. Although the United States intends to issue reports biannually, Japan should not accept such an approach.

The EU Banana Disputes

Under the Lomé Convention, the European Union provides preferential treatment to imports of bananas from African, Caribbean, and Pacific ("ACP") countries. . A WTO panel and the Appellate Body have both ruled that the current EU banana imports regime violates MFN and other WTO obligations. The EU announced that it would rectify the relevant measures by 1 January 1999, but none of the EU proposals to do so were accepted by the complaining parties (the United States, Ecuador, Guatemala, Honduras and Mexico). In April 1999, the United States imposed retaliatory tariffs, but agreement between the U.S. and the EU, and the EU and Ecuador, in April 2001 resulted in the elimination of these tariffs in July 2001.

A. History of the EU Banana Disputes

In accordance with the WTO recommendations, the EU furnished two implementation drafts, one in July 1998 and the other the following October. The complaining parties (the United States, Ecuador, Guatemala, Honduras and Mexico), however, asserted that the proposed amendments still illegally favored the ACP countries and are, therefore, inconsistent with the WTO Agreements. In December 1998, the EU and Ecuador both requested the establishment of the original panel under Article 21.5 of the DSU.

Meanwhile, the U.S. government, under strong pressure from the affected parties through Congress, decided to invoke unilateral measures under Section 301 against the EU. The United States asserted that such unilateral measures were authorized by Article 22 of the DSU if the EU did not amend its banana import regime in compliance with the WTO Agreements. The EU asserted that any application of unilateral measures must be preceded by approval from the panel pursuant to Article 21.5 of the DSU. In November 1998, the EU requested consultations, insisting that the U.S. Section

301 imposed measures were inconsistent with Article 23 of the DSU's prohibition on imposing unilateral sanctions.

In December 1998, pursuant to Section 301, the United States imposed unilateral measures totaling $520 million on handbags, Kashmir wool products and other goods imported from the EU. The U.S. and the EU agreed to refer the case to arbitration. The WTO issued the results of this arbitration on 6 April 1999 and approved up to $191.4 million of the $520 million in sanctions sought by the United States. The U.S. government announced that it would finalize a list of sanctions and collect them retroactively from 3 March 1998. The 19 April DSB meeting approved the U.S. proposed list of sanctions. In December 2000, the EU announced a "first-come, first-serve" system that grants banana import licenses under the tariff quota to parties preferentially exporting bananas to the EU market. It was proposed that the quota system would take effect in April 2001, with a tariff-only system to take effect no later than 2006.

In April 2001, an agreement was finally reached between the U.S., Ecuador and the EU over what had become a very protracted dispute. One of the stipulations in the agreement was that the EU would institute a licensing system beginning on 1 July 2001 as a transitional measure, shifting to a tariff-only system in January 2006. The licensing system was implemented as scheduled, leading the U.S. to lift the sanctions imposed on the EU since 1999, effective 1 July. The issue subsequently appeared again on the DSB meeting agenda and discussion continues in the lead-up to the introduction of a tariff-only system in 2006.

B. Issues in this Case from the Viewpoint of the WTO Agreements

a) Relationship between Article 21.5 and Article 22 of the DSU

Article 22 of the DSU states that if the DSB's recommendation is "not implemented within a reasonable period of time," concerned Members may request authorization from the DSB to invoke unilateral measures ("suspension of concessions"). Since the DSB uses a "reverse consensus" method for decision-making, authorization is virtually automatic unless the concerned countries express objection and refer the matter to arbitration.

In this case, the EU insisted, based on Article 21.5, that the panel should judge the WTO consistency of the losing Member's implementation as a prerequisite to any unilateral measures set forth in Article 22 and requested the General Council to adopt an authoritative interpretation. In the current DSU, there is no provision indicating the relationship between Article 21.5 and Article 22. However, it is generally considered that the prevailing party cannot impose unilateral measures by independently determining that the measure taken by the losing Member to implement the DSB's recommendation is not consistent with the WTO Agreements. In such a case, the matter should be referred to the original panel as stipulated under Article 21.5 of the DSU. This issue was studied during the DSU review, with a new Article 21.2 included in the joint proposal on improving the DSU as formulated by Japan. Following the Doha Ministerial Meeting, the EU, Japan and others submitted an amended proposal during the debate on reviewing the DSU.

Importantly, if a panel's finding with regard to Article 21.5 is a strict prerequisite for imposing unilateral measures, a procedural defect in the form of an "endless loop" would exist. That is, if the losing Member does not implement the DSB's recommendation in good faith, the matter would be referred to the original panel, repeating eternally the Article 21.5 procedure.

b) Application of Measures by the U.S on imports of EU products

The DSB approved U.S. retaliatory tariffs against the EU on 19 April 1999, but the United States originally expected approval by 3 March and had required deposits in the amount of the tariff before 19 April. Consequently, this had the effect of instituting retroactive tariffs dating back to 3 March. The EU requested that a panel be convened in May 1999, alleging that this retroactive measure by the United States was in violation of Article 23 of the DSU. In July 2000, a report was distributed by the panel that virtually upheld the EU's argument, but the EU filed an appeal with the Appellate Body in September 2000 because it was still dissatisfied with the panel's ruling on some points. The Appellate Body report, distributed in December 2000, treated the 3 March measure separately from the 19 April measure and overturned the panel's ruling by finding that the 3 March measure no longer existed and that there was, therefore, nothing for the United States to remedy. However, the Appellate Body upheld the finding of the panel that the 3 March measure was a unilateral measure taken by the United States without the approval of the DSB and, therefore, in contravention of Article 3.7 of the DSU. The Appellate Body avoided defining the order of precedence between Article 21 and Article 22 procedures in its ruling. However, it found that the panel improperly ruled that the mediator under Article 22.6 could judge the implementation of the DSB's recommendation (role under Article 21.5). Japan supports these rulings by the Appellate Body.

***Like the Banana case, the Beef Hormones case is another instance in which there have been conflicts between fulfilling the WTO dispute settlement procedures and the unilateral measures found in Section 301 of the U.S. Trade Act. See Chapter 10, Standards and Certification, for a discussion of this case.**

Annual Report on Unfair Trade Measures (2001).

Japan --IMPROVING WTO DISPUTE-SETTLEMENT PROCEDURES.

http://www.meti.go.jp/english/report/data/g400117e.html

1. Current WTO Dispute-Settlement Procedures

We stated in the Preface that this report places particular weight on internationally agreed-upon rules (such as those of the WTO Agreement) and on the WTO's dispute-settlement procedures as practical methods for the resolution of trade dispute.

There are several provisions in the WTO Agreement regarding dispute-settlement procedures, but chief among them are those found in the "Understanding on Rules and Procedures Governing the Settlement of Disputes" (DSU) that was agreed upon during the Uruguay Round negotiations. In the old GATT system, dispute-settlement procedures had been largely fragmented. The core rules were found in GATT Article XXII and Article XXIII, but separate dispute-settlement procedures were provided in the Tokyo Round Antidumping Code and Agreement on the Interpretation and Application of Article VI, XVI, and XXIII of the General Agreement on Tariffs and Trade etc. (1) Major improvements in the DSU

A. *Automatic and accelerated panel procedures*

The old procedures required a consensus in the Contracting Parties before member countries could establish panels or have panel reports adopted. Resistance by the respondent country could therefore delay panel establishment, and the losing country could, and often did, block adoption of the panel report. The new procedures use a "negative consensus" method for making decisions in the Disputes Settlement Body. This method makes panel establishment, report adoption, and approval of retaliatory measures almost automatic.

B. Timeframe for procedures

The new procedures include detailed timeframe for each step of dispute settlement. Countries may request that a panel be established any time after sixty days have elapsed from the request for bilateral consultations. No more than nine months may be spent between the establishment of a panel and the adoption of the panel report.

C. Appeals system

Because the negative consensus system has increased the automaticity of procedures, the DSU provides for an Appellate Body to review panel decisions. The Appellate Body serves to balance the automaticity of the dispute settlement process and ensures that procedures are legally sound and provide sufficient due process. Its authority is limited to reviewing issues of law covered in the panel report and legal interpretations developed by the panel. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

D. Cross-retaliation (DSU Article 22:3)

When retaliatory measures in the disputed sector would be of little effect, retaliation may be made in a different sector ("cross retaliation"). However, the country subject to retaliation may seek arbitration if it considers the sector targeted for cross-retaliation inappropriate.

E. Explicit prohibition of unilateral redress (DSU Article 23)

Unilateral measures such as those under Section 301 of the U.S. Trade Act of 1974 as amended, have been a major factor in reducing the credibility of the multilateral dispute-settlement system. The DSU explicitly states that countries must use WTO dispute-settlement procedures to redress of a violation of obligations, or other nullification or impairment of benefits, or an impediment to the attainment of any objective of the WTO Agreement. This statement adds a new prohibition on the invocation of unilateral measures which are not the results of WTO dispute settlement procedures. (For details, see Chapter 13, "Unilateral Measures").

(2) Evaluation of the DSU

The DSU has greatly increased the effectiveness of WTO disputes settlement. As evidence for this, we would note the increase in the number of cases brought before the dispute-settlement procedures, the increased use of dispute-settlement procedures by developing countries, and the improved compliance with the findings of dispute-settlement procedures. (See Part III Appendix II.2, "Use of GATT/WTO Dispute-Settlement Procedures".)

Increased number of cases brought before the dispute-settlement procedures

Under the old GATT system, an average of seven cases a year came before the dispute-settlement procedures (excluding the Tokyo Round Antidumping Code Agreement on the Interpretation and Application of Article VI, XVI, and XXIII of the General Agreement on Tariffs and Trade). After the DSU took effect, there has been a significant increase in the number of cases: 25 cases (request for consultations) in 1995, 39 cases in 1996, and 50 cases in 1997. These numbers indicate that countries are more willing to use of the disputes-settlement procedures in the WTO, and that the procedures are functioning effectively.

Greater use by developing countries

One of the most pronounced differences brought by the DSU is that far more developing countries are utilizing dispute-settlement procedures than during the GATT years. Since the WTO took effect, a total of forty countries have brought complaints that resulted in the establishment of panels, of which twenty-nine have been developing countries. The DSU mandates that "particular consideration" be given to developing countries in consultations, recommendations and rulings. It also contains other measures designed to ensure that developing countries receive protection. We consider it noteworthy development that the dispute-settlement procedures are indeed being used to protect the interests of all WTO member countries, not just a handful of the largest trading countries.

Compliance with the recommendations of dispute-settlement procedures

A third difference we would note is the faithful compliance with the recommendations of dispute-settlement procedures. As of February 1998, the Panel has decided on 11 cases, and for 9 of the 11 cases Appellate Body reports have been issued. In all cases, countries have already either implemented the recommendations, expressed their intention to comply with the recommendations by

the deadlines imposed, or have extended the deadlines for compliance with the consent of the parties concerned.

(3) Need to review the DSU

It has been three years since the WTO Agreement took effect and the dispute-settlement procedures in the DSU began to operate. This does not necessarily provide sufficient data to evaluate whether the system is running properly, but it is still worthwhile to make some tentative observations now. A review of the DSU is scheduled for 1998 as part of the WTO's "built-in agenda". In this report we hope to contribute to the discussion by analyzing how WTO dispute-settlement procedures are in operation today and noting some of the problems that have become apparent.

2. Problems in the DSU

(1) Increased workload on panels and the Appellate Body because of the large number of disputes.

(2) Increased workload on panels and the Appellate Body because of changes in the nature of disputes.

(3) Procedural inadequacies in the DSU.

3. Potential Improvements to the Dispute-Settlement Procedures

The increase in the number of cases being brought before the dispute-settlement system, the participation of developing countries, and the willingness to comply with recommendations would seem to indicate that the DSU is functioning extremely well. There is, however, room for improvement in current dispute-settlement procedures, particularly in regards to the dramatic increase in the number of disputes to be heard, the increasingly complex and technical nature of the disputes themselves, and other developments that could not have been foreseen when the DSU was put in place. Among the most pressing challenges to be dealt with in this regard are the increase in the number of panel complaints caused by the automaticity of panel procedures, flaws in institutionalized procedures for appeals, and the lack of effective schemes for preventing the abuse of unilateral measures. Thus, while the DSU is currently functioning quite well and major changes in the system are not yet necessary, we think that the following issues should be examined as a part of the 1998 DSU review. We divide our list into "near-term" and "long-term" issues.

A. Increased load: strengthening the panels and Appellate Body

Not only is the number of cases increasing, but the cases themselves are becoming more complex and technical, and verification of facts is taking on a greater role in their judgement. This has placed extremely large burdens on panelists, and panels have had to rely on assistance from the WTO secretariat in the drafting of many of their panel reports. Maintaining high standards of quality for reports under these conditions while also ensuring the consistency and linkage of resolutions among individual disputes will require either the establishment of a standing panel with expert knowledge or a strengthening of the secretariat so that it is better able to assist panelists. Given the increasing number of disputes that require high levels of technical expertise in order to verify facts, it would probably be desirable to make effective use of the "expert review groups" described in Appendix 4 to the DSU. We also anticipate an increase in the number of cases referred to the Appellate Body and think it worthwhile to consider increasing the membership of the Appellate Body.[2]

B. Change in the nature of disputes

(a) Establish the scope of panel review

We have already noted that as disputes become more complex and technical, there are increasing numbers of requests for panels to be established in which the measures at issue are not necessarily specified, or are unclear about the reasons for claiming violation of the agreement or nullification and impairment of benefits. In the Japan-US film case, the United States complained of "liberalization countermeasures", a vaguely-worded term which it hedged even further by saying that its case was "not limited to" these measures and reserving the right to add "other related measures". The scope of deliberation was therefore infinite. In the EC banana case, the complainant countries used the vague concept of "banana regime", under which it attempted to deal comprehensively with a large number of measures. This too was taken issue with.

When countries are forced to defend against vaguely-worded panel establishment requests such as these, they may find themselves harassed with frivolous litigation, spending much of their time and energy on hypothetical defenses and being robbed of the opportunity to defend appropriately against the real issues in the case.

We note in this regard that the current DSU already requires that requests to establish panels "identify the specific measures at issue" and "provide a brief summary of the legal basis of the complaint" (Article 6:2). But one of the problems is that the DSU does not provide for a response when a request fails to specify measures or provide a brief summary (or when there are doubts about whether it has done so). In the two cases we cited above, the panels explicitly refused to consider additional arguments based on vague panel establishment requests. Because panel reports do not

necessarily constitute binding precedents, there is a need for an explicit statement of this handling in order to provide legal stability.

To secure the ability of respondent countries to defend their interests and to ensure that there are no detrimental impacts on fair panel hearings, countries filing complaints should be required to cite specific provisions when making the request to establish the panel. Moreover, when the citing of provisions alone is insufficient to show why the measures in question violate the agreement or when there are questions about the scope of measures subject to complaint, the panel should make a provisional determination in order to specify the scope of the deliberations and resolve any doubts before the actual deliberations begin. For example, the respondent country should be given the right to seek a limited citation of measures and explicit statement of legal basis for the complaint within a set period of time after the terms of reference have been decided, and when this is vague, to seek rejection of the panel establishment request. This provisional determination would prevent any increase in the load on the panel due to frivolous expansion of the points of dispute.

(b) Verification of facts: institutionalizing a remand procedure for verifying facts

The Appellate Body's jurisdiction is limited to legal questions covered in the panel's report and judgements on the legal interpretations made by the panel. Because of this limited grant of authority, the Appellate Body can be left powerless to render decisions in certain cases -- for example, when the Appellate Body overturns the findings of the panel, where the panel report has not provided sufficient factual findings on the evidence, or where the evidence itself is insufficient, or when a panel report has not provided findings on all matters in a complaint. In the gasoline case, if the Appellate Body had admitted the application of Article XX, it could not have decided whether the measure at issue was inconsistent with TBT Agreement. We saw such an outcome in the dispute over periodicals from Canada. In this case, the Appellate Body could not render a decision on the point in dispute over GATT Article III:2:1 because it could not remand the case back to the panel to obtain further factual evidence.

In the GATT years, panels sometimes adopted the principle of "minimalism" in which they avoided rendering decisions on other violation complaints if they found one violation. Since the WTO took effect, panels have tended to render their verdicts in as detailed form as possible on all related points of dispute, perhaps for the benefit of the Appellate Body. This would appear to make procedures more complex and to extend the hearing periods.

We believe that a remand system is necessary to avoid these inadequacies. There has been some debate on whether the current system could be interpreted so as to allow remands, but we find it preferable to make this authority explicit as the DSU is revised.[3]

C. Procedural inadequacies

(a) Explicit statement of the requirements for third-country participation in consultations

The current DSU contains provisions allowing third countries to participate in consultations when a country has a substantial trade interest in a dispute over a specific agreement. However, it must seek the consent of the country to which the request for consultations was addressed in order to participate. Differing interpretations of the requirements for participation in consultations may result in some countries failing to complete third-country participation procedures in a timely manner. For example, if the requested countries fail to respond to a request to participate in consultations, the third country is effectively barred from participating.

To prevent third countries from being placed in an uncertain position, a deadline for responding to requests to participate in consultations should be established. For example, the DSU could require requested countries to respond affirmatively or negatively to requests to participate in consultations within a set time period after receiving notification of intent to participate.[4]

(b) Methods of judging cases in which irrevocable damages could be incurred; Establish rules for emergency cases.

Currently the DSU defines emergency cases in Article 4:8 and 4:9 and Article 12:8, as "cases of urgency, including those which concern perishable goods". This definition is abstract and vague, however. There is no clear basis for determining what kind of disputes would constitute "cases of urgency". Nor are there any rules governing who will decide whether there is urgency, at what point in the process of consultations and panel deliberations, and by what procedures.[5]

We recognize that the DSU has in general accelerated the disputes-settlement process because procedures are more automatic and there are clear procedural time limits. Still, the fact remains that it requires a long period of time to reach a resolution even now. When a country is incurring real damages because of measures adopted by another country, the fact that a maximum of eighteen months from panel establishment to the determination of the reasonable period of time for implementation of recommendation is allowed, and then a further period of time to seek approval for retaliatory measures, could threaten the country, companies, and industries being damaged with irrevocable harm. The "cases of urgency" clause was included to address such situations. We think it is necessary to provide clear assurances that cases that threaten irrevocable harm will be treated as "emergencies" and adjudicated quickly by establishing rules on when, how, and under what authority the decision on urgency will be made. [6]

(2) Issues for long-term consideration

A. Verification of facts: establishing rules of evidence

As we have already noted, many recent disputes are not over clear measures and how to interpret and apply the WTO Agreement in light of them, as they were in the past. Rather, they are complex questions of fact, looking at whether measures even exist, and if they do, what their nature and effect might be. We expect that these new kinds of disputes will increase in the future, and anticipate that the dispute-settlement system may not be able to adequately deal with them using existing panel procedures. There will probably be a need to ensure that verifications of fact are appropriate. This can be achieved by enhancing the rules of evidence such as rules governing witness testimony.[7]

B. ***Methods of judging and remedying cases in which irrevocable damages could be incurred;*** **Providing retroactive and provisional remedies**

The remedial measures allowed under WTO dispute-settlement procedures generally require that measures violating the agreement be eliminated in the future; they are not retroactive and do not consider past violations. However, the lack of after-the-fact remedies might encourage the violation of the agreement. We think that the discussion on amending the DSU should include retroactive remedies[8] and provisional remedies[9] as issues for future consideration.

Korea -- Ministry of Foreign Affairs & Trade.

KOREA -- Ministry Statements (MOFAT) on Economy & Trade – WTO.

Press Statement. Ministry of Foreign Affairs & Trade (2004-11-02)

http://www.mofat.go.kr/me/me_a005/me_b021/me05_03.jsp

Korea requests to WTO to suspend tariff concessions to the U.S. in relation to Byrd Amendment (November 10th, 2004)……

1. Korea, along with the EC, Japan, Canada, Mexico, and India, requested that the WTO Dispute Settlement Body (DSB) approve the suspension of tariff concessions against the U.S. in relation to the dispute on the Byrd Amendment. As a result, the WTO DSB will discuss whether or not to approve this request.

- **Article 22 paragraph 7 in the WTO Dispute Agreement stipulates that unless all member countries are opposed to it, the Dispute Settlement Body must approve the request of suspending tariff concessions, and therefore this request will be automatically approved.**

2. The countries that are jointly filing against the U.S. added only a comprehensive list of products for suspending tariff concessions to the suspension request that they submitted to the DSB on November 10. In order to actually implement suspension of tariff concessions, the countries must inform the WTO DSB of the products for suspension and specify the additional tariff rates in advance. Therefore, this move is meaningful in that is establishes the right of the countries to implement the suspension of tariff concessions.

- **These countries made their first request to the WTO on January 15, 2004, and because the U.S. opposed to the level of suspension of tariff concessions, an arbitration panel was established. On August 31, this panel judged in favor of the countries that filed jointly against the U.S.**

3. The government of Korea selected three industrial products and three fishery products as products for suspension, which were based on whether there was an alternate import source, whether it was used as a raw material or parts in the domestic industry, and the domestic supply and demand, in order to minimize the damage to the domestic industry.

4. The Korean government hopes that the U.S. will respect the decision of the WTO DSB and abolish the Byrd Amendment within a short period of time, and the time for the implementation of the suspension of

tariff concessions will be decided after taking into account the U.S.'s movement towards abolishing the amendment.

The countries filing against the U.S. will make a joint public announcement that encourages the U.S. to abolish the Byrd Amendment as soon as possible.

Indonesia refers Korea to the WTO for Antidumping Measures (June 10th, 2004)……

1. Indonesia referred Korea's imposition of antidumping duties on Indonesian information paper and uncoated wood-free paper to the WTO through an official letter dated June 4th, 2004, declaring it as being against the WTO rules.

2. The Korean Trade Commission (KTC), after conducting antidumping investigations on Indonesian information paper and uncoated wood-free paper upon the request of 5 domestic producers, concluded on September 26th, 2003, that these products had been dumped and caused substantial injury to the domestic industry. Accordingly, the Ministry of Finance and Economy decided on November 7th, 2003, to impose 2.8% - 8.22% antidumping duties for three years (November 7th, 2003 - November 6th, 2006).

3. Information paper and uncoated wood-free paper include no fiber, or a very small amount, and are used when printing books, leaflets, or as computer/printer paper, xerox, and writing paper. In the year 2002, the market share of these paper products amounted to 55.41 billion won, of which 34.5% were imported products, and the domestic market occupancy of Indonesian products marked 22.6%.

In accordance with the WTO Dispute Settlement Understanding (DSU), the countries in dispute will conduct bilateral consultations within 30 days, and if they fail to reach agreement within 60 days following the request for bilateral consultations, the complaining country may request the appointment of a WTO panel.

Korea Files WTO Complaint Against EU Shipbuilding Subsidies (September 3, 2003)……

On September 3, 2003, the Government of Korea filed a formal complaint with the World Trade Organization (WTO) over the operating and provisional subsidies granted by the European Union (EU) to its shipbuilding industry. As the first step in the proceeding, the Korean government sent a consultation request dated September 3 to the EU.

The EU previously filed a complaint to the WTO against Korea on October 21, 2002, regarding Korea's financial programs and restructuring measures for certain domestic shipyards. Subsequently, Korea and the EU held consultations on three separate occasions from November 2002 to May 2003 until the selection of panelists on July 21, 2003. Panel procedures are currently in progress.

The Korean government plans to prove through the WTO dispute settlement process the unfairness and unlawfulness of the EU's provision of operating aid, restructuring aid, and provisional subsidies for the European shipbuilding industries. Especially with respect to provisional subsidies, the Korean government conceives that the provision of such subsidies is inconsistent with the Most Favored Nation (MFN) principle under the WTO agreements due to the anticompetitive nature of the subsidies.

According to the WTO agreements, following a request for consultations, the countries in dispute will hold consultations for a period of 60 days. Afterwards, if no agreement is reached, the complaining country may request the composition of a panel. In general, it takes 6-9 months for the panel to issue a final report

from the date of the panel selection. In this case, however, due to the urgent nature of the case, the panel's final report will be made available within 5 months from the setting-up of a panel.

Korea's Position on the EC Decision To resort to WTO dispute settlement (October 22, 2002)……

The European Commission has initiated WTO dispute settlement procedures over alleged subsidies to Korean shipbuilders claimed to have inflicted serious prejudice to the EC shipbuilding industry.

The Korean Government regrets that discussions with the EC have evolved to this stage. The Korean Government is ready to respond to the EC allegations in consultations and, if necessary, in any further panel proceedings under the WTO dispute settlement system. The Government of Korea firmly believes that it has not granted any subsidies in violation of the WTO Agreement on Subsidies and Countervailing Measures. And, furthermore, the Korean shipbuilding industry has caused no serious prejudice to the EC shipbuilding industry.

Korea is committed to adhering to its WTO commitments and will participate in the consultations with the aim of demonstrating its compliance with its WTO obligations.

WTO Decision on US Safeguard Measures on Korean Line Pipes (July 31, 2002) ……..

1. On July 29, 2002, the Republic of Korea and the US reached an agreement on the implementation plan for the WTO Dispute Settlement Body (DSB)'s decision to modify the US safeguard measures on Korean line pipes. The safeguard measures have been imposed since March 1, 2000.

2. Specific contents of the implementation plan are as follows.

- **Pursuant to the Dispute Settlement Understanding (DSU), the US has a 6 month Reasonable Period of Time (RPT), from March 8 to September 1, 2002, to implement the recommendations and the ruling of the WTO.**
- **If the safeguard measures are not withdrawn within the RPT, the US is to increase its annual tariff rate quota (TRQ) on Korean line pipes from 9,000 tons to 70,000 tons.**
- **The US is to withdraw the safeguard measures by March 1, 2003**

3. This case was initially brought to the WTO on June 13, 2002. The Korean Government believes that the safeguard measures, which impose additional tariffs on Korean line pipes in excess of 9,000 tons, are inconsistent with the WTO Agreement. The WTO Panel and Appellate Body ruled in favor of Korea, and on March 8, 2002, the decision was finalized and adopted by the WTO DSB.

4. The two sides were unable to agree on the RPT. Therefore, the Korean Government requested arbitration, placing special significance on the RPT issue. To this end, the Korean Government held consultations with the US Government.

5. The RPT set in the agreed implementation plan is within the range requested by the Korean Government, securing both substantial TRQs, as well as the commitment of the US to withdraw the safeguard measures by March 1, 2003.

Korea -- Ministry of Foreign Affairs & Trade.

KOREA -- Outcomes of the WTO Trade Policy Review of Korea.

Press Statement. Ministry of Foreign Affairs & Trade (2004-09-18)
http://www.mofat.go.kr/me/me_a005/me_b021/1163466_1017.html

1. The WTO Trade Policy Review (TPR) of Korea was held September 15th-17th at the WTO Secretariat located in Geneva, Switzerland. Since the holding of the first TPR of Korea in 1992 under the GATT system, this was the third TPR to be held under the WTO system, following the reviews of 1996 and 2000. The Korean delegation participating in the review was headed by Mr. Choi Hyuck, Ambassador to Geneva, and consisted of officials from 9 related government agencies including the Ministry of Foreign Affairs and Trade, the Ministry of Finance and Economy, the Ministry of Forestry and Agriculture, and the Ministry of Commerce, Energy and Industry.

2. Ambassador Choi delivered a keynote speech presenting the efforts of the Korean government for reform and opening through measures such as structural reform in 4 key sectors (financial, corporate, labor, public), enhancing transparency in regulatory reform, the liberalization of foreign investment and improvement of the investment environment. In addition, he explained that the Korean government would continue to promote the policy of reform and opening, notwithstanding domestic and international circumstances. Also, he explained that the Korean government attaches importance to the multilateral trading system centered around the WTO, and will continue contributing to the maintenance and strengthening of the multilateral trading system and the successful conclusion of the DDA negotiations. Concerning FTA negotiations, it was explained that FTAs would be pursued in a manner that supplements multilateral liberalization.

3. WTO member countries evaluated Korea as a model case of achieving economic growth through the multilateral trading system, and assessed the improvement of Korea's trade-related laws and systems, and its efforts for market opening and liberalization. While evaluating the Korean government's policy of reform and opening, as well as its endeavors to improve trade-related systems and practices, the following areas were pointed out as requiring further efforts:

- **The simplification of tariff structures and the reduction or elimination of adjusted tariffs**
- **High tariffs on agricultural goods and the facilitation of structural reform in agriculture**
- **Ensuring that sanitary measures and technical standards do not function as barriers to trade**
- **Protection of intellectual property rights in the internet environment**
- **Restricting the exclusion of products from tariff concessions, the principles for promoting FTAs and current conditions**

4. Responding to the questions asked by member countries on Korea's trade policy, the Korean delegation explained the measures taken for market opening since the 2000 TPR and the status of implementation of WTO obligations, and on the issues raised by Korea's trading partners concerning domestic systems and practices, the delegation answered that they would be administered in accordance with the WTO Agreement.

5. The objective of the WTO Trade Policy Review Mechanism (TPRM) is to maintain and strengthen the WTO system through increasing transparency in the trade policies and practices of member countries, by conducting regular evaluations and reviews, and enhancing understanding among member countries. The cycle of review differs according to each country's trading volume, with a 2 year cycle for the 4 major trading countries (the U.S., the EU, Japan, Canada), and a 4 year cycle for the 5th-20th largest trading countries, including Korea, and a 6 year cycle for other member countries.

New Zealand Ministry of Foreign Affairs & Trade (Legal Division).

NEW ZEALAND -- WTO DISPUTE SETTLEMENT.

http://www.mfat.govt.nz/support/legal/disputes/wtodispute.html

General.

One of the major achievements of the Uruguay Round negotiations was to set in place, under the World Trade Organisation (WTO), a procedure for resolving trade disputes arising between members. WTO members agree not to take unilateral action when they think their rights have been violated. Instead they put their grievance through the WTO dispute settlement system and agree to abide by its rules and findings.

The WTO system deals with all trade disputes arising from any of the agreements contained in the Final Act of the Uruguay Round including agreements on: Tariffs and Trade (GATT) relating to market access eg tariff levels; Agriculture (including export subsidy and domestic support provisions); Intellectual Property (eg trademarks, copyrights and patents); Services; Rules of Origin, Import Licensing and Customs Valuation; Subsidies; Anti-Dumping; Safeguards; Sanitary and Phytosanitary Measures (deals with food safety and animal and plant health regulations); Technical Barriers to Trade (aims to ensure that technical regulations, testing or certification procedures do not create unnecessary barriers to trade).

The WTO dispute settlement process comprises three main elements:

1. **Consultations: The countries meet to try to resolve the dispute.**
2. **Panel hearing: If consultations do not settle the issue, the complaining country may ask an adjudicative panel to produce a ruling. The members that are party to the dispute select and agree on three panellists to hear the dispute. Should the panel decide that the measure in question is in breach of the relevant WTO agreement, it will call on the country concerned to bring its laws or policies into line with that agreement. It may also suggest ways in which to do so.**
3. **Appeal: The WTO dispute settlement process also gives either party to the dispute the right of appeal to the Appellate Body. Appeals are limited to issues of law covered in the panel report and legal interpretations developed by the panel. This whole process takes between 12-18 months (depending on whether or not it goes to appeal).**

If a New Zealand business is encountering an obstacle to trade in a particular product, or feels the requirements being set by the importing country are unreasonable, it should raise the issue with the Ministry of Foreign Affairs and Trade.

In assessing whether an action should be taken, the Ministry considers:

- **Whether there is an important economic interest at stake.**
- **Whether New Zealand has a general concern of principle.**
- **Whether the barriers are illegal under the WTO.**

The preferred option is to try to resolve the matter bilaterally (by a direct approach to the Government concerned) before going to the WTO. Many small, and a number of large, trade problems have been resolved this way. If this does not work, the Government will consider formal proceedings under the WTO.

WTO disputes in which New Zealand has been involved.

To date, New Zealand has been involved as a principal complainant in six WTO disputes, and has joined as a third party in four others. To date, no countries have initiated disputes against New Zealand.

Click on any of the cases listed below to find out more about them.

WTO disputes in which New Zealand has been a principal complainant:

- **Hungary - Export Subsidies in Respect of Agricultural Products (WT/DS35)**
- **European Communities - Measures Affecting Butter Products (WT/DS72)**
- **India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (WT/DS/93)**
- **Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products (WT/DS113)**
- **United States - Safeguard Measures on Imports of Fresh, Chilled and Frozen Lamb from New Zealand (WT/DS177)**
- **United States - Definitive Safeguard Measures on Imports of Certain Steel Products (WT/DS258)**

Hungary - Export Subsidies in Respect of Agricultural Products (WT/DS35).

The 1995 Hungarian budget provided for export subsidies to over 300 agricultural products, with an allocation of 35 billion florints (US$280 million). This allocation put Hungary in breach of its Uruguay Round commitments on export subsidies, which limit export subsidies to 16 agricultural products, at levels falling from 21.0 billion florints in 1995 to 14.3 billion florints in 2000. Hungary's budgeted export subsidies for 1996 again exceeded these levels.

New Zealand and a number of other WTO Member countries had been actively involved for almost 20 months in seeking ways for Hungary to bring its export subsidy practices back into WTO-conformity. Together with Argentina, Australia, Canada, Thailand and the United States (with Japan as a third party), New Zealand participated in four formal rounds of consultations with

Hungary under the Dispute Settlement Understanding in 1996. These consultations did not resolve the issue and New Zealand, together with Argentina, Australia and the United States sought the establishment of a WTO panel in January of 1997.

A Panel was established in February 1997, however it did not have to convene to hear the dispute, since the parties reached a settlement of the dispute which was notified to the Dispute Settlement Body in July of 1997.

European Communities - Measures Affecting Butter Products (WT/DS72).

In June 1996, the European Communities ruled that New Zealand butter manufactured by the AMMIX and spreadable butter-making processes was not eligible for New Zealand's country-specific tariff quota (CSTQ) for butter established by the EC's WTO Schedule because it believed that these butter products were not "manufactured directly from milk or cream" (one of the conditions of the CSTQ). The practical effect of the decision was that these two products would be levied by the EC at the much higher out-of-quota tariff rate. New Zealand disagreed with the EC ruling. After extensive bilateral discussions on this issue the EC confirmed that it would not alter its position. This left New Zealand with no avenue for redress other than WTO dispute settlement.

New Zealand requested WTO consultations in March 1997. When consultations failed to resolve the dispute, New Zealand requested an adjudicative panel which was established in November of that year. The parties to the dispute (New Zealand and the EC) made written and oral submissions to the Panel during 1998. Before the Panel's Report was made public, New Zealand agreed to an EC proposal to explore a settlement of the dispute. In February 1999, New Zealand requested a suspension of the panel proceedings in order to allow settlement negotiations to take place.

Settlement negotiations were eventually successful, and in November 1999, New Zealand notified the WTO that a mutually agreed solution to the dispute had been reached. As part of the settlement, the EC has passed a regulation which clarifies that New Zealand exports of spreadable and AMMIX butter do qualify for entry under New Zealand's CSTQ for butter.

India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (WT/DS/93).

For a number of years, India had maintained quantitative import restrictions on a wide range of agricultural, textile and industrial products (over 2,700 different types of products). India claimed it was entitled to maintain these restrictions for balance of payments reasons. In 1997, New Zealand, the European Union, the United States, Australia, Switzerland and Canada were all of the view that India could no longer justify these restrictions under the WTO rules. In July of 1997, each requested consultations with India under the WTO Dispute Settlement Understanding.

As a result of extensive consultations, New Zealand, the EU, Switzerland, Canada and Australia were able to reach a mutually agreed solution to the dispute with India, which was duly notified to the WTO (New Zealand's notification - WT/DS93/8 - is dated 14 September 1998). As part of the solution to the dispute, India has agreed to a programme phasing out the quantitative import restrictions by 31 March 2003 at the latest.

Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products (WT/DS113).

In 1995, Canada introduced a new pricing system for dairy exports, called the "Special Milk Classes" scheme. This scheme ensures that Canadian exporters have access to milk at considerably lower prices than otherwise available on Canada's domestic market. New Zealand and the United States shared the view that the scheme provides export subsidies for the purposes of the WTO Agreement on Agriculture, and as such these exports must be limited by Canada's export subsidy volume commitments for dairy products. New Zealand and the United States argued that because Canada's exports under the "Special Milk Classes" scheme were running at around double Canada's export subsidy commitment levels, Canada was therefore in breach of the Agriculture Agreement.

In November 1997, the Government agreed to New Zealand invoking the dispute settlement provisions of the WTO against Canada in respect of its "Special Milk Classes" regime. New Zealand requested consultations under the Dispute Settlement Understanding in December 1997. As the consultations did not resolve the dispute, New Zealand requested a WTO adjudicative panel in March 1998. The United States had also requested a panel in respect of the "Special Milk Classes" scheme. The Panel that was established heard both cases together.

The parties to the case (New Zealand, the United States and Canada) all made written and oral submissions to the Panel in the latter part of 1998. The Panel issued its report in May 1999. The Panel found that Canada's "Special Milk Classes" scheme did provide export subsidies, and that Canada had therefore exceeded its export subsidy commitment levels in breach of the WTO Agriculture Agreement.

Canada unsuccessfully appealed the Panel's Report - in its Report in October 1999, the WTO Appellate Body upheld the Panel's key findings. The WTO Dispute Settlement Body (made up of all WTO Member countries) adopted these findings, and recommended that Canada bring its measures into conformity with the WTO rules.

New Zealand and the United States then reached an agreement with Canada in December 1999 on the time-frame for Canada's implementation of the outcome of the case. This agreement provided for a "phased" implementation over the 2000 calendar year. As part of its implementation, Canada would continue to make use of the "Special Milk Classes" scheme for dairy exports, but agreed to limit export volumes under the scheme to within its commitment levels.

However as part of its implementation, Canada introduced a number of new dairy export mechanisms on a province-by-province basis. Canada claimed that the new schemes did not provide export subsidies, and it would not therefore limit the volume of exports under them to within its export subsidy commitment levels. New Zealand and United States officials considered that the new schemes continued to provide export subsidies and that Canada had therefore failed to comply with the Dispute Settlement Body's recommendations.

In February 2001, New Zealand, the United States and Canada held consultations on this issue, but failed to resolve New Zealand's and the United State's concerns. Consequently, later in February, New Zealand and the United States formally requested that the WTO reconvene the original dispute settlement Panel to examine Canada's replacement schemes. The Panel received written and oral submissions from the parties in May 2001. The EU, Mexico and Australia also participated as third parties and made written and oral submissions to the Panel. The Panel issued its decision in July 2001. The Panel found that Canada's replacement schemes continued to provide export subsidies in breach of its WTO commitments.

Canada subsequently appealed this decision and in December 2001 the Appellate Body held that the Panel had applied the wrong legal test to determine whether export subsidies had been provided. The Appellate Body also determined that it was unable to make any determination as to whether the Canadian measures were export subsidies since further factual information was required before the correct legal test could be applied.

Following the December 2001 Appellate Body ruling, New Zealand and the United States requested, for a second time, the reconvening of the original dispute settlement Panel to examine Canada's replacement measures against the legal test outlined by the Appellate Body. The Panel received written and oral submissions from the parties in March and April 2002. The EU, Argentina and Australia also participated as third parties and made written and oral submissions to the Panel. The Panel issued its decision in July 2002. The Panel, once again, found that Canada's replacement schemes continued to provide export subsidies in breach of its WTO commitments.

On 23 September 2002, Canada notified its decision to appeal the Panel decision. Following receipt of written submissions of the parties, the Appellate Body heard the appeal in Geneva on 31 October 2002. The Appellate Body upheld the Panel's finding that Canada was providing export subsidies in breach of its WTO commitments. The Appellate Body found that Canada's replacement scheme was contrary to Canada's obligations under Article 3.3 and Article 8 of the Agreement on Agriculture. The Appellate Body's decision was adopted by the Dispute Settlement Body on 17 January 2003.

At the same time as initiating the dispute settlement process to investigate Canada's compliance with the original panel's finding, NZ also lodged a request seeking authorisation from the Dispute Settlement Body to take retaliatory action against Canada by suspending tariff concessions up to the value of US$35 million a year, which is the damage calculated to be caused to New Zealand by Canada's illegal dairy export subsidy regime (the US also made a similar request to the Dispute Settlement Body). The requests of New Zealand and the US were referred to arbitration. A mutually agreed solution between Canada and New Zealand (and separately between the United States and Canada) was notified to the WTO on 9 May 2003.

United States - Safeguard Measures on Imports of Fresh, Chilled and Frozen Lamb from New Zealand (WT/DS177).

In October 1998 United States' lamb and sheep producers filed a petition under Section 201 of the US Trade Act 1974 seeking a remedy for their claim of serious injury caused by increased lamb imports from New Zealand and Australia. The United States International Trade Commission (USITC) concluded that while no actual serious injury had been caused by increasing lamb imports, those imports did cause a threat of serious injury to the domestic industry. The USITC majority recommended that trade restrictions be imposed on New Zealand and Australian lamb imports.

In July 1999 President Clinton announced the imposition of a trade-restrictive safeguard measure against imports of lamb from New Zealand and Australia with effect from 22 July 1999. The safeguard measure imposed consisted of a tariff quota set for three years and one day initially, although the duration of the safeguard measure could be extended for up to a total of eight years. Quota levels were set at approximately 1998 trading levels for the first year, increasing slightly in the following years, and tariff rates of 9% in-quota and 40% out of quota for the first year, 6% in-quota and 32% out-of-quota for the second year, and 3% in-quota and 24% out-of-quota for the third and final year.

New Zealand, Australia and the United States held consultations under the Safeguards Agreement in Geneva in April and May 1999 and in Washington in July 1999. Those consultations reached an unsatisfactory conclusion from New Zealand's point of view. Accordingly, on 16 July 1999 New Zealand requested consultations with the United States under the Dispute Settlement Understanding (DSU), claiming that the safeguard measure was in breach of Articles 2, 3, 4, 5, 11, and 12 of the Safeguards Agreement, and Articles I, II, and XIX of the GATT 1994. At about the same time Australia also requested DSU consultations with the United States.

New Zealand and Australia held consultations with the United States under the DSU in Geneva in August 1999. Unfortunately, these consultations did not lead to a resolution of differences. Accordingly, on 27 October 1999 New Zealand requested the establishment of an adjudicative panel of the WTO to rule on the matter of the consistency of the safeguard measure with the United States WTO obligations. A panel was established pursuant to this request on 19 November 1999. Australia also requested a panel at the same time, and a single panel has heard both New Zealand and Australian arguments in the case. Canada, the EC, Japan, and Iceland participated as third parties. Panel hearings were held in Geneva on 25 and 26 May 2000, and on 26 and 27 July 2000.

In December 2000, the WTO Panel issued its decision, which was overwhelmingly in New Zealand's and Australia's favour, although there were some decisions on certain aspects which were not completely satisfactory in New Zealand's view. The United States appealed the Panel's ruling to the WTO's Appellate Body in January 2001. In response, New Zealand cross-appealed certain adverse aspects of the Panel's decision.

The Appellate Body heard the appeal in March 2001. The Appellate Body ruled comprehensively in New Zealand's and Australia's favour. It upheld all the findings of the Panel, as well as finding in New Zealand's favour on most of the issues that were cross-appealed. The ruling meant that the tariffs and quotas imposed by the United States on lamb meat were deemed inconsistent with WTO rules. The Appellate Body's report was adopted by the Dispute Settlement Body on 16 May 2001.

After considering its options, on 31 August 2001, the United States announced it would implement the recommendations and rulings of the Dispute Settlement Body by removing the safeguard measure on New Zealand and Australian lamb meat, effective from 15 November 2001.

United States - Definitive Safeguard Measures on Imports of Certain Steel Products (WT/DS258).

Following a safeguards investigation initiated in June 2001, the United States imposed safeguard measures on a broad range of imported steel products effective from 20 March 2002. This included products in the 'certain carbon flat-rolled steel' (CCFRS) category which are exported by New Zealand to the United States. Thus, an initial tariff of 30% was imposed on plate, hot-rolled steel, cold-rolled steel and coated steel, reducing to 18% in the third and final year of the measure. Slabs were subjected to a tariff rate quota of 30% on imports exceeding 5.4 million short tons, decreasing to 18% in the third year on imports exceeding 6.4 million short tons.

Certain types of CCFRS and other steel products, narrowly defined technically but amounting to a large percentage of total import volumes, were excluded from the measure at the time it was imposed and also subsequently pursuant to an exclusions application process which is ongoing. No New Zealand exports benefited from product exclusions.

On 7 March 2002, New Zealand requested consultations with the United States under Article 12.3 of the WTO Agreement on Safeguards. These took place in Geneva on 19 March 2002. On 21 May 2002, New Zealand requested dispute settlement consultations with the United States which took place in Geneva on 13 June 2002. These failed to resolve the dispute, so on 28 June 2002 New Zealand requested the establishment of a WTO panel. This was achieved on 8 July 2002 and the case brought by all eight principal complainants (Brazil, China, the European Communities, Japan, Korea, New Zealand, Norway and Switzerland) referred to a single panel. The members of this Panel were appointed by the WTO Director-General on 25 July 2002.

New Zealand, along with most of the other complainants, claimed that the United States had breached the GATT 1994 Article XIX, and Articles 2, 3, 4, and 5 of the Agreement on Safeguards. Canada, Chinese Taipei, Cuba, Mexico, Thailand, Turkey and Venezuela participated as third parties.

The first substantive hearing of the Panel took place in Geneva from 29-31 October 2002. The second substantive hearing of the Panel took place in Geneva from 10-12 December 2002. Complainants coordinated their oral statements to the Panel at both hearings, dividing the heads of claim between them. The Panel, which estimated that it received over 3,500 pages of submissions and 3,000 pages of exhibits, issued its final report on 11 July 2003. It found that the United States had acted inconsistently with its obligations under the GATT 1994 Article XIX, and with Articles 2.1, 3.1, and 4.2 of the Agreement on Safeguards. It also exercised "judicial economy" (i.e. did not rule) on a number of claims made by the complainants, including the claims that the United States had not complied with its obligation under Articles 2.1 and 4.1 to define correctly the "domestic industry" allegedly injured by increased imports; its obligation to demonstrate serious injury to that industry; and its obligation to apply safeguard measures proportionate to that serious injury as required by Article 5.1.

The United States appealed the Panel's ruling to the WTO Appellate Body, filing its Notice of Appeal on 11 August and its Appellant Submission on 21 August. New Zealand and the other complainants filed their Other Appellant's Submissions on 26 August, and all complainants and the United States filed Appellee submissions on 5 September. The Appellate Body held oral hearings in Geneva on 29 and 30 September, and issued its decision on 10 November 2003. It upheld the Panel's conclusions that the United States had acted inconsistently with its obligations under the GATT 1994 Article XIX, and under Articles 2.1, 3.1 and 4.2 of the Agreement on Safeguards. On 4 December 2003, the United States President announced that the safeguard measures would be removed, effective from 5 December. On 10 December, the WTO Dispute Settlement Body adopted the Panel Report as modified by the Appellate Body.

WTO disputes in which New Zealand has been involved as a third party:

- **European Communities - Measures Affecting Livestock and Meat (Hormones) (WT/DS26)**
- **Korea - Measures Affecting Imports of Fresh, Chilled, and Frozen Beef (WT/DS161)**
- **United States - Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities (WT/DS166)**
- **Japan - Measures Affecting the Importation of Apples (WT/DS245)**
- **United States - Subsidies on Upland Cotton (WT/DS267)**

European Communities - Measures Affecting Livestock and Meat (Hormones) (WT/DS26).

In January of 1996, the United States requested consultations with the European Union under the WTO Dispute Settlement Understanding in relation to the EU's ban on the use of certain hormonal growth promotants in livestock farming. The ban seriously restricted US exports of beef to the EU, since the hormones in question are widely used by US farmers. The US claimed that the ban was inconsistent with a variety of WTO rules, and in particular with the provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement).

In February of 1996, New Zealand, Australia and Canada requested to be joined in the consultations. Joint consultations were held in March of 1996, but failed to reach a mutually satisfactory solution. The US requested that an adjudicative WTO Panel be established in April 1996, and one was duly established in May of that year. New Zealand, Australia, Canada and Norway reserved their rights to participate in the Panel proceedings as third parties. New Zealand lodged a written submission to the Panel, and together with the other third parties met with the Panel in October of 1996. New Zealand, like the US, Australia and Canada, argued that the EU was in breach of its commitments under the SPS Agreement, since it had put in place a trade restriction on hormone-treated meat that was not based on any scientific risk assessment.

The Panel issued its Report in August of 1997. The Panel found that the European Union, by maintaining sanitary measures (bans on meat sourced from hormone-treated livestock) which were not based on a risk assessment or on any international standard, and which were discriminatory in their application, had acted inconsistently with the requirements of the SPS Agreement.

The EU appealed the Panel's findings in September. The WTO Appellate Body, in its Report issued in January of 1998, upheld the Panel's key findings.

To date, the EU has not removed its ban. The WTO DSU provides a mechanism for compensation or retaliation where a country has failed to bring itself back into conformity with the WTO rules following a ruling of a Panel or the Appellate Body. Based on these provisions, the US and Canada have obtained the permission of the WTO Dispute Settlement Body to increase tariffs on imports of products from the EU. The annual value of the increases is US$116.8 million for the US, and C$11.3 million for Canada. These values were determined by a WTO arbitration to be equivalent to the level of harm suffered by the US and Canada as a result of the EU's ban.

Korea - Measures Affecting Imports of Fresh, Chilled, and Frozen Beef (WT/DS161).

In February 1999, the United States and Australia requested consultations with Korea, claiming that Korea maintained an array of restrictions that prevented imported beef from competing on the same footing as domestically-produced Korean beef. These included a dual retail system which required retailers to install separate display counters and signage if they wanted to seel imported beef. In the complaining countries' views, Korea had also miscalculated, and therefore exceeded, its allowable level of domestic agricultural support in 1997 and 1998. New Zealand joined in these consultations, which failed to settle the dispute. The United States and Australia requested the establishment of an adjudicative WTO Panel in April and July of 1999 respectively. In July 1999 a "merged" Panel was established in respect of both requests. New Zealand participated as a third party.

The Panel issued its Report in July 2000, and found comprehensively in favour of the principal complainants, Australia and the US, as well as New Zealand as a third party. The Panel's findings were subsequently upheld by the WTO's Appellate Body in November 2000, and Korea was given until 10 September 2001 to comply. Prior to the passing of that date, Korea announced that it would implement the ruling by dismantling the dual retail system.

The Reports of the Panel and Appellate Body are available on the WTO's website. The United States and Australia requested consultations under the WTO Dispute Settlement Understanding in February and April of 1999 respectively. New Zealand and Canada joined in these consultations, which failed to settle the dispute. The United States and Australia requested the establishment of an adjudicative WTO Panel in April and July of 1999 respectively. In July 1999 a "merged" Panel was established in respect of both requests. New Zealand and Canada reserved third party rights.

In November of 1999, New Zealand lodged a detailed written submission on the dispute with the Panel. The Panel issued its Report in July 2000, and found comprehensively in favour of the principal complainants, Australia and the US, as well as New Zealand as a third party. Korea has a right to lodge an appeal against the Panel's findings to the WTO Appellate Body.

United States - Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities (WT/DS166).

On 26 July 1999 a WTO dispute settlement panel was established in a case brought by the European Communities against the United States over the latter's safeguard measure against imports of wheat gluten. New Zealand, Australia and Canada participated in the case as third parties. New Zealand had no commercial interest in the case, but had a systemic interest in the implementation by the United States of safeguards, given our parallel dispute with the United States over the lamb safeguard measure. Accordingly, New Zealand's third party submission raised issues under Articles 2, 4, 5, and 12 of the Safeguards Agreement.

On 31 July 2000 the Panel issued its Report on the WTO-consistency of the United States wheat gluten safeguard measure. The Panel found that the measure was inconsistent with the obligations of the United States under the Safeguards Agreement. This finding was upheld by the Appellate Body following an appeal by the United States. In June 2001 the US removed its safeguard measure on wheat gluten, in line with the ruling of the WTO.

Japan - Measures Affecting the Importation of Apples (WT/DS245).

Since 1993, Japan has allowed the importation of apples from New Zealand only in accordance with an array of restrictions intended to protect Japan against the introduction of fire blight. Japan also imposes similar restrictions on other countries where fire blight is established, including the United States. In New Zealand's view, however, scientific evidence shows that fire blight disease is not introduced to new countries via the export of mature apples.

Following unsuccessful formal bilateral consultations, the United States brought dispute settlement proceedings against Japan in May 2002. The United States' complaint focused on the provisions of the WTO Agreement on Sanitary and Phytosanitary Measures ("the SPS Agreement"). The US considered that Japan's fire blight measures on apples breached the requirements of the SPS Agreement in that they were being maintained without sufficient scientific evidence. Among other things, the US also argued that Japan had not based its restrictions on an appropriate risk assessment, and that there were other, less-trade restrictive options available to Japan that would equally achieve protection against the introduction of fire blight. The United States has sought the removal of all of Japan's current restrictions on apple imports.

Along with Australia, Brazil, the EC and Chinese Taipei, New Zealand participated in the Japan-Apples dispute as a third party. New Zealand's third party submission to the Panel presented scientific evidence to show that mature apples do not cause the introduction of fire blight.

The Panel held its first hearing on 21 October 2002 and issued its on 15 July 2003. The Panel found that, on the basis of the information provided to it, there was not sufficient scientific evidence that apple fruit are likely to serve as a pathway for the entry, establishment, or spread of fireblight within Japan. Accordingly, the Panel found that the measures imposed by Japan on imports of apples from the United States were, as a whole, maintained "without sufficient scientific evidence" in breach of Article 2.2 of the SPS Agreement and were not based on a risk assessment as required by Article 5.1 of the SPS Agreement.

On 28 August 2003 Japan notified to the DSB its intention to appeal the Panel decision. The United States also cross-appealed certain aspects of the Panel Report. Following receipt of written submissions from the parties, the Appellate Body held an oral hearing on 13 October 2003 and issued its report on 26 November 2003.

The Appellate Body upheld the Panel's findings that Japan's restrictions are inconsistent with Article 2.2 of the SPS Agreement because (i) they are maintained without sufficient scientific evidence; (ii) are not justified as a provisional measure under Article 5.7 of the SPS Agreement because the situation is not one where the relevant scientific evidence is 'insufficient'; and (iii) are not based on a risk assessment as required by Article 5.1 of the SPS Agreement.

New Zealand participated in the appeal as a third party by making a submission and statement to the Appellate Body supporting the Panel's finding that Japan's fire blight-related restrictions on imports of apples from the United States are inconsistent with the SPS Agreement.

On 10 December the WTO Dispute Settlement Body adopted the report of the Appellate Body and the report of the Panel as upheld by the Appellate Body. It was agreed that Japan would have until 30 June 2004 to bring its measures into compliance. Japan notified the WTO of its revised SPS measures on that date.

Then in August 2004 the United States requested that a Compliance Panel be convened under Article 21.5 of the Dispute Settlement Understanding to examine Japan's compliance with the rulings and recommendations of the Dispute Settlement Body. The United States argued that Japan's revised SPS measures continue to breach the SPS agreement in that they are not based on sufficient scientific evidence, are more trade restrictive than necessary, and are not based on a risk assessment. The United States contends that the revised measures are substantially the same as the original measures and contain most of the trade restrictive elements of those original measures. Japan in turn has responded by bringing forth new scientific studies which it argues support its revised measures.

The Compliance Panel, made up of the same panellists as the original Panel, held a hearing of parties on 28 and 29 October 2004. New Zealand filed a written third party submission on 19 October 2004, and made an oral statement at the hearing. The Panel has now indicated that it will consult further with scientific experts before issuing its report.

United States - Subsidies on Upland Cotton (WT/DS267).

Brazil has brought dispute settlement proceedings against the United States on the grounds that the United States provides prohibited and actionable subsidies to US producers, users and/or exporters of upland cotton. Brazil's complaint is that the subsidies are inconsistent with the obligations of the United States under the Agreement on Subsidies and Countervailling Measures, the Agreement on Agriculture and the GATT 1994. Brazil also claims that the United States' measures are not exempt from action under Article 13 of the Agreement on Agriculture (the "peace clause").

On 18 March 2003 a panel was established to hear the dispute. The Panel first received submissions from the parties relating to the application of the "peace clause" and held an oral hearing from 22-24 July 2003.

In its second phase the Panel considered arguments from the parties relating to Brazil's claims that US subsidies to upland cotton cause or threaten to cause serious prejudice to the interests of Brazil under the Agreement on Subsidies and Countervailling Measures as well as violating the GATT 1994. The Panel resumed its first hearing to consider these arguments from 7-9 October 2003.

The Panel has indicated that it will issue its report in May 2004.

New Zealand joined the dispute as a third party because of the systemic issues it raises relating to WTO disciplines on prohibited export subsidies and domestic support in the context of agriculture. New Zealand made written and oral submissions to the Panel in support of Brazil's claims. Other third parties in the dispute are Argentina, Australia, Benin, Canada, Chad, China, Chinese Taipei, the EC, India, Pakistan, Paraguay and Venezuela.

New Zealand Ministry of Foreign Affairs & Trade (Trade Negotiations Division).

NEW ZEALAND -- ABOUT THE WORLD TRADE ORGANIZATION.

http://www.mfat.govt.nz/foreign/tnd/general/about.html#What%20is%20the%20WTO?

Why is New Zealand a member of the WTO?

New Zealand became a founding member of the GATT on 30 July 1948 and became a WTO member when it was created on 1 January 1995. We have a Permanent Mission in Geneva representing New Zealand on WTO issues.

New Zealand benefits from clear trade rules that are applicable to all. Without the multilateral forum of the WTO New Zealand would have to negotiate trade agreements with every country we wanted to trade with, resulting in different agreements with each country.

Our exporters would then have a huge and expensive task keeping up to date with any trading scheme changes each country makes. In the WTO, New Zealand is kept informed via trade policy reviews of each member country.

Without the WTO, New Zealand would be disadvantaged making deals with larger economies. With the weight of other member countries behind us, New Zealand can make more ambitious demands of larger countries. There is also an effective dispute settlement regime. WTO decisions are by consensus which means that all members have an equal say.

Trade Policy Reviews.

Surveillance of national trade policies is an important WTO activity and all WTO members are subject to trade policy reviews. The objectives of the WTO Trade Policy Review Mechanism (TPRM) are to contribute to improved adherence by all WTO members to WTO rules, disciplines and commitments, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in and understanding of the trade practices and policies of members.

New Zealand review – 2003

New Zealand's trade and economic policies are reviewed every six years - the last review took place in May 2003. After a series of meetings with officials, academics, businesses and non-governmental organisations in 2002 the WTO Secretariat prepared a report on New Zealand's trade policy.

The New Zealand Government prepared a policy statement, and these two documents formed the basis for the meeting of the WTO Trade Policy Review Body on 12 and 14 May 2003. WTO members were able to put written questions to New Zealand about our trade policy prior to the meeting. These questions and written answers are collated together with any statements made at the meeting in an official Minute of the Meeting.

The Ministry of Foreign Affairs and Trade and the WTO.

Negotiations with the WTO are undertaken by the Trade Negotiations Division of the Ministry of Foreign Affairs and Trade on behalf of the government. Input from businesses and individuals is welcome.

New Zealand Ministry of Foreign Affairs & Trade (Trade Negotiations Division).

NEW ZEALAND – Strengthening Rules for International Trade.
-- SAFEGUARDS, SUBSIDIES & ANTIDUMPING --

http://www.mfat.govt.nz/foreign/tnd/tradewto.html

SAFEGUARDS.

A safeguard is a form of temporary relief. They are used when imports of a particular product, as a result of tariff concessions or other WTO obligations undertaken by the importing country, increase unexpectedly to a point that they cause or threaten serious injury to domestic producers of "like or directly competitve products". Safeguards give domestic producers a period of grace in which to become more competitive.

If this happens, the government of the importing country may suspend the concession or obligation, but will be expected to provide compensation by offering some other concession. Otherwise, the affected WTO member(s) can retaliate by withdrawing equivalent concessions. Industries or companies often request safeguard action by their governments.

Safeguards usually take the form of duty increases to higher than bound rates or quantitative restrictions on imports.

Safeguards can be seen as the brakes on the trade liberalisation car. While the immediate function of brakes is to slow the car down, the fact that the car has them allows the car to be driven much faster than it could if it lacked them. (Think how fast you would be prepared to drive if you know your car did not have brakes!). By offering a temporary escape route, safeguards give WTO members confidence to offer each other greater liberalisation measures in trade negotiations than they might other The Agreement on Safeguards sets out the rules for application of safeguard measures and requirements for safeguard investigations by national authorities. The agreement emphasises transparency and the avoidance of arbitrariness through laying down rules. The goal of the agreement is to encourage structural adjustment on the part of the industries adversely affected by increased imports, thereby enhancing competition in international markets.

The agreement also aims to cure the problems caused by "grey area" measures and permanent safeguard actions. Voluntary export restraints, orderly marketing arrangements or any other similar "grey area" measures on the export or the import side are prohibited. Bilateral measures existing when the WTO agreement entered into force on 1 January 1995 had to be modified so that they conformed with the safeguards agreement or be phased out by the end of 1998. A time limit of eight years was set on any remaining safeguard measures dating from 1993 or 1994, starting from the date on which they were first applied.

No safeguard measure may last longer than four years, unless through a new investigation its continuation is found to be necessary to prevent or remedy serious injury, and there is evidence that

the industry is adjusting. The sum of the initial period of application and any extension may not exceed eight years (or ten years for developing countries).

In addition, safeguard measures due to last longer than one year must be progressively liberalised at regular intervals during the period of application. This requirement also carries over into any extended period of a safeguard's application.

Any measure due to last more than three years must be reviewed at mid-term and, based on that review, if appropriate, the WTO member applying the measure must withdraw it or accelerate its liberalisation.

Members are obliged to apply safeguard measures only to the extent necessary to remedy or prevent serious injury and to facilitate adjustment. In the case of tariff measures, the agreement does not specify any maximum increase in the tariff above the bound rate.

WTO members applying safeguard measures generally must compensate other members for their effects. They must offer a substantially equivalent level of concessions and other obligations to affected members for the duration of the safeguard.

If there is no agreement on trade compensation within 30 days, the affected exporting members individually may suspend substantially equivalent concessions and other obligations - that is, raise tariffs - unless the Council for Trade in Goods disapproves of this.

During the first three years of application of a safeguard measure, however, this remedy is not available if the measure is taken in response to an absolute increase in imports and otherwise conforms to the provisions of the safeguards agreement.

Another rule in the Safeguards agreement aimed at a pre-Uruguay Round abuse is that a safeguard may not be reapplied to a product until the longer of two years and a period equal to the duration of the original safeguard measure has elapsed. For developing country members, this period is replaced with the longer of 2 years and half the duration of the original safeguard. Other members too may reapply a safeguard measure for 180 days or less provided at least a year has elapsed since the date the original safeguard measure was introduced, and no more than two safeguard measures have been applied on the product during the five years immediately preceding the date of reapplication.

The Safeguards agreement directs members to pursue consultations and disputes arising under the agreement under the general WTO dispute settlement procedures.

SUBSIDIES.

A subsidy is a financial contribution by a government or any public body (including provincial and local governments) within the territory of a member, which confers a benefit.

A financial contribution can include:

- **direct transfers of funds (eg grants, loans, and equity infusion)**
- **contingent direct transfers of funds or liabilities (eg loan guarantees)**
- **government revenue forgone or not collected (eg fiscal incentives such as tax credits)**
- **providing goods or services other than general infrastructure**

- **purchasing goods**
- **a government entrusting or directing a private body to carry out the above functions**

In the case of cash grants, the benefit to the recipient is obvious and easily calculated but with other kinds of subsidy it is not so easy. For example, exemption of enterprises from industrial or environmental laws may save the enterprises money, but is considered to be a regulatory advantage, not a financial one - hence it is not a subsidy. Or if a government makes a loan to an enterprise on terms substantially equivalent to those the enterprise could obtain from private lenders, there is a financial contribution but no benefit, so the loan is not a subsidy. Technical and financial assistance given by private non-governmental organisations (provided their funding is not obtained from a government or public body) is not a subsidy.

A subsidy enables producers to sell their goods at lower than normal prices by covering some of the producer's costs. It makes the product artificially competitive with others in the market where normally it would be more expensive for consumers. This gives the exporter an unfair advantage over domestic producers.

Countervailing measures are special duties imposed on imports to offset the benefits of prohibited or actionable subsidies to producers or exporters in the exporting country.

WTO members may apply them as a remedy to unfair subsidies only after investigating and determining that the conditions set out in the Subsidies and Countervailing Measures (SCM) Agreement are satisfied.

The conditions are:

- **the imports are subsidised by prohibited or actionable subsidies (determined under Part I of the SCM Agreement);**
- **there is material injury or threat of material injury to a domestic industry, or material retardation of the establishment of such an industry; and**
- **there is a causal link between the subsidised imports and the material injury (both determined under Part V of the SCM Agreement).**

In addition, there are stringent procedural requirements concerning the conduct of investigations and the imposition and maintenance of countervailing measures. This is to ensure that investigations are conducted in a transparent manner, that all interested parties have the opportunity to defend their interests, and that investigating authorities properly explain the reasons for their determinations. Failure to comply with any of these requirements can result in the measures being overturned under the WTO's dispute settlement mechanism.

The SCM Agreement forms part of the WTO rules designed to secure fair conditions of trade. It imposes multilateral disciplines on how governments may provide subsidies to their domestic industries, and regulates their use of countervailing measures against imports subsidised by other WTO members.

The SCM Agreement created three basic categories of subsidies:

(1) Prohibited

Some subsidies are prohibited because they directly affect trade, so are likely to cause adverse effects to the interests of other WTO members. Subsidies that are contingent upon export performance (export subsidies), or the use of domestic over imported goods (import substitution subsidies) are prohibited. If a WTO member provides a prohibited subsidy, it can be taken to dispute settlement without the need for the complaining member to show the effects the subsidy has on trade. This is because, by design, export subsidies or import substitution subsidies affect trade, so are most likely to cause adverse affects.

(2) Actionable

A subsidy that is not prohibited may still be subject to the SCM Agreement if it has been specifically provided to an enterprise or industry or group of enterprises or industries. This is because a specific subsidy may still produce distortions in the allocation of resources within an economy. Most specific subsidies, such as production subsidies, fall in the "actionable" category. There are five ways in which "specificity" within the meaning of the SCM Agreement may arise:

- **enterprise-specificity - a government targets a particular firm or firms for subsidization**
- **industry-specificity - a government targets a particular sector or sectors for subsidisation**
- **regional-specificity - a government targets producers located in specified parts of its territory for subsidisation**
- **trade-specificity - a government targets export goods or goods using domestic inputs for subsidisation**
- **de facto specificity - despite the rules governing the subsidy not appearing to give specificity, other factors in the implementation of the subsidy programme lead to an inference that the subsidy is specific in fact.**

A specific subsidy can be challenged if it:

- **causes injury to the domestic industry of a WTO member**
- **nullifies or impairs a benefit (this is most likely to arise when a member finds that the improved market access it might have expected to gain through reductions of tariff bindings is undercut by the effects of a subsidy), or**
- **causes serious prejudice to the interests of another member (for example, where a subsidy causes significant price under-cutting, price suppression or price depression)**

(3) Non-actionable

- **for a period of five years, some subsidies were classified as non-actionable, such as research subsidies, subsidies to disadvantaged regions and environmental subsidies. This section lapsed 31 December 1999, meaning that these types of subsidies currently fall into the actionable category.**

New Zealand recognises that, in controlled circumstances, subsidies may assist economic development. In particular, subsidies may play a role in achieving the three elements of the NZ government framework for economic transformation:

- **strengthening economic foundations**
- **investing in innovation, talent and global connections**
- **sectoral policies focussing on biotechnology, ICT and creative sectors.**

New Zealand's strategic objective for the subsidies negotiation is to maintain the "traffic-light" structure of the SCM Agreement: prohibited export subsidies (red light), actionable subsidies (orange light) and non-actionable subsidies (green light).
Another New Zealand concern is to reintroduce, in some form, the "teeth" of the SCM Agreement: a "serious prejudice" provision aimed at making it easier for exporting countries to challenge the adverse effects of foreign subsidies. For certain categories of subsidy, the exporting country needed only to establish that such a subsidy existed, and then the subsidising country had to show that its subsidy had not caused serious prejudice to the interests of the complaining Member. In practice, however, this provision was seldom used and it also lapsed at the end of 1999.

At the same time, it will be important to ensure that any changes to the rules on countervailing measures investigations are not overly prescriptive or place unreasonable burdens on investigating authorities. Further, we would not want to see a system that is more reliant on the dispute settlement system than it currently is, since this is time-consuming and costly.

Another key aspect of the negotiations will be to ensure that adequate provision is made for technical assistance for those countries whose countervailing investigation practices are not well-developed, perhaps due to inexperience or lack of resources. Making sure that the results of WTO dispute settlement rulings are followed and enforced will also raise the standards of investigation and implementation of countervailing measures.

ANTIDUMPING.

Dumping is the exporting of a product at a lower price than the product's "normal value" (the price normally charged on the producing country's market). World Trade Organisation (WTO) members have agreed that dumping is to be condemned if:

- **it causes or threatens material injury to an established industry in another member country**

or

- **materially retards the establishment of a domestic industry.**

Dumping does not necessarily equate to unfair competition and anti-dumping actions are seen by some as a form of protectionism. Where foreign industries are finding it difficult to manage competition in the domestic market from overseas, anti-dumping could emerge as a problem for New Zealand exporters of like goods.

In recent years there has been an increase in the use of anti-dumping measures by an increasing number of WTO members. Some members believe it is important to clarify the existing anti-dumping agreement to achieve greater consistency and transparency in the ways that members interpret and apply the agreement. This could limit the inconsistent application of anti-dumping measures, while ensuring that they remain an effective remedy to the effects of dumped imports on our domestic industries.

New Zealand exporters of agricultural and horticultural products may be particularly at risk from any increased and protectionist use of trade remedies as tariff and other traditional barriers to their products are reduced.

Dumping does not necessarily amount to unfair competition. Few countries have laws preventing a domestic producer from selling at a loss, let alone prohibiting differential pricing. There are sound commercial reasons for both practices. For example, two people sitting next to each other in economy class on a domestic airline flight may have bought their tickets on the same day, yet paid very different prices for them.

The mere initiation of investigation can have a dampening effect on trade. So it is sometimes argued that the existence of anti-dumping as a tool against overseas competitors behaving no differently from domestic competitors (against whom no such remedy is available) is an invitation to protectionist abuse. Critics argue that a robust competition law banning predatory pricing is sufficient to protect both consumers and producers. Nonetheless, many governments, New Zealand's included, take action against dumping in order to defend their domestic industries.

WTO agreements do not pass judgment on whether or not there should be anti-dumping. Instead, they regulate the use of anti-dumping to ensure that fair investigation procedures are followed. This is important because as tariff rates have been lowered over time anti-dumping duties have become increasingly common.

Two of the key issues that New Zealand wants addressed in the negotiations are increased transparency in anti-dumping investigations, and best-practice guidelines to clarify some of the less prescriptive articles of the current anti-dumping agreement.

New Zealand is also mindful that a degree of flexibility must be maintained to deal with the particular circumstances of any given case. Further, we would not want to see a system that is more reliant on the dispute settlement system than it currently is since this is time-consuming and costly.

Addressing these factors would help to ensure that anti-dumping measures are correctly applied and would avoid the possible use of anti-dumping as a protectionist tool.

Another key aspect of the negotiations will be to ensure that adequate provision is made for technical assistance for those countries whose practices are not well-developed, perhaps due to inexperience and lack of resources. Making sure that the results of WTO dispute settlement rulings are followed and enforced will also raise the standards of investigation and implementation of anti-dumping measures.

Anti-dumping provisions first appeared in the General Agreement on Tariffs and Trade (GATT), 1994. A major overhaul of anti-dumping took place in the Uruguay Round. The result was an

agreement about 14 times longer than the anti-dumping provisions in GATT. The anti-dumping agreement clarifies and expands on Article VI of GATT, and the two operate together.

The WTO committee on anti-dumping provides a forum in which to discuss matters relating to the anti-dumping agreement and meets at least twice a year. The committee reviews national anti-dumping legislation that is notified to the WTO. Its meetings are an opportunity for members to ask questions about the operation of other members' national anti-dumping laws and regulations, and to query the consistency of national practice with the anti-dumping agreement. The committee also reviews notifications of anti-dumping actions taken by members, providing the opportunity to discuss particular cases.

The committee has created a separate body, the ad hoc group on implementation, which is open to all members of the WTO. This group focuses on technical issues of implementation that frequently arise in administering anti-dumping laws.

What does the anti-dumping agreement do?

The anti-dumping agreement attempts to balance the interests of importing countries to protect their domestic industries from dumping, and the interests of exporters that anti-dumping measures and procedures are not an obstacle to trade.

The key provisions in the agreement deal with:

- **How to establish whether goods are being dumped**
- **How to find out whether the dumped goods are causing or threatening injury to a domestic industry**
- **The procedures to be followed in instigating and during investigations, in making and reviewing determinations, and imposing and terminating anti-dumping duties.**

Notifications of anti-dumping legislation and investigations.

All WTO members are required to bring their anti-dumping legislation into conformity with the anti-dumping agreement and to notify that legislation to the anti-dumping committee.

Members must also notify the committee twice per year about all anti-dumping investigations, measures and actions taken. Members must also promptly notify the committee of preliminary and final anti-dumping actions taken, and provide certain information required by guidelines agreed to by the committee.

Investigations are usually initiated on the basis of a written request submitted by or on behalf of a domestic industry. The request must be supported by domestic producers contributing 25% or more of the total output of the competing product, provided the total output of producers opposing an investigation is not greater than that of those supporting it. The application must include evidence of dumping, injury, and causality, as well as other information regarding the product, industry, importers, exporters, and other matters.

In special circumstances authorities may themselves initiate an investigation without a written application from a domestic industry, but may proceed only if they have sufficient evidence of dumping, injury and causality.

Rules to ensure fair and transparent investigation procedures.

Investigation procedures vary from member to member, but all are based on the principles and rules in the anti-dumping agreement. The authorities must guarantee the confidentiality of sensitive information and verify the information on which determinations are based. To ensure the transparency of proceedings, the authorities must disclose to interested parties the information on which determinations are to be based, and provide them with adequate opportunity to comment. Interested parties must be given the right to participate in the investigation, including the right to confront parties with adverse interests, though public hearings are not specifically required. Two annexes to the agreement set out detailed rules for on-the-spot investigations to verify information obtained from foreign parties, as well as rules for the use of best information available if a party does not provide requested information or significantly impedes the investigation.

The investigation must be completed within 18 months. Once under way, the investigation is immediately terminated if the volume of imports from the country concerned is below 3% of total imports of the like product or if the margin of dumping is under 2% of the product's export price.

Anti-dumping duties are designed to counter the effects of dumping. They are an extra tax on a product from a particular exporting country over and above any taxes the product would usually incur. This makes the product more expensive to export forcing exporters to raise their prices in the destination country.

Anti-dumping duties can be imposed only after proper investigation determines that goods are being dumped, and that the dumped goods are causing (or threaten to cause) material injury. But even if all these requirements have been met, anti-dumping duties are only imposed if the importing member chooses to do so.

Members are also encouraged (but not actually required) to apply the "lesser duty" rule. This means that authorities can impose duties at a level lower than the margin of dumping if this level is adequate to remove injury.

Members are obliged to collect duties on a non-discriminatory basis on imports from all sources found to be dumped and causing injury, except for sources from which a price undertaking has been accepted.

How long can anti-dumping duties be in place for?

The anti-dumping agreement establishes rules for the duration and review of anti-dumping duties. This was prompted by some countries' practice before the Uruguay Round of leaving anti-dumping duties in place indefinitely. Anti-dumping measures must expire five years after they were first imposed, unless an investigation begun before the measure expiring shows that ending the measure would lead to injury. The authorities must review the need for the continued imposition of a duty if an interested party requests

Exporters facing anti-dumping duties in foreign markets should seek legal advice in that country. Aggrieved exporters may be able to seek judicial review or sue the foreign government over the decision to impose duties.

One option to avoid paying anti-dumping duties is to offer a price undertaking. An exporter may give an undertaking to the importing member to revise their prices or cease exports at dumped prices, but only after there has been a preliminary decision that dumping has taken place and is causing injury. Settlements must be voluntary on the part of both exporters and investigating authorities. An exporter may also request that the investigation be continued after their undertaking has been accepted. If it is finally determined that no dumping, injury, or causality has occurred, the undertaking must automatically lapse. Members may challenge another member's compliance with the anti-dumping agreement through the WTO dispute settlement procedures.

A special standard is applied in anti-dumping agreement cases to the dispute settlement panel's review of the determination of the national authorities imposing the measure. The test is whether or not the national authorities established the facts properly, evaluated them in an unbiased and objective way, and whether or not their interpretation of the law is permissible. This test is intended to prevent dispute settlement panels from making decisions based on their own views of the facts and law.

U.S. OVERVIEW – ENFORCING WTO OBLIGATIONS & TRADE RIGHTS.

US-China Trade Relations: Entering New Phase of Accountability & Enforcement.

February 2006
United States Trade Representative
http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/asset_upload_file921_8938.pdf

EXECUTIVE SUMMARY.

Thirty years ago, China was a nation mostly closed to international commerce. Today, it is the world's third largest trading power. China's emergence over this period as a major international player has not only redefined the global trading system, but also has far-reaching economic and political impact on China, the United States, East Asia and the world.

China's integration into the global economy and progressive embrace of market principles have been encouraged by more than 25 years of U.S. political and economic engagement, pursued on a largely bipartisan basis across administrations. These developments have helped broaden and deepen relationships between the United States and China at all levels, to the benefit of both countries. But they have also caused some friction.

The trade relationship between our two countries has become increasingly central to the economies of both our countries. China's economy has been growing at roughly ten percent a year for more than two decades, and its growth has been closely tied to the open trade and investment regimes of the major economies of the world. Exports account for 40 percent of China's gross domestic product (GDP), and China has depended on the growth of its export sector to spur modernization of its economy and support improved standards of living. The World Bank estimates that during the past two decades (1980s and 1990s), nearly 400 million people in China have been lifted out of poverty.

According to Chinese data, the United States market has directly accounted for 22 percent of China's phenomenal export growth over the last twenty years.

The United States has also derived certain benefits from the trade relationship. American consumers now have access to a wider variety of less costly goods, and low-cost consumer and

industrial goods from China have helped spur U.S. economic growth while keeping a check on inflation. Together, the United States and China have accounted for roughly half of the economic growth globally in the past four years.

American manufacturers, service providers, and farmers continue to eye China's increasingly fast growing middle class and new businesses as potential consumers of U.S. products, ranging from capital equipment to financial services to high-quality and efficiently produced brand name and specialty consumer products, services, agricultural products, and technology. Indeed, since 2001, U.S. exports to China have grown five times faster than they have to the rest of the world, and China has gone from being the 9th to the 4th biggest export market for the United States. America's exports to China increased by an impressive 20% in 2005, building on 22% growth in 2004 and making China our fastest growing export market among our major trading partners. Market forces continue to drive broader and deeper economic ties between our two countries.

That said, the enormous scope and scale of the changes that have occurred in China's trading posture and in our bilateral trade relationship pose continual challenges. In particular, there is concern that the U.S.-China trade relationship lacks balance in opportunity, as well as equity and durability, with China's focus on export growth and developing domestic industries not being matched by a comparable focus on fulfilling market opening commitments and on the protection of intellectual property and internationally recognized labor rights. Specific U.S. concerns include: continued Chinese barriers to some U.S. exports; failure to protect intellectual property rights; failure to protect labor rights and enforce labor laws and standards; unreported and extensive government subsidies and preferences for its own industries; environmental concerns; spotty compliance with some international trade rules; and a large and growing imbalance in our bilateral trade flows, resulting in a trade deficit of almost $202 billion in 2005. Chinese barriers to U.S. exports that contribute to this deficit and appear inconsistent with China's multilateral and bilateral commitments have a corrosive effect on political support for the bilateral trade relationship. Absent tangible evidence that China is acting responsibly with respect to these issues, popular support for a twenty-five-year-old trade policy of constructive economic engagement with China could be in danger, with potentially damaging consequences for both countries.

China's emergence has also created opportunities and challenges for the Asia Pacific region. China has become both the largest single goods export market and the largest single supplier of imports for developing countries in Asia, helping to spur broader regional growth. At the same time, China has emerged as a tough competitor for third countries that traditionally have been major suppliers to the United States. Indeed, while our trade deficit has widened with China, it has narrowed with other Asian trading partners. China's share of U.S. imports has grown from 5.8 percent to 14.6 percent over the past 11 years, while the share of the U.S. global trade deficit represented by the Asia Pacific Rim as a whole (including China) has actually fallen from 57% in 1999 to 43% in 2005. Moreover, China is competing with these Asian neighbors not only for sales to the United States, but also for foreign direct investment.

China's ascendancy as a major international trading partner brings with it certain responsibilities for the maintenance of the multilateral, global trading system. As the size of its market and trade flows have increased, China's constructive participation is increasingly

critical to the international regimes governing trade practices – regimes that foster free and open markets, a level playing field, and transparent regulations.

Given the importance of our trade relationship with China and the challenges that confront us in that relationship, it is an appropriate time to review U.S. trade policies toward China. To that end, the United States Trade Representative (USTR) has led an interagency "top-to-bottom" review of our China trade policy, drawing upon input received from Congressional hearings; Government Accountability Office (GAO) reports; discussions with industry associations; and written submissions and oral testimony on China's compliance with its World Trade Organization (WTO) obligations, provided pursuant to notice in the Federal Register.

This review focused on:

(i) Identifying the core principles and key objectives of our trade policy with China;

> [This is not to say that the growth of U.S. imports from China is a zero-sum proposition for the Asian region. To a large extent, these statistics reflect China's growing role as final assembler of components and products manufactured in other economies in Asia. Though U.S. trading partners such as Malaysia, Indonesia and the Philippines have seen their relative shares of direct U.S. imports decrease, they have seen rapid growth in exports of components to China that are re-exported as finished goods to the United States and other destinations.]

(ii) Assessing the current status and establishing priority goals for each key objective; and
(iii) Identifying specific action items that will help us achieve our priority goals.

This report summarizes the results of the review. It concludes that the United States is entering an important new phase in our trade relationship with China. For the past 20 years, U.S. trade policy was focused principally on encouraging market-based reforms in China and bringing China into the international trading system. Now, as we near the end of China's transition period as a new WTO member, the report recommends that U.S. trade resources and priorities should be readjusted to meet new challenges.

Specifically, in addition to strengthening our current focus on China's WTO compliance and adherence to international norms, this report urges that more focus be put on ensuring that: (1) the bilateral trade relationship offers more balanced opportunities and is equitable and durable; (2) U.S. trade policymaking is more proactive and informed by more comprehensive information regarding China's economic trends and developments and stronger coordination within the Executive branch and between the Executive and Congressional branches; (3) China participates more fully in the global trading system as a responsible trading partner; and (4) the United States remains an active and influential economic and trading power in the Asia Pacific region.

Based on the results of the review, the Administration will take a series of actions to help ensure that we are best positioned to meet our key China trade objectives. The list below includes initial steps we will be taking. Additional action items will be developed and implemented in consultation with Congress and other stakeholders to ensure meaningful progress in achieving these key objectives.

- *Expanding USTR trade enforcement capacity to better ensure China's compliance with trade obligations,* including through establishment of a China Enforcement Task Force at USTR, to be headed by a Chief Counsel for China Trade Enforcement;
- *Expanding USTR capability to obtain and apply comprehensive, forward-looking information regarding China's trade regime and practices to U.S. trade policy formulation and implementation,* by: (1) adding personnel to USTR's China office to coordinate collection and integration of information on current and potential China trade issues from other U.S. government agencies and other sources; and (2) establishing an Advisory Committee for Trade Policy and Negotiation (ACTPN) China Task Force to provide strategic advice and recommendations related to U.S.-China trade policy;
- *Expanding U.S. trade policy and negotiating capacity in Beijing and other resources in China* to more effectively pursue top priority issues, especially the protection of intellectual property rights;
- *Increasing coordination with other trading partners* on China trade issues of common interest, such as enforcement of intellectual property rights;
- *Deepening and strengthening trade relations with other Asian economies, and within the Asia-Pacific Economic Cooperation (APEC) forum*, to maintain and enhance U.S. commercial relationships in the region;
- *Increasing the focus on regulatory reform in China,* including through initiating a high-level dialogue on steel with China under the U.S.-China Joint Commission on Commerce and Trade (JCCT), deepening and expanding the State Department's high-level dialogue with China's economic planners regarding structural reform, launching an initiative to evaluate, assess and engage on China's subsidies issues, expanding initiatives led by the U.S. Department of Agriculture (USDA) to improve China's transparency and compliance with its sanitary and phytosanitary (SPS) obligations under the WTO, and focusing intensive interagency efforts to address China's development of standards and of an anti-monopoly law;
- *Increasing effectiveness of high-level meetings with China's leaders*, including through holding annual, elevated meetings of the JCCT prior to presidential-level meetings where possible and conducting mid-year reviews of goals and progress under the JCCT at the Vice Minister/Deputy level;
- *Strengthening and expanding US-China dialogue* on numerous other specific issues of significance to the global trading system and on bilateral trade issues that pose potential problems for the relationship, including, *e.g.*, China's participation in global institutions; market access and standards issues related to telecommunications, financial services, healthcare and direct sales; subsidies and structural issues, especially in the steel industry; standards; labor; environmental protection; and transparency and the rule of law;
- *Strengthening U.S. government interagency coordination,* including through monthly review, by the Trade Policy Review Group and Trade Policy Staff Committee, of

strategies and progress made in achieving the key objectives identified in this report; and

- *Strengthening the Executive-Congressional partnership on China trade,* through initiation by USTR of a program of regular briefings for Congressional members and staff, to update them on progress in pursuing the objectives outlined in this report and to ensure that the Administration's China trade policy is informed by Congressional priorities.

2006 Trade Policy Agenda and 2005 Annual Report.

(USTR March 2006)

http://www.ustr.gov/Document_Library/Reports_Publications/2006/2006_Trade_Policy_Agenda/Section_Index.html

Trade Enforcement Activities -- Enforcing U.S. Trade Agreements – Overview.

USTR coordinates the Administration's active monitoring of foreign government compliance with trade agreements and pursues enforcement actions, using dispute settlement procedures and applying the full range of U.S. trade laws when necessary. Vigorous investigation efforts by relevant agencies, including the Departments of Agriculture, Commerce, and State, help ensure that these agreements yield the maximum benefits in terms of ensuring market access for Americans, advancing the rule of law internationally, and creating a fair, open, and predictable trading environment. Ensuring full implementation of U.S. trade agreements is one of the Administration's strategic priorities. We seek to achieve this goal through a variety of means, including:

Asserting U.S. rights through the World Trade Organization (WTO), including the stronger dispute settlement mechanism created in the Uruguay Round, and the WTO bodies and committees charged with monitoring implementation and with surveillance of agreements and disciplines;

Vigorously monitoring and enforcing bilateral agreements;

Invoking U.S. trade laws in conjunction with bilateral and WTO mechanisms to promote compliance;

Providing technical assistance to trading partners, especially in developing countries, to ensure that key agreements like the Agreement on Basic Telecommunications and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) are implemented on schedule; and

Promoting U.S. interests under FTAs through work programs, accelerated tariff reductions, and use, or threat of use, of dispute settlement mechanisms, including labor and environment.

Through the vigorous application of U.S. trade laws and active use of WTO dispute settlement procedures, the United States has effectively opened foreign markets to U.S. goods and services. The United States also has used the incentive of preferential access to the U.S. market to encourage improvements in workers' rights and reform of intellectual property laws and practices in other countries.

These enforcement efforts have resulted in major benefits for U.S. firms, farmers, and workers.

To ensure the enforcement of WTO agreements, the United States has been one of the world's most frequent users of WTO dispute settlement procedures. Since the establishment of the WTO in 1994, the United States has filed 70 complaints at the WTO, thus far successfully concluding 43 of them by settling 23 cases favorably and prevailing on 20 others through litigation in WTO panels and the Appellate Body. The United States has obtained favorable settlements and favorable rulings in virtually all sectors, including manufacturing, intellectual property, agriculture, and services. These cases cover a number of WTO agreements – involving rules on trade in goods, trade in services, and intellectual property protection – and affect a wide range of sectors of the U.S. economy.

***Satisfactory settlements*. Our hope in filing cases, of course, is to secure U.S. benefits (and fairer trade for both countries) rather than to engage in prolonged litigation. Therefore, whenever possible we have sought to reach favorable settlements that eliminate the foreign breach without having to resort to panel proceedings.**

We have been able to achieve this preferred result in 23 of the 47 cases concluded so far, involving: Argentina's protection and enforcement of patents; Australia's ban on salmon imports; Belgium's duties on rice imports; Brazil's auto investment measures; Brazil's patent law; China's value added tax; Denmark's civil procedures for intellectual property enforcement; Egypt's apparel tariffs; the EU's market access for grains; an EU import surcharge on corn gluten feed; Greece's protection of copyrighted motion pictures and television programs; Hungary's agricultural export subsidies; Ireland's protection of copyrights; Japan's protection of sound recordings; Korea's shelf-life standards for beef and pork; Mexico's restrictions on hog imports; Pakistan's protection of patents; the Philippines' market access for pork and poultry; the Philippines' auto regime; Portugal's protection of patents; Romania's customs valuation regime; Sweden's enforcement of intellectual property rights; and Turkey's box-office taxes on motion pictures.

***Litigation successes.* When our trading partners have not been willing to negotiate settlements, we have pursued our cases to conclusion, prevailing in 20 cases so far, involving: Argentina's tax and duties on textiles, apparel, and footwear; Australia's export subsidies on automotive leather; Canada's barriers to the sale and distribution of magazines; Canada's export subsidies and an import barrier on dairy products; Canada's law protecting patents; the EU's import barriers on bananas; the EU's ban on imports of beef; the EU's regime for protecting geographical indications; India's import bans and other restrictions on 2,700 items; India's protection of patents on pharmaceuticals and agricultural chemicals; India's and Indonesia's measures that discriminated against imports of U.S. automobiles; Japan's restrictions affecting imports of apples, cherries, and other fruits; Japan's barriers to apple imports; Japan's and Korea's discriminatory taxes on distilled spirits; Korea's beef imports; Mexico's antidumping duties on high-fructose corn syrup; Mexico's telecommunications barriers and Mexico's antidumping duties on rice.**

USTR also works to ensure the most effective use of U.S. trade laws to complement its litigation strategy and to address problems that are outside the scope of the WTO and U.S. free trade agreements. USTR has effectively applied Section 301 of the Trade Act of 1974 to address unfair foreign government measures, "Special 301" for intellectual property rights enforcement, Section 1377 of the Omnibus Trade and Competitiveness Act of 1988 for telecommunications trade problems, and Title VII of the 1988 Act to address problems in foreign government procurement. The application of these trade law tools is described further below.

WTO Dispute Settlement -- 2005 Activities.

Enforcement successes in 2005 include rulings against Japan's restrictions on imports of apples, Mexico's antidumping measure on rice and the EU's discriminatory regime on geographical indications. The United States also favorably resolved several disputes after completing or initiating WTO dispute settlement procedures. For example, China removed its discriminatory tax on semiconductors, Canada removed several restrictions on wheat, Egypt removed discriminatory textile tariffs and Mexico removed anti-competitive rules which drove up the cost of international calls. Recently, the United States obtained a favorable dispute ruling against Mexico on its discriminatory soft drink tax. Ongoing enforcement actions involve the EU's moratorium on biotechnology products, the EU's aircraft subsidies, the EU's customs regime and Turkey's restrictions on rice. The United States also filed a complaint under WTO dispute settlement procedures involving Turkey's import restrictions on rice.

Other Monitoring and Enforcement Activities -- Subsidies Enforcement.

The WTO Agreement on Subsidies and Countervailing Measures (Subsidies Agreement) establishes multilateral disciplines on subsidies. Among its various disciplines, the Subsidies Agreement provides remedies for subsidies that have adverse effects not only in the importing country's market, but also in the subsidizing government's market and in third country markets. Prior to the Subsidies Agreement coming into effect in 1995, the U.S. countervailing duty law was the only practical mechanism for U.S. companies to address subsidized foreign competition. However, the countervailing duty law focuses exclusively on the effects of foreign subsidized competition in the United States. Although the procedures and remedies are different, the multilateral remedies made available under the Subsidies Agreement provide an alternative tool to address foreign subsidies that affect U.S. businesses in an increasingly global market place.

Section 281 of the Uruguay Round Agreements Act of 1994 (URAA) sets out the responsibilities of USTR and the Department of Commerce (Commerce) in enforcing the United States' rights under the Subsidies Agreement. USTR coordinates the development and implementation of overall U.S. trade policy with respect to subsidy matters, represents the United States in the WTO, including the WTO Committee on Subsidies and Countervailing Measures, and leads the interagency team on matters of policy. The role of Commerce's Import Administration (IA) is to enforce the countervailing duty law and, in accordance with responsibilities assigned by the Congress in the URAA, to spearhead the subsidies enforcement activities of the United States with respect to the disciplines embodied in the Subsidies Agreement. The Import Administration's Subsidies Enforcement Office (SEO) is the specific office charged with carrying out these responsibilities.

The primary mandate of the SEO is to examine subsidy complaints and concerns raised by U.S. exporting companies and to monitor foreign subsidy practices to determine whether there is reason to believe they are impeding U.S. exports to foreign markets and are inconsistent with the Subsidies Agreement. Once sufficient information about a subsidy practice has been gathered to permit it to be reliably evaluated, USTR and Commerce will confer with an interagency team to determine the most effective way to proceed. It is frequently advantageous to pursue resolution of these problems through a combination of informal and formal contacts, including, where warranted, dispute settlement action in the WTO. Remedies for violations of the Subsidies Agreement may, under certain circumstances, involve the withdrawal of a subsidy program or the elimination of the adverse effects of the program.

During this past year, USTR and IA staff have handled numerous inquiries and met with representatives of U.S. industries concerned with the subsidization of foreign competitors. These efforts continue to be greatly enhanced by IA officers stationed overseas (in China and Korea), who help gather, clarify and confirm the accuracy of information concerning foreign subsidy practices. State Department officials at posts where IA staff are not present have also handled such inquiries.

The SEO's electronic subsidies database continues to fulfill the goal of providing the U.S. trading community with a centralized location to obtain information about the remedies available under the Subsidies Agreement and much of the information that is needed to develop a countervailing duty case or a WTO subsidies complaint. The website (http://ia.ita.doc.gov/esel/index.html) includes information on all the foreign subsidy programs that have been investigated in U.S. countervailing duty cases since 1980, covering more than 50 countries and over 2,000 government practices. This database is frequently updated, making information on subsidy programs investigated or reviewed quickly available to the public.

Monitoring Foreign Antidumping and Countervailing Duty Actions.

Agreement permit WTO Members to impose antidumping or countervailing duties to offset injurious dumping or subsidization of products exported from one Member to another. The United States closely monitors antidumping and countervailing duty proceedings initiated against U.S. exporters to ensure that foreign antidumping and countervailing duty actions are administered fairly and in full compliance with the WTO Agreements. To this end, IA tracks foreign antidumping and countervailing duty actions involving U.S. exporters and analyzes information collected by U.S. embassies worldwide, enabling U.S. companies and U.S. Government agencies to monitor other Members' administration of antidumping and countervailing duty actions involving U.S. companies. Information about foreign antidumping and countervailing duty actions affecting U.S. exports is accessible to the public via IA's website. The stationing of IA officers to certain overseas locations, as noted above, has contributed importantly to the Administration's efforts to monitor the application of foreign trade remedy laws with respect to U.S. exports.

Based in part on this monitoring activity, the United States mounted a successful WTO challenge of Mexico's antidumping measure on U.S. exports of rice, as well as certain changes to Mexico's foreign trade laws. Among other antidumping investigations of U.S. goods that were closely monitored in the past year are Canada's AD/CVD investigations of grain corn, Mexico's *ex officio* investigation of pork legs and shoulders/hams and its "reinvestigation" of apples, and China's investigations of kraft linerboard, dimethyl cyclosiloxane and several other products. Import Administration personnel have also participated in technical exchanges with the administering authorities of Egypt, Australia and Indonesia to obtain a better understanding of these countries' administration of trade remedy laws and compliance with their WTO obligations.

Members must notify on an ongoing basis without delay their preliminary and final determinations to the WTO. Twice a year, WTO Members must also notify the WTO of all antidumping and countervailing duty actions they have taken during the preceding six-month period. The actions are identified in semiannual reports submitted for discussion in meetings of the relevant WTO committees. Finally, Members are required to notify the WTO of changes in their antidumping and countervailing duty laws and regulations. These notifications are accessible through the USTR and IA website "links" to the WTO's website.

U.S. Trade Laws -- Section 301.

Section 301 of the Trade Act of 1974, as amended (the Trade Act), is designed to address foreign unfair practices affecting U.S. exports of goods or services. Section 301 may be used to enforce U.S. rights under bilateral and multilateral trade agreements and also may be used to respond to unreasonable, unjustifiable, or discriminatory foreign government practices that burden or restrict U.S. commerce. For example, Section 301 may be used to obtain increased market access for U.S. goods and services, to provide more equitable conditions for U.S. investment abroad, and to obtain more effective protection worldwide for U.S. intellectual property.

Operation of the Statute.

The Section 301 provisions of the Trade Act provide a domestic procedure whereby interested persons may petition the USTR to investigate a foreign government policy or practice and take appropriate action. The USTR also may self-initiate an investigation. In each investigation the USTR must seek consultations with the foreign government whose acts, policies, or practices are under investigation. If the consultations do not result in a settlement and the investigation involves a trade agreement, Section 303 of the Trade Act requires the USTR to use the dispute settlement procedures that are available under that agreement.

If the matter is not resolved by the conclusion of the investigation, Section 304 of the Trade Act requires the USTR to determine whether the practices in question deny U.S. rights under a trade agreement or whether they are unjustifiable, unreasonable, or discriminatory and burden or restrict U.S. commerce. If the practices are determined to violate a trade agreement or to be unjustifiable, the USTR must take action. If the practices are determined to be unreasonable or discriminatory and to burden or restrict U.S. commerce, the USTR must determine whether action is appropriate and, if so, what action to take. The time period for making these determinations varies according to the type of practices alleged. Investigations of alleged violations of trade agreements with dispute settlement procedures must be concluded within the earlier of 18 months after initiation or 30 days after the conclusion of dispute settlement proceedings, whereas investigations of alleged unreasonable, discriminatory, or unjustifiable practices (other than the failure to provide adequate and effective protection of intellectual property rights) must be decided within 12 months.

The range of actions that may be taken under Section 301 is broad and encompasses any action that is within the power of the President with respect to trade in goods or services or with respect to any other area of pertinent relations with a foreign country. Specifically, the USTR may: (1) suspend trade agreement concessions; (2) impose duties or other import restrictions; (3) impose fees or restrictions on services; (4) enter into agreements with the subject country to eliminate the offending practice or to provide compensatory benefits for the United States; and/or (5) restrict service sector authorizations. After a Section 301 investigation is concluded, the USTR is required to monitor a foreign country's implementation of any agreements entered into, or measures undertaken, to resolve a matter that was the subject of the investigation.

2005 SPECIAL 301 REPORT.

(USTR April 2005).

http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file195_7636.pdf

EXECUTIVE SUMMARY.

The 2005 "Special 301" annual review examines in detail the adequacy and effectiveness of intellectual property rights (IPR) protection in 90 countries. Based on a lengthy process of information-gathering and analysis, the United States Trade Representative (USTR) has identified 52 countries that are designated in the categories of Priority Foreign Country, Section 306 Monitoring, Priority Watch List, or Watch List. The Special 301 Report reflects the Administration's resolve to take consistently strong actions under the Special 301 provisions of the Trade Act.

This Administration is determined to ensure the adequate and effective protection of intellectual property and fair and equitable market access for U.S. products. The designations and corresponding requisite measures announced today result from close consultations with affected industry groups, other private sector representatives, and Congressional leaders, and demonstrate the Administration's commitment to use all available methods to resolve IPR issues.

Addressing weak IPR protection and enforcement in China continues to be one of the Administration's top priorities. These IPR issues, outlined in the China section of the Special 301 Report, are critical in light of the rampant counterfeit and piracy problems that plague China's domestic market and the fact that China has become a leading exporter of counterfeit and pirated goods to the world. In the China section of the Special 301 Report, we are announcing the results of the out-of-cycle review conducted in early 2005. This year's Special 301 Report also sets forth the United States' plan to work with U.S. industry and other stakeholders to further build a factual record and to develop arguments with an eye toward utilizing World Trade Organization (WTO) procedures to bring China into compliance with its WTO Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) obligations, to invoke the transparency provisions of the TRIPS Agreement, to elevate China to the Priority Watch List, and to maintain Section 306 monitoring. We will be monitoring closely China's IPR activities throughout the coming year.

USTR notes the continued need for Ukraine to take effective action against significant levels of optical media piracy and to implement intellectual property laws that provide adequate and effective protection. As a result, Ukraine will continue to be designated a Priority Foreign Country, and the

$75 million in sanctions, first imposed on Ukrainian products on January 23, 2002, will remain in place. Ukraine's failure to protect IPR jeopardizes its efforts to join the WTO and undermines its ability to attract trade and investment. The United States notes with optimism, however, that Ukraine has recently renewed efforts to enact needed optical media legislative amendments, and has expressed its commitment to resolving IPR issues. The United States encourages Ukraine to enact necessary IPR laws and regulations as well as increase its enforcement efforts to combat piracy, and today announces the commencement of a Special 301 out-of-cycle review to monitor Ukraine's progress in providing effective copyright protection and IPR enforcement.

The Special 301 report addresses significant concerns with respect to such trading partners as Argentina, Brazil, Egypt, India, Indonesia, Israel, Kuwait, Lebanon, Pakistan, Paraguay, the Philippines, Russia, Turkey, and Venezuela. In addition, the report notes that the United States will consider all options, including, but not limited to, initiation of dispute settlement consultations, in cases where countries do not appear to have implemented fully their obligations under the TRIPS Agreement.

In this year's review, USTR devotes special attention to the need for significantly improved enforcement against counterfeiting and piracy. We place particular emphasis on the ongoing campaign to reduce production of unauthorized copies of optical media products such as compact discs (CDs), video compact discs (VCDs), digital versatile discs (DVDs), and compact disc read-only memory (CD-ROMs), as well as on the counterfeiting of trademarked goods. Optical media piracy and trademark counterfeiting are increasing problems in many countries, including Brazil, Bulgaria, China, India, Indonesia, Lebanon, Mexico, Pakistan, Paraguay, the Philippines, Russia, Thailand, Venezuela, and Vietnam. At issue in these and other countries is the foreign governments' political will to effectively address piracy and counterfeiting. In addition, USTR continues to focus on other critically important issues, including Internet piracy, proper implementation of the TRIPS Agreement by developed and developing country WTO Members, and full implementation of TRIPS standards by new WTO Members at the time of their accession. USTR also continues to insist that other countries' government ministries use only authorized software.

Over the past year, many developing countries and newly acceding WTO Members have made progress toward implementing their TRIPS obligations. Nevertheless, full implementation of TRIPS Agreement obligations has yet to be achieved in certain countries, particularly with respect to the TRIPS Agreement's enforcement provisions. Levels of piracy and ounterfeiting of intellectual property remain unacceptably high in these countries. The annual Special 301 review provides an opportunity to assess these issues, and the Special 301 Report sends a necessary message to the governments of countries where serious IPR-related problems exist.

The United States is committed to a policy of promoting increased intellectual property protection. In this regard, we are making progress in advancing the protection of these rights through a variety of mechanisms, including through the negotiation of Free Trade Agreements (FTAs). The intellectual property chapters of the FTAs provide for higher levels of intellectual property protection in a number of areas covered by the TRIPS Agreement. We are pleased that the recent FTAs with Morocco and Australia will strengthen the protection of IPR in those countries. When the pending Bahrain FTA and Central American Free Trade Agreement (CAFTA-DR) (with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic) are adopted, we look forward to seeing strengthened IPR regimes in those countries as well. We are also seeking higher levels of protection and enforcement in the FTAs that are currently under negotiation with Panama, Thailand, the Southern Africa Customs Union, the Andean countries, the United Arab Emirates, and

Oman, and in the ongoing negotiation of a Free Trade Area of the Americas. Another opportunity we are using to strengthen the protection and enforcement of intellectual property is the increasing number of Trade and Investment Framework Agreement (TIFA) negotiations with several countries in regions such as the Middle East and Asia.

USTR will continue to use all statutory tools, as appropriate, to improve intellectual property protection in countries where it is inadequate. For example, USTR examines IPR practices through the implementation of trade preference programs, such as the ongoing Generalized System of Preferences (GSP) reviews of countries, including Brazil, Kazakhstan, Lebanon, Pakistan, Russia, and Uzbekistan.

Implementation of the WTO TRIPS Agreement.

One of the most significant achievements of the Uruguay Round was the negotiation of the TRIPS Agreement, which requires all WTO Members to provide certain minimum standards of protection for patents, copyrights, trademarks, trade secrets, geographical indications, and other forms of intellectual property. The Agreement also requires countries to provide effective IPR enforcement. The TRIPS Agreement is the first broadly-subscribed multilateral intellectual property agreement that is subject to mandatory dispute settlement provisions.

Developed countries were required to fully implement the TRIPS Agreement as of January 1, 1996, while developing countries were given a transition period for many obligations until January 1, 2000. Ensuring that developing countries are in full compliance with the TRIPS Agreement obligations now that this transition period has come to an end is one of this Administration's highest IPR priorities. The least-developed countries have until January 1, 2006 to implement the TRIPS Agreement, and the United States looks forward to the successful completion of this transition. However, in order to address the concerns raised by the least developed countries, the United States suggested, and all other WTO members agreed, to extend the transition period for ten years, until 2016, for the least-developed countries to implement their TRIPS obligations for patent and data protection for pharmaceutical products.

Developing countries continue to make progress toward full implementation of their TRIPS obligations. Nevertheless, certain countries are still in the process of finalizing implementing legislation and establishing adequate IPR enforcement mechanisms. Every year the U.S. Government provides extensive technical assistance and training on the implementation of the TRIPS Agreement to a large number of U.S. trading partners. Such assistance is provided by a number of U.S. Government agencies, including the U.S. Patent and Trademark Office, the U.S. Copyright Office, the Department of State, the U.S. Agency for International Development, U.S. Customs and Border Protection, the Department of Justice, and the Department of Commerce. This assistance is provided on a country-by-country basis, as well as in group seminars, including those co-sponsored with the World Intellectual Property Organization (WIPO) and the WTO. In addition, U.S. industry is actively involved in providing specific enforcement-oriented training in key markets around the world. Technical assistance involves the review of, and drafting assistance on, laws concerning intellectual property and enforcement. Training programs usually cover the substantive provisions of the TRIPS Agreement, including IPR enforcement. The United States will continue to work with WTO Members and expects further progress in the near term to complete the TRIPS implementation process. However, in those instances in which additional progress is not achieved, the United States will consider other means of encouraging implementation, including the possibility of dispute settlement consultations.

One of the key implementation priorities that we have focused on in this year's review is the implementation of Article 39.3 of the TRIPS Agreement, which requires WTO Members to protect test data submitted by companies to health authorities against "unfair commercial use" for pharmaceutical and agricultural chemical products.[1]

Most countries, including the United States, impose stringent regulatory testing requirements on companies seeking to market a new drug or agricultural chemical product. Many countries have recognized, however, the value of allowing abbreviated approval procedures for "secondcomers" seeking to market a product identical to one that has already been approved. Generally, these second applicants may be required to demonstrate the bioequivalence of their products with the product of the first company, and will be allowed to rely on the test data, rather than repeat all of the expensive and laborious clinical tests conducted by the first company to prove the safety of the product.

However, because of the considerable effort involved in producing the safety and efficacy data needed to obtain marketing approval, the TRIPS Agreement requires that the original applicant must receive protection for that data against unfair commercial use. Accordingly, the United States and other countries provide a period of protection during which second-comers may not rely on the data submitted by the innovative company to obtain approval for their copies of the product. This means that, during the period of exclusivity, the data provided by the originator cannot be relied upon by regulatory officials to approve similar products. This period of protection is five years in the United States and six to ten years in the EU Member States. Other countries that provide a period of protection against reliance on data include Australia, China, Japan, Jordan, Korea, Mexico, New Zealand, and Switzerland. We commend Bulgaria on its recent implementation of data protection for pharmaceutical and agricultural chemical products. We urge all WTO members to swiftly complete their implementation of TRIPS Article 39.3, including certain Andean countries, Israel and Turkey.

Intellectual Property and Health Policy.

The Administration is dedicated to addressing the serious health problems, such as HIV/AIDS, afflicting African and other least-developed countries. The United States is firmly of the conviction that intellectual property protection, including for pharmaceutical patents, is critical to the long term viability of a health care system capable of developing new and innovative lifesaving medicines. Intellectual property rights are necessary to encourage rapid innovation, development, and commercialization of effective and safe drug therapies. Financial incentives are needed to develop new medications; no one benefits if research on such products is discouraged.

At the same time, the United States is committed to the principle that international obligations such as the TRIPS Agreement have sufficient flexibility to allow countries, particularly developing and least-developed countries, to address the serious public health problems that they face.

At the WTO Doha Ministerial in November 2001, WTO Ministers issued a separate Declaration on the TRIPS Agreement and Public Health, acknowledging the serious public health problems afflicting Africa and other developing and least-developed countries, especially those resulting from HIV/AIDS, malaria, tuberculosis, and other epidemics. Ministers agreed that intellectual property rules contain flexibilities to meet the dual objectives of, on the one hand, meeting the needs of poor countries without the resources to pay for cutting edge pharmaceuticals and, on the other hand, ensuring that the patent rights system continues to promote the development and creation of new lifesaving drugs.

The United States proposed, and all WTO members agreed, that the Doha Declaration should provide an additional ten year transition period (until 2016) for least-developed countries to implement the pharmaceutical-related provisions of the TRIPS Agreement. This extended transition period balances the interests of intellectual property rights holders and the needs of the least-developed countries.

In addition, in paragraph 6 of the Declaration, Ministers recognized that WTO Members with "insufficient or no manufacturing capacities in the pharmaceutical sector" could have difficulty using the compulsory licensing provisions of the TRIPS Agreement and directed the TRIPS Council to find an expeditious solution to this problem. In December 2002, the United States announced a framework to ease WTO rules to allow countries in need to import life-saving drugs.

On August 30, 2003, the WTO General Council adopted the TRIPS/health "solution," which is comprised of a Decision and an accompanying Chairman's Statement that sets out the shared understandings of WTO Members on how the Decision should be interpreted and applied. Under the solution, Members are permitted, in accordance with specified procedures, to issue compulsory licenses to export pharmaceutical products to countries that cannot produce drugs for themselves.

The United States strongly supports effective and appropriate use of the TRIPS/health solution to facilitate access to life-saving medicines by countries in need. The United States would be willing to discuss the need to provide technical assistance if some Members encounter difficulties in implementing or utilizing the solution.

In fact, the United States has already taken steps to ensure that the solution can be implemented. For example, in July 2004, the United States reached an agreement with Canada to ensure that NAFTA's provisions will not impede implementation of the TRIPS/health solution. The TRIPS Council is under instructions to incorporate the solution into an amendment of the TRIPS Agreement. The United States supports an amendment that reflects the agreement reached in August 2003, and will remain committed to working with the other Members to reach a consensus for an amendment as expeditiously as possible. In order to move towards an amendment, the United States submitted a paper at the March 2005 meeting of the WTO TRIPS Council expressing support for the amendment and setting out a simple and effective approach to do so. The solution will continue to be available as a WTO waiver until an amendment is finalized.

In the recent Free Trade Agreements with CAFTA-DR, Morocco, and Bahrain, the United States has clarified that the intellectual property provisions in the agreements do not stand in the way of measures necessary to protect public health. Specifically, the United States has confirmed that the intellectual property chapters of the FTAs do not affect the ability of the United States or our FTA partners to take necessary measures to protect public health by promoting access to medicines for all, in particular concerning cases such as HIV/AIDS, tuberculosis, malaria, and other epidemics as well as circumstances of extreme urgency or national emergency. The United States has also made clear that the intellectual property chapter of the FTAs will not prevent effective utilization of the TRIPS/health solution.
WTO Dispute Settlement.

Dispute settlement efforts this year continue to focus on resolving disputes that were announced through previous Special 301 determinations, using the full range of tools available. These tools include informal consultations and settlement, which can be more efficient and are therefore the preferred manner of resolving disputes, or where those are unsuccessful, full utilization of the dispute settlement process.

At the conclusion of the 1999 Special 301 review, the United States initiated dispute settlement consultations concerning the European Union's (EU) regulation on food-related geographical indications (GIs), based on concerns that the regulation was inconsistent with the EU's TRIPS Agreement obligations. These consultations were based on the United States' long-standing complaint that the EU GI system discriminates against foreign products and persons – notably by requiring that EU trading partners adopt an "EU-style" system of GI protection – and provides insufficient protections to trademark owners. Because those consultations failed to resolve the matter, on August 18, 2003, the United States requested the establishment of a panel, and panelists were appointed on February 23, 2004.

On April 20, 2005, the WTO Dispute Settlement Body ("DSB") adopted a panel report ruling in favor of the United States that the EU GI regulation is inconsistent with the EU's obligations under the TRIPS Agreement and the General Agreement on Tariffs and Trade 1994. In the panel report adopted by the DSB, the panel agreed that the EU's GI regulation impermissibly discriminates against non-EU products and persons. The panel also agreed with the United States that Europe could not, consistent with WTO rules, deny U.S. trademark owners their rights; it found that, under the regulation, any exceptions to trademark rights for the use of registered GIs were narrow, and limited to the actual GI name as registered. The DSB recommended that the EU amend its GI regulation to come into compliance with its WTO obligations.

Dispute Settlement Update (USTR) – Summary of Pending WTO Cases.

[November 15, 2005]

http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/asset_upload_file343_5697.pdf

(Pending current cases.)

A. Proceedings in which the United States is a plaintiff.

1. Argentina—Patent and test data protection for pharmaceuticals and agricultural chemicals (WT/DS171, 196)

On May 6, 1999, the United States filed a consultation request challenging Argentina's failure to provide a system of exclusive marketing rights for pharmaceutical products, and to ensure that changes in its laws and regulations during its transition period do not result in a lesser degree of consistency with the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"). Consultations were held on June 15, 1999, and again on July 27, 1999. On May 30, 2000, the United States expanded its claims in this dispute to include new concerns that have arisen as a result of Argentina's failure to fully implement its remaining TRIPS obligations that came due on January 1, 2000. These concerns include Argentina's failure to protect confidential test data submitted to government regulatory authorities for pharmaceuticals and agricultural chemicals; its denial of certain exclusive rights for patents; its failure to provide such provisional measures as preliminary injunctions to prevent infringements of patent rights; and its exclusion of certain subject matter from patentability. Consultations continued until April 16, 2002, when the two sides agreed to settle eight of the ten issues in the dispute. Argentina and the United States notified a settlement of these issues to the DSB on May 31, 2002. The United States reserved its rights with respect to the remaining issues, and the dispute remains in the consultation phase with respect to these issues.

2. Brazil—Measures on minimum import prices (WT/DS197)

The United States requested consultations on May 31, 2000, with Brazil regarding its customs valuation regime. U.S. exporters of textile products have reported that Brazil uses officially-established minimum reference prices both as a requirement to obtain import licenses and/or as a base requirement for import. In practice, this system works to prohibit the import of products with declared values below the established minimum prices. This practice appears inconsistent with Brazil's WTO obligations, including those under the Agreement on Customs Valuation. The United

States participated as an interested third party in a dispute initiated by the EU regarding the same matter, and decided to pursue its own case as well. The United States held consultations with Brazil on July 18, 2000, and continues to monitor the situation.

3. Canada—Measures relating to exports of wheat and treatment of imported grain (WT/DS276)

On December 17, 2002, the United States requested consultations with Canada regarding trade in wheat. The United States challenged the wheat trading practices of the Canadian Wheat Board (CWB) as inconsistent with WTO disciplines governing the conduct of state-trading enterprises. The United States also challenged as unfair and burdensome Canada's requirements to treat imported grain differently than Canadian grain in the Canadian grain handling system, along with Canada's discriminatory policy that affects U.S. grain access to Canada's rail transportation system. Consultations were held January 31, 2003 but failed to resolve the dispute.

The United States requested the establishment of a panel on March 6, 2003. The DSB established a panel on March 31, 2003. The Director General composed the panel as follows: Ms. Claudia Orozco, Chair, and Mr. Alan Matthews and Mr. Hanspeter Tschaeni, Members. Following a preliminary procedural ruling, the DSB established a second panel on July 11, 2003, with the same panelists and the same schedule. In its report circulated on April 6, 2004, the panel found that Canada's grain handling system and rail transportation system discriminate against imported grain in violation of national treatment principles. However, the panel found that the United States failed to establish a claim that Canada violates WTO disciplines governing the conduct of state trading enterprises. The United States appealed the panel's findings related to state trading enterprises. On August 30, 2004, the Appellate Body upheld the panel's findings on state trading enterprises. Canada did not appeal the panel's findings that Canada's grain handling and transportation systems discriminate against U.S. grain. The DSB adopted the panel and Appellate Body reports on September 27, 2004. Canada and the United States subsequently agreed to a reasonable period of time for implementation of the DSB's recommendations and rulings that ended on August 1, 2005. Prior to the end of the reasonable period of time, Canada announced that it had remedied the discriminatory aspects of its grain handling and rail transportation systems.

4. China—Value-added tax on integrated circuits (WT/DS309)

On March 18, 2004, the United States requested consultations with China regarding its value added tax ("VAT") on integrated circuits ("ICs"). While China provides for a 17 percent VAT on ICs, enterprises in China are entitled to a partial refund of the VAT on ICs that they have produced. Moreover, China allows for a partial refund of the VAT for domestically-designed Ics that, because of technological limitations, are manufactured outside of China. As a result of the rebates, China appears to be according less favorable treatment to imported ICs than it accords to domestic ICs. China also appears to be providing for less favorable treatment of imports from one WTO Member than another and discriminating against services and service suppliers of other Members. The United States considers these measures to be inconsistent with China's obligations under Articles I and III of the GATT 1994, the Protocol on the Accession of the People's Republic of China, and Article XVII of the GATS. Consultations were held on April 27, 2004 in Geneva, and additional bilateral meetings were held in Washington and Beijing. On July 14, 2004, the United States and China notified the WTO of their agreement to resolve the dispute. Effective immediately, China no longer certified any new IC products or manufacturers for eligibility for VAT refunds and China no longer offered VAT refunds that favor ICs designed in China, and by April 1, 2005,China stopped providing VAT refunds

on Chinese-produced Ics to current beneficiaries. Based on these developments, the United States and China notified the DSB on October 5, 2005 that they had reached a mutually satisfactory solution.

5. EC—Measures concerning meat and meat products (hormones) (WT/DS26, 48)

The United States and Canada challenged the EU ban on imports of meat from animals to which any of six hormones for growth promotional purposes had been administered. On July 2, 1996, the following panelists were selected, with the consent of the parties, to review the U.S. claims: Mr. Thomas Cottier, Chairman; Mr. Jun Yokota and Mr. Peter Palecka, Members. The panel found that the EU ban is inconsistent with the EU's obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"), and that the ban is not based on science, a risk assessment, or relevant international standards. Upon appeal, the Appellate Body affirmed the panel's findings that the EU ban fails to satisfy the requirements of the SPS Agreement. The Appellate Body also found that while a country has broad discretion in electing what level of protection it wishes to implement, in doing so it must fulfill the requirements of the SPS Agreement. In this case the ban imposed is not rationally related to the conclusions of the risk assessments the EU had performed.

Because the EU did not comply with the recommendations and rulings of the DSB by May 13, 1999, the final date of its compliance period as set by arbitration, the United States sought WTO authorization to suspend concessions with respect to certain products of the EU, the value of which represents an estimate of the annual harm to U.S. exports resulting from the EU's failure to lift its ban on imports of U.S. meat. The EU exercised its right to request arbitration concerning the amount of the suspension. On July 12, 1999, the arbitrators determined the level of suspension to be $116.8 million. On July 26, 1999, the DSB authorized the United States to suspend such concessions and the United States proceeded to impose 100 percent *ad valorem* duties on a list of EU products with an annual trade value of $116.8 million. On May 26, 2000, USTR announced that it was considering changes to that list of EU products. While discussions with the EU to resolve this matter are continuing, no resolution has been achieved yet. On November 3, 2003, the EU notified the WTO of its plans to make permanent the ban on one hormone, oestradiol. As discussed below (DS320), on November 8, 2004, the European Communities requested consultations and a panel with respect to "the United States' continued suspension of concessions and other obligations under the covered agreements" in the *EC – Hormones* dispute.

6. EC—Protection of trademarks and geographical indications for agricultural products and foodstuffs (WT/DS174)

The United States first requested consultations regarding this matter on June 1, 1999, and, on April 4, 2003, requested consultations on the additional issue of the EU's national treatment obligations under the GATT 1994. Australia also requested consultations with respect to this measure. When consultations failed to resolve the dispute, the United States requested the establishment of a panel on August 18, 2003. The DSB established a panel on October 2, 2003, to consider the complaints of the United States and Australia. On February 23, 2004, the Director General composed the panel as follows: Mr. Miguel Rodriguez Mendoza, Chair, and Mr. Seung Wha Chang and Mr. Peter Kam-fai Cheung, Members. On April 20, 2005, the DSB adopted the panel report, which found that the EC's regulation on food-related geographical indications (GIs), EC Regulation 2081/92, is inconsistent with the EC's obligations under the TRIPS Agreement and the GATT 1994. This finding results from the long-standing U.S. complaint that the EC GI system discriminates against foreign products and

persons – notably by requiring that EC trading partners adopt an "EC-style" system of GI protection – and provides insufficient protections to trademark owners. The WTO panel agreed that the EC's GI regulation impermissibly discriminates against non-EC products and persons. The panel also agreed with the United States that Europe could not, consistent with WTO rules, deny U.S. trademark owners their rights; it found that, under the regulation, any exceptions to trademark rights for the use of registered GIs were narrow, and limited to the actual GI name as registered. The panel recommended that the EC amend its GI regulation to come into compliance with its WTO obligations. The EC, the United States, and Australia (which filed a parallel case) agreed that the EC would have until April 3, 2006, to implement the recommendations and rulings.

7. EC—Provisional safeguard measures on imports of certain steel products (WT/DS260)

On May 30, 2002, the United States filed a consultation request with respect to the EU's provisional safeguard measures against certain steel products, imposed effective on March 29, 2002. These measures appear to be inconsistent with the EC's obligations under the provisions of the GATT 1994 and of the WTO Agreement on Safeguards, and, in particular, Article XIX of the GATT 1994 and Articles 2, 3, 4, 6, and 12 of the Agreement on Safeguards. These provisions provide, inter alia, that a provisional safeguard measure may only be applied in critical circumstances where delay would cause damage difficult to repair, and only pursuant to a preliminary determination that there is clear evidence that increased imports have caused or threaten to cause serious injury. One round of consultations was held on June 27, 2002, and a second round was held on July 24, 2002. The United States requested the establishment of a panel on August 19, 2002, and the DSB established a panel on September 16, 2002.

8. EC—Measures affecting the approval and marketing of biotech products (WT/DS291)

On May 13, 2003, the United States filed a consultation request with respect to the EU's moratorium on all new biotech approvals, and bans of six member states (Austria, France, Germany, Greece, Italy and Luxembourg) on imports of certain biotech products previously approved by the EU. The moratorium is not supported by scientific evidence, and the EU's refusal even to consider any biotech applications for final approval constitutes "undue delay." The national import bans of previously EU-approved products appear not to be based on sufficient scientific evidence. Consultations were held June 19, 2003. The United States requested the establishment of a panel on August 7, 2003, and the DSB established a panel on August 29, 2003. On March 4, 2003, the Director General composed the panel as follows: Mr. Christian Häberli, Chairman, and Mr. Mohan Kumar and Mr. Akio Shimizu, Members.

9. Egypt—Apparel Tariffs (WT/DS305)

On December 23, 2003, the United States requested consultations with Egypt regarding the duties that Egypt applies to certain apparel and textile imports. During the Uruguay Round, Egypt agreed to bind its duties on these imports (classified under HS Chapters 61, 62 and 63) at rates of less than 50 percent (*ad valorem*) in 2003 and thereafter. The United States believed the duties that Egypt actually applied, on a "per article" basis, greatly exceeded Egypt's bound rates of duty. In January and September 2004, Egypt issued decrees applying ad valorem rates to these imports and setting the duty rates within Egypt's tariff bindings. Based on these developments, Egypt and the United States agreed in May 2005 that a mutually satisfactory solution had been reached to the matter raised by the United States.

10. Japan—Measures affecting the importation of apples (WT/DS245)

On March 1, 2002, the United States requested consultations with Japan regarding Japan's quarantine restrictions on U.S. apples imported into Japan to protect against introduction of fire blight (*Erwinia amylovora*). These restrictions included, *inter alia*, the prohibition of imported apples from orchards in which any fire blight is detected, the requirement that export orchards be inspected three times yearly for the presence of fire blight, the disqualification of any orchard from exporting to Japan should fire blight be detected within a 500 meter buffer zone surrounding such orchard, and a post-harvest treatment of exported apples with chlorine. The United States considered these measures to be inconsistent with Japan's obligations under the GATT 1994, the SPS Agreement, and the Agreement on Agriculture. Consultations were held on April 18, 2002, but failed to resolve the matter. The DSB established a panel on June 3, 2002. The Director General composed the panel as follows: Mr. Michael Cartland, Chairman, and Mr. Christian Haeberli and Ms. Kathy-Ann Brown, Members. In its report issued on July 15, 2003, the panel agreed with the United States that Japan's fire blight measures on U.S. apples are inconsistent with Japan's WTO obligations. In particular, the panel found that: (1) Japan's measures are maintained without sufficient scientific evidence, inconsistent with Article 2.2 of the SPS Agreement; (2) Japan's measures cannot be provisionally maintained under Article 5.7 of the SPS Agreement (an exception to the obligation under Article 2.2); and (3) Japan's measures are not based on a risk assessment and so are inconsistent with Article 5.1 of the SPS Agreement. Japan appealed the panel's report on August 28, 2003. The Appellate Body issued its report on November 26, 2003, upholding the panel's findings. The DSB adopted the panel and Appellate Body reports on December 10, 2003. Japan notified its intention to implement the recommendations and rulings of the DSB on January 9, 2004. Japan and the United States agreed that the reasonable period of time for implementation would expire on June 30, 2004.

On expiration of the reasonable period of time, Japan proposed revised measures which made limited changes to its existing measures, and which continued to include an orchard inspection and a buffer zone. On July 19, 2004, the United States requested the establishment of a DSU Article 21.5 compliance panel to evaluate Japan's revised measures. Simultaneously, the United States requested authorization to suspend concessions or other obligations under DSU Article 22.2 in an amount equal to $143.4 million. Japan objected to this amount on July 29, 2004, referring the matter to arbitration. The parties suspended the arbitration pending completion of the compliance proceeding. The compliance panel was established on July 30, 2004. The original three panelists agreed to serve on the compliance panel. The panel issued its final report on June 23, 2005, finding Japan's revised measure in breach of Articles 2.2, 5.1 and 5.6 of the SPS Agreement. The DSB adopted the compliance panel report on July 20, 2005. On August 25, 2005, Japan issued revised regulations eliminating its unnecessary and unjustified measures on U.S. apples, including among other things orchard inspections, buffer zones, and the surface disinfection of apple fruit.

On August 30, 2005, the United States and Japan informed the DSB that they had reached a mutually agreed solution to the dispute. Accordingly, the United States withdrew its Article 22.2 request to suspend concessions and other obligations to Japan, and Japan withdrew its Article 22.6 request for arbitration regarding the proposed level of suspension of concessions.

11. Mexico—Measures affecting telecommunications services (WT/DS204)

On August 17, 2000, the United States requested consultations with Mexico's commitments and obligations under the General Agreement on Trade in Services ("GATS") with respect to basic and value-added telecommunications services. The U.S. consultation request covered a number of key issues, including the Government of Mexico's failure to (1) maintain effective disciplines over the former monopoly, Telmex, which is able to use its dominant position in the market to thwart competition; (2) ensure timely, cost-oriented interconnection that would permit competing carriers to connect to Telmex customers to provide local, long-distance, and international service; and (3) permit alternatives to an outmoded system of charging U.S. carriers above-cost rates for completing international calls into Mexico.

These consultations, which were held on October 10, 2000, provided helpful clarifications but did not resolve the dispute. Therefore, on November 10, 2000, the United States filed a request for the establishment of a panel as well as an additional request for consultations on Mexico's newly issued measures. Those consultations were held on January 16, 2001. At that time, the United States decided not to pursue its panel request further given progress subsequently achieved in Mexico's domestic telecommunications market. For instance, Mexico reduced domestic interconnection rates and introduced measures to regulate Telmex as a dominant carrier. However, Mexico failed to take steps to address U.S. concerns regarding the anticompetitive nature of its international telecommunications regime, including the exorbitant interconnection rates that Telmex charged U.S. operators to complete calls into Mexico. Therefore, on February 13, 2002, the United States filed a new request for a panel to examine these unresolved issues. The panel was established on April 17, 2002. On August 26, 2002, the Director General composed the panel as follows: Mr. Ernst-Ulrich Petersmann, Chairman; Mr. Raymond Tam and Mr. Björn Wellenius, Members.

On April 2, 2004, the panel released its final report, siding with the United States on most of the major claims in this dispute. Specifically, the panel found that: (1) Mexico breached its commitment to ensure that U.S. carriers can connect their international calls to Mexico's major supplier, Telmex, at cost-based rates; (2) Mexico breached its obligation to maintain appropriate measures to prevent its dominant carrier from engaging in anti-competitive practices, by granting Telmex the exclusive authority to negotiate the rate that all Mexican carriers charge U.S. companies to complete calls originating in the United States; and (3) Mexico breached its obligations to ensure that U.S. carriers operating within Mexico can lease lines from Mexican carriers (and thereby provide services on a resale basis). The panel concluded, however, that Mexico may prohibit U.S. carriers from using leased lines in Mexico to complete calls originating in the United States.

Mexico did not appeal the panel report, which the DSB adopted on June 1, 2004. At that DSB meeting, Mexico and the United States informed the DSB that they had reached agreement on the steps required to implement the panel report. Mexico and the United States subsequently agreed that the reasonable period of time for implementation of the DSB's recommendations and rulings would expire on July 1, 2005. In August 2004, Mexico modified its international telecommunications rules to allow the competitive negotiation of international interconnection rates, and in July 2005 Mexico enacted new rules to allow the resale of international and long distance services. Based on these developments, the United States and Mexico informed the DSB on August 31, 2005 that Mexico had taken the steps required under their agreement.

12. Mexico—Definitive antidumping measures on beef and rice (WT/DS295)

On June 16, 2003, the United States requested consultations on Mexico's antidumping measures on rice and beef, as well as certain provisions of Mexico's Foreign Trade Act and its Federal Code of Civil Procedure. The specific U.S. concerns include: (1) Mexico's injury investigations in the two antidumping determinations; (2) Mexico's failure to terminate the rice investigation after a negative preliminary injury determination and its decision to include firms that were not dumping in the coverage of the antidumping measures; (3) Mexico's improper application of the "facts available"; (4) Mexico's improper calculation of the antidumping rate applied to non-investigated exporters; (5) Mexico's improper limitation of the antidumping rates it calculated in the beef investigation; (6) Mexico's refusal to conduct reviews of exporters' antidumping rates; and (7) Mexico's insufficient public determinations. The United States also challenged five provisions of Mexico's Foreign Trade Act. The United States alleges violations of various provisions of the Antidumping Agreement, the Agreement on Subsidies and Countervailing Measures, and the GATT 1994. Consultations were held July 31 and August 1, 2003. The United States requested the establishment of a panel on the measure on rice on September 19, 2003, and the DSB established a panel on November 7, 2003. On February 13, 2004, the Director General composed the panel as follows: Mr. Crawford Falconer, Chair, and Ms. Marta Calmon Lemme and Ms. Enie Neri De Ross, Members. Consultations on the measure on beef continue.

On June 6, 2005, the Panel issued its final report, siding with the United States on all of the major claims in dispute. Specifically, the Panel found that Mexico improperly (1) based its injury analysis on outdated information and failed to examine half of the injury data it collected; (2) applied its antidumping measure to two U.S. exporters that were not dumping; (3) applied an adverse "facts available" margin to a U.S. exporter that had no shipments during the period of investigation; and (4) applied "facts available" margins to U.S. exporters and producers that it did not even investigate. The Panel also found that six provisions of Mexico's antidumping and countervailing duty law are inconsistent "as such" with the WTO Antidumping Agreement and the WTO Agreement on Subsidies and Countervailing Measures.

On July 20, 2005, Mexico appealed the findings in the panel report. The Appellate Body is scheduled to issue its final report no later than November 29, 2005.

13. Mexico—Tax measures on soft drinks and other beverages (WT/DS308)

On March 16, 2004, the United States requested consultations with Mexico regarding its tax measures on soft drinks and other beverages that use any sweetener other than cane sugar. These measures apply a 20 percent tax on soft drinks and other beverages that use any sweetener other than cane sugar. Soft drinks and other beverages sweetened with cane sugar are exempt from the tax. Mexico's tax measures also include a 20 percent tax on the commissioning, mediation, agency, representation, brokerage, consignment, and distribution of soft drinks and other beverages that use any sweetener other than cane sugar. Mexico's tax measures work *inter alia* to restrict U.S. exports to Mexico of high fructose corn syrup, a corn-based sweetener that is directly competitive and substitutable with cane sugar. The United States considers these measures to be inconsistent with Mexico's national treatment obligations under Article III of the GATT 1994. Consultations were held on May 13, 2004, but they failed to resolve the dispute.

The United States requested the establishment of a panel on June 10, 2004, and the DSB established a panel on July 6, 2004. On August 18, 2004, the parties agreed to the composition of the panel as follows: Mr. Ronald Saborío Soto, Chair, and Mr. Edmond McGovern and Mr. David Walker, Members. On October 7, 2005, the panel circulated its report. The panel concluded that Mexico's beverage tax is inconsistent with Articles III:2 and III:4 of the General Agreement on Tariffs and Trade 1994 and rejected Mexico's defense that the tax is justified as necessary to secure U.S. compliance with the North American Free Trade Agreement. The panel found that the beverage tax discriminates against U.S. sweeteners, including high-fructose corn syrup (HFCS), by subjecting beverages made with any sweetener other than cane sugar to a 20 percent tax whereas beverages made with cane sugar are tax-exempt.

14. Venezuela—Import licensing measures on certain agricultural products (WT/DS275)

On November 7, 2002, the United States requested consultations with Venezuela regarding import licensing measures on certain agricultural products. Venezuela has established import licensing and permit requirements for numerous agricultural products that appear to establish a discretionary import licensing regime, and that fail to establish a transparent and predictable system for issuing import licenses. These measures severely restrict and distort trade in these goods, and appear to be in violation of provisions of the Agreement on Agriculture, the GATT 1994, and the Import Licensing Agreement. Consultations were held November 26, 2002.

15. European Communities—Selected customs matters (WT/DS315)

On September 21, 2004, the United States requested consultations with the EC with respect to (1) lack of uniformity in the administration by EC member States of EC customs laws and regulations and (2) lack of an EC forum for prompt review and correction of member State customs determinations. On September 29, 2004, the EC accepted the U.S. request for consultations, and consultations were subsequently held on November 16, 2004. The panel was established on March 21, 2005. On May 27, 2005, the Director General composed the panel as follows: Mr. Nacer Benjelloun-Touimi, Chair, and Mr. Mateo Diego-Fernandez and Mr. Hanspeter Tschani, Members.

16. European Communities—Subsidies on large civil aircraft (WT/DS316)

On October 6, 2004, the United States requested consultations with the EC, as well as with Germany, France, the United Kingdom, and Spain, with respect to subsidies provided to Airbus, a manufacturer of large civil aircraft. The United States alleged that such subsidies violated various provisions of the SCM Agreement, as well as Article XVI:1 of the GATT. Consultations were held on November 4, 2004. On January 11, 2005, the United States and the EU agreed to a framework for the negotiation of a new agreement to end subsidies for large civil aircraft. The parties set a three-month time frame for the negotiations and agreed that, during negotiations, they would not request panel proceedings.

The United States and the EU were unable to reach an agreement within the 90-day time frame. Therefore, the United States filed a request for a panel on May 31, 2005. The Panel was established on July 20, 2005. The U.S. request challenges several types of EU subsidies that appear to be prohibited, or actionable, or both. On February 13, 2004, the Deputy Director General composed the panel as follows: Mr. Carlos Pérez del Castillo, Chair, and Mr. John Adank and Mr. Thinus Jacobsz, Members.

17. Turkey— Measures affecting the importation of rice (WT/DS334)

On November 2, 2005, the United States requested consultations regarding Turkey's import licensing system and domestic purchase requirement with respect to the importation of rice. By conditioning the issuance of import licenses to import at preferential tariff levels upon the purchase of domestic rice, not permitting imports at the bound rate, and implementing a de facto ban on rice imports during the Turkish rice harvest, Turkey appears to be acting inconsistently with several WTO agreements, including the Agreement on Trade-Related Investment Measures (TRIMS), the General Agreement on Tariffs and Trade 1994, the Agreement on Agriculture, and the Agreement on Import Licensing Procedures.

B. Proceedings in which the United States is a defendant.

1. United States—Tax treatment for "foreign sales corporations" ("FSC") (WT/DS108)

The EU challenged the FSC provisions of the U.S. tax law, claiming that the provisions constitute prohibited export subsidies and import substitution subsidies under the Subsidies Agreement, and that they violate the export subsidy provisions of the Agreement on Agriculture. A panel was established on September 22, 1998. On November 9, 1998, the following panelists were selected, with the consent of the parties, to review the EU claims: Mr. Crawford Falconer, Chairman; Mr. Didier Chambovey and Mr. Seung Wha Chang, Members. The panel found that the FSC tax exemption constitutes a prohibited export subsidy under the Subsidies Agreement, and also violates U.S. obligations under the Agreement on Agriculture. The panel did not make findings regarding the FSC administrative pricing rules or the EU's import substitution subsidy claims. The panel recommended that the United States withdraw the subsidy by October 1, 2000. The panel report was circulated on October 8, 1999 and the United States filed its notice of appeal on November 26, 1999. The Appellate Body circulated its report on February 24, 2000. The Appellate Body upheld the panel's finding that the FSC tax exemption constitutes a prohibited export subsidy under the Subsidies Agreement, but, like the panel, declined to address the FSC administrative pricing rules or the EU 's import substitution subsidy claims. While the Appellate Body reversed the panel's findings regarding the Agreement on Agriculture, it found that the FSC tax exemption violated provisions of that Agreement other than the ones cited by the panel. The panel and Appellate Body reports were adopted on March 20, 2000, and on April 7, 2000, the United States announced its intention to respect its WTO obligations. On November 15, 2000, the President signed legislation that repealed and replaced the FSC provisions, but the EU claimed that the new legislation failed to bring the US into compliance with its WTO obligations.

In anticipation of a dispute over compliance, the United States and EU reached agreement in September 2000 on the procedures to review U.S. compliance with the WTO recommendations and rulings. Pursuant to a request approved by the WTO, the deadline for U.S. compliance was changed from October 1, 2000, as recommended by the panel, to November 1, 2000. The procedural agreement also outlined certain procedural steps to be taken after passage of US legislation to replace the FSC. The essential feature of the agreement provided for sequencing of WTO procedures as follows: (1) a panel would determine the WTO-consistency of FSC replacement legislation (the parties retained the right to appeal); (2) only after the appeal process was exhausted would arbitration over the appropriate level of retaliation be conducted if the replacement legislation was found WTO-

inconsistent. Pursuant to the procedural agreement, on November 17, the EU requested authority to impose countermeasures and suspend concessions in the amount of $4.043 billion. On November 27, the United States objected to this amount, thereby referring the matter to arbitration, which was then suspended pending a review of the legislation's WTO-consistency. On December 7, the EU requested establishment of a panel to review the legislation, and the panel was reestablished for this purpose on December 20, 2000. In a report circulated on August 20, 2001, the panel found that the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (ETI Act) does not bring the United States into conformity with its WTO obligations. The United States appealed the panel ruling on October 15, 2001. On January 14, 2001, the Appellate Body affirmed the findings of the panel. On January 29, 2002, the panel and Appellate Body reports were adopted, and the suspended arbitration to determine the amount of concessions was reactivated, with the original panelists serving as the arbitration panel pursuant to the procedural agreement. The arbitration panel circulated its report on August 30, 2002, and found that the EU was entitled to impose trade sanctions in the amount of $4.043 billion. On May 7, 2003, the DSB granted the EC authorization to suspend concessions consistent with the decision of the arbitrator. On December 8, 2003, the Council of the European Union adopted Council Regulation (EC) No. 2193/2003, which provided for the graduated imposition of sanctions. These sanctions took effect on March 1, 2004.

On October 22, 2004, the President signed the American Jobs Creation Act of 2004 (AJCA). The AJCA repealed the FSC/ETI regime and, consistent with standard legislative practice regarding major tax legislation, contained a transition provision and a "grandfather" provision for pre-existing binding contracts. On November 5, 2004, the EU requested consultations regarding the transition and grandfather provisions. Consultations took place on January 11, 2005. On January 31, 2005, the EU published a regulation that suspended the sanctions with effect from January 1, 2005. The EU requested establishment of a panel on January 13, 2005, and the DSB established a panel on February 17. On May 2, the Director-General selected Mr. Germain Denis to replace Mr. Crawford Falconer as chairman, Mr. Falconer having earlier indicated that he was no longer able to serve on the panel. On September 30, 2005, the panel issued its report, finding that the AJCA maintains prohibited FSC and ETI subsidies through its transition and grandfathering provisions, and that the United States has therefore not fully brought its measures into conformity with its obligations under the relevant covered agreements. The United States appealed the report on November 14, 2005.

2. United States—Section 110(5) of U.S. Copyright Act (WT/DS160)

As amended in 1998 by the Fairness in Music Licensing Act, Section 110(5) of the U.S. Copyright Act exempts certain retail and restaurant establishments that play radio or television music from paying royalties to songwriters and music publishers. The EU claimed that, as a result of this exception, the United States is in violation of its TRIPS obligations. Consultations with the EU took place on March 2, 1999. A panel on this matter was established on May 26, 1999. On August 6, 1999, the Director General composed the panel as follows: Ms. Carmen Luz Guarda, Chair; Mr. Arumugamangalam V. Ganesan and Mr. Ian F. Sheppard, Members. The panel issued its final report on June 15, 2000, and found that one of the two exemptions provided by Section 110(5) is inconsistent with the United States' WTO obligations. The panel report was adopted by the DSB on July 27, 2000, and the United States informed the DSB of its intention to respect its WTO obligations. On October 23, 2000, the EU requested arbitration to determine the period of time to be given the United States to implement the panel's recommendation. By mutual agreement of the parties, Mr. J. Lacarte-Muró was appointed to serve as arbitrator. He determined that the reasonable period of time for implementation would expire on July 27, 2001. On July 24, the DSB approved a U.S. proposal to extend the reasonable

period of time for implementation until the earlier of the end of the then-current session of the U.S. Congress or December 31, 2001.

On July 23, 2001, the United States and the EU requested arbitration to determine the level of nullification or impairment of benefits accruing to the EU as a result of Section 110(5)(B). The Director General composed the arbitration panel as follows: Mr. Ian F. Sheppard, Chair; Ms. Margaret Liang and Mr. David Vivas-Eugui, Members. In a decision circulated to WTO Members on November 9, 2001, the arbitrators determined that the value of the benefits lost to the EU in this case is $1.1 million.

On January 7, 2002, the EU requested authorization to suspend certain WTO obligations because the United States had not implemented the recommendations of the DSB. The United States objected to the request on January 17, 2002, and the matter was referred to arbitration. The parties agreed that the arbitration should be carried out by the same individuals that served in the earlier arbitration proceeding in the case. On February 27, 2002, the panel suspended the arbitration at the joint request of the United States and the EU, in light of ongoing efforts to resolve the issue.

On June 23, 2003, the United States and the EU notified to the WTO a mutually satisfactory temporary arrangement regarding the dispute. Pursuant to this arrangement, the United States made a lump-sum payment of $3.3 million to the EU, to a fund established to finance activities of general interest to music copyright holders, in particular awareness-raising campaigns at the national and international level and activities to combat piracy in the digital network. The temporary arrangement covered a three-year period, which ended on December 21, 2004.

3. United States—Section 211 Omnibus Appropriations Act of 1998 (WT/DS176)

Section 211 addresses the ability to register or enforce, without the consent of previous owners, trademarks or trade names associated with businesses confiscated without compensation by the Cuban government. The EU questions the consistency of Section 211 with the TRIPS Agreement, and it requested consultations on July 7, 1999. Consultations were held September 13 and December 13, 1999. On June 30, 2000, the EU requested a panel. A panel was established on September 26, 2000, and at the request of the EU the Director General composed the panel on October 26, 2000, as follows: Mr. Wade Armstrong, Chairman; Mr. François Dessemontet and Mr. Armand de Mestral, Members. The panel report was circulated on August 6, 2001, rejecting 13 of the EU's 14 claims and finding that, in most respects, section 211 is not inconsistent with the obligations of the United States under the TRIPS Agreement. The EU appealed the panel report on October 4, 2001. The Appellate Body issued its report on January 2, 2002. The Appellate Body reversed the panel's one finding against the United States, and upheld the panel's favorable findings that WTO members are entitled to determine trademark and trade name ownership criteria. The Appellate Body found certain instances, however, in which section 211 might breach national treatment and most favored nation obligations of the TRIPS Agreement. The Appellate Body and panel reports were adopted on February 1, 2002, and the United States informed the DSB of its intention to implement the recommendations and rulings. The reasonable period of time for implementation ended on June 30, 2005.

4. United States—Antidumping measures on certain hot-rolled steel products from Japan (WT/DS184)

Japan alleged that the preliminary and final determinations of the Department of Commerce and the USITC in their antidumping investigations of certain hot-rolled steel products from Japan, issued on

November 25 and 30, 1998, February 12, 1999, April 28, 1999, and June 23, 1999, were erroneous and based on deficient procedures under the U.S. Tariff Act of 1930 and related regulations. Japan claimed that these procedures and regulations violate the GATT 1994, as well as the Antidumping Agreement. Consultations were held on January 13, 2000, and a panel was established on March 20, 2000. In May 1999, the Director General composed the panel as follows: Mr. Harsha V. Singh, Chairman; Mr. Yanyong Phuangrach and Ms. Lidia di Vico, Members. On February 28, 2001, the panel circulated its report, in which it rejected most of Japan's claims, but found that particular aspects of the antidumping duty calculation were inconsistent with the WTO Antidumping Agreement. On April 25, 2001, the United States filed a notice of appeal on certain issues in the panel report. The Appellate Body report was issued on July 24, 2001, reversing in part and affirming in part. On September 10, 2001, at a meeting of the DSB, the United States stated its intention to implement the recommendations and rulings of the DSB in a manner that respects U.S. WTO obligations, and that it would need a reasonable period of time in which to do so. The United States and Japan were unable to reach agreement on a reasonable period of time for compliance, and on November 20, 2001, Japan referred the question to arbitration. By mutual agreement of the parties, Mr. Florentino P. Feliciano was appointed to serve as arbitrator. On February 19, 2002, he determined that the reasonable period of time for implementation will expire on November 23, 2002. The United States implemented the recommendations and rulings of the DSB with respect to the particular investigations at issue prior to November 23, 2003. With respect to the outstanding implementation issue, the reasonable period of time ended on July 31, 2005.

5. United States—Countervailing duty measures concerning certain products from the European Communities (WT/DS212)

On November 13, 2000, the EU requested WTO dispute settlement consultations concerning determinations made in various U.S. countervailing duty (CVD) proceedings covering imports from member states of the EU, all such determinations involving the Department of Commerce's "change in ownership" (or "privatization") methodology. Previously, the EU had successfully challenged Commerce's methodology in a WTO dispute concerning leaded steel products from the UK. Consultations were held December 7, 2000. Further consultations were requested on February 1, 2001, and held on April 3. Eventually, the EU requested the establishment of a panel with respect to determinations in 12 CVD determinations involving imported steel products from EU member states. The EU's challenged the continued application of the methodology at issue in the UK leaded steel products case, as well as the new methodology devised by Commerce to replace it. A panel was established on September 10, 2001, and at the request of the EU the Director General composed the panel on November 5, 2001, as follows: Mr. Gilles Gauthier, Chairman; Ms. Marie-Gabrielle Ineichen-Fleisch and Mr. Michael Mulgrew, Members. In its final report, issued July 31, 2002, the panel found both the old and new Commerce privatization methodologies to be inconsistent with the WTO Subsidies Agreement. In addition, the panel found section 771(5)(F) of the Tariff Act of 1930 – the "privatization" provision in the CVD statute – to be WTO-inconsistent based on its conclusion that the provision precludes Commerce from acting in a WTO-consistent manner. The United States appealed the report on September 9, 2002. The Appellate Body issued its report on December 9, 2002. The Appellate Body affirmed the panel's finding that Commerce's methodology is inconsistent with the Subsidies Agreement, but disagreed with some of the panel's reasoning. In particular, the Appellate Body disagreed with the panel that an arm's length sale of a government-owned firm for fair market value always extinguishes prior subsidies. Instead, according to the Appellate Body, such a transaction creates merely a rebuttable presumption that prior subsidies are extinguished.

The DSB adopted the panel and Appellate Body reports on January 8, 2003. The United States stated its intention to implement the DSB recommendations and rulings on January 27, 2003. On April 10, 2003, the EC and the United States agreed that the reasonable period of time for implementation will expire on November 8, 2003. Commerce modified its methodology for analyzing a privatization in the context of the CVD law, and issued revised determinations under section 129 of the Uruguay Round Agreements Act, revoking two CVD orders in whole and one CVD order in part, and, in the case of five CVD orders, revising the cash deposit rates for certain companies. The United States stated that it had complied with the DSB recommendations and rulings at a DSB meeting on November 7, 2003.

On March 17, 2004, the EU requested consultations regarding the Department of Commerce's new change of ownership methodology. The EU contends that the Department countervails the entire amount of unamortized subsidies even if the price paid for the acquired firm was only $1 less than the fair market value. With respect to the Department of Commerce's revised determinations, the EU complains about the three sunset reviews in which the Department declined to address the privatization transactions in question on what essentially were "judicial economy" grounds. With respect to a fourth sunset review, the EU challenges the Department's analysis of the sale of shares to employees of the company in question. Consultations took place on May 24, 2004. A panel was established on September 27, 2004. The original three panelists agreed to serve on the compliance panel.

On August 17, 2005, the panel circulated its report. With respect to one determination, the panel did not find that Commerce's application of the privatization methodology was inconsistent with U.S. WTO obligations. The panel did find that Commerce should have applied the privatization methodology in two other determinations, where Commerce simply assumed the benefit of the subsidy was extinguished by the privatization; in addition, the panel found that Commerce should have taken into account new record evidence presented during the redetermination proceeding. The panel also found that the USITC was not obliged to redo its sunset determination on likelihood of injury.

6. United States—Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA") (WT/DS217, 234)

On December 21, 2000, Australia, Brazil, Chile, the EU, India, Indonesia, Japan, Korea, and Thailand requested consultations with the United States regarding the Continued Dumping and Subsidy Offset Act of 2000 (19 USC 754), which amended Title VII of the Tariff Act of 1930 to transfer import duties collected under U.S. antidumping and countervailing duty orders from the U.S. Treasury to the companies that filed the antidumping and countervailing duty petitions. Consultations were held on February 6, 2001. On May 21, 2001, Canada and Mexico also requested consultations on the same matter, which were held on June 29, 2001. On July 12, 2001, the original nine complaining parties requested the establishment of a panel, which was established on August 23. On September 10, 2001, a panel was established at the request of Canada and Mexico, and all complaints were consolidated into one panel. The Director General composed the panel as follows: Mr. Luzius Wasescha, Chair, and Mr. Maamoun Abdel-Fattah and Mr. William Falconer, Members. The panel's final report, circulated on September 16, 2002, found that the CDSOA is an impermissible action against dumping and subsidies under the WTO Antidumping and Subsidies Agreements, respectively. It also found that the CDSOA violates the standing provisions of these agreements. The United States appealed the panel's report on October 1, 2002. The Appellate Body issued its report on January 16, 2003, upholding the panel's finding that the CDSOA is an impermissible action

against dumping and subsidies, but reversing the panel's finding on standing. The DSB adopted the panel and Appellate Body reports on January 27, 2003. At that meeting, the United States stated its intention to implement the DSB recommendations and rulings. On March 14, 2003, the complaining parties requested arbitration to determine a reasonable period of time for implementation. On June 13, 2003, the arbitrator determined that this period would end on December 27, 2003. On June 19, 2003, legislation to bring the Continued Dumping and Subsidy Offset Act into conformity with U.S. obligations under the AD Agreement, the SCM Agreement and the GATT of 1994 was introduced in the U.S. Senate (S. 1299).

On January 15, 2004, eight complaining parties (Brazil, Canada, Chile, EU, India, Japan, Korea, and Mexico) requested WTO authorization to retaliate. The remaining three complaining parties (Australia, Indonesia and Thailand) agreed to extend to December 27, 2004, the period of time in which the United States has to comply with the WTO rulings and recommendations in this dispute. On January 23, 2004, the United States objected to the requests from the eight complaining parties to retaliate, thereby referring the matter to arbitration. On August 31, 2004, the Arbitrators issued their awards in each of the eight arbitrations. They determined that each complaining party could retaliate, on a yearly basis, covering the total value of trade not exceeding, in U.S. dollars, the amount resulting from the following equation: amount of disbursements under CDSOA for the most recent year for which data are available relating to antidumping or countervailing duties paid on imports from each party at that time, as published by the U.S. authorities, multiplied by 0.72.

Based on requests from Brazil, the EU, India, Japan, Korea, Canada, and Mexico, on November 26, 2004, the DSB granted these Members authorization to suspend concessions or other obligations, as provided in DSU Article 22.7 and in the Decisions of the Arbitrators. The DSB granted Chile authorization to suspend concessions or other obligations on December 17, 2004. On May 1, 2005, Canada and the EU began imposing additional duties of 15 percent on a list of products from the United States. On August 18, 2005, Mexico began imposing additional duties ranging from nine to 30 percent on a list of U.S. products. On September 1, 2005, Japan began imposing additional duties of 15 percent on a list of U.S. products.

7. United States—Countervailing duties on certain carbon steel products from Brazil (WT/DS218)

On December 21, 2000, Brazil requested consultations with the United States regarding U.S. countervailing duties on certain carbon steel products from Brazil, alleging that the Department of Commerce's "change in ownership" (or "privatization") methodology, which was ruled inconsistent with the WTO Subsidies Agreement when applied to leaded steel products from the UK, violates the Subsidies Agreement in this situation as well. Consultations were held on January 17, 2001.

8. United States—Antidumping duties on imports of seamless pipe from Italy (WT/DS225)

On February 5, 2001, the EU requested consultations with the United States regarding antidumping duties imposed by the United States on seamless line and pressure pipe from Italy, complaining about the final results of a "sunset" review of that antidumping order, as well as the procedures followed by the Department of Commerce generally for initiating "sunset" reviews pursuant to Section 751 of the Tariff Act of 1930 and 19 CFR §351. The EU alleges that these measures violate the WTO Antidumping Agreement. Consultations were held on March 21, 2001.

9. United States—Certain measures regarding antidumping methodology (WT/DS239)

On September 18, 2001, the United States received from Brazil a request for consultations regarding the *de minimis* standard as applied by the U.S. Department of Commerce in conducting reviews of antidumping orders, and the practice of "zeroing" in conducting investigations and reviews. Brazil submitted a revised request on November 1, 2001, focusing specifically on the antidumping duty order on silicon metal from Brazil. Consultations were held on December 7, 2001.

10. United States—Final countervailing duty determination with respect to certain softwood lumber from Canada (WT/DS257)

On May 3, 2002, Canada requested consultations with the United States on the U.S. Department of Commerce's final countervailing duty determination concerning certain softwood lumber from Canada. Among other things, Canada challenged the evidence upon which the investigation was initiated and claimed that the Commerce Department incorrectly determined that the provision of low-cost timber to lumber companies was a subsidy, incorrectly measured the amount of subsidy, and failed to conduct its investigation properly. Consultations were held on June 18, 2002, and a panel was established at Canada's request on October 1, 2002. The panel was composed of Mr. Elbio Rosselli, Chair, and Mr. Weislaw Karsz and Mr. Remo Moretta, Members.

In a report circulated on August 29, 2003, the panel found that the United States acted consistently with the SCM Agreement and GATT 1994 in determining that the programs at issue provided a financial contribution and that those programs were "specific" within the meaning of the SCM Agreement. It also found, however, that the United States had acted inconsistently with the SCM Agreement when it rejected private timber prices in Canada as the benchmark to determine whether – and to what extent – Canada was subsidizing lumber companies by providing low-cost timber. The Commerce Department had used U.S. prices as the basis for the benchmark, rejecting Canadian private prices because they were distorted by the government's dominance in the timber market. The panel also found that the United States had improperly failed to conduct a "pass-through" analysis to determine whether subsidies granted to one producer were passed through to other producers. The United States appealed these issues to the WTO Appellate Body on October 21, 2003, and Canada appealed the "financial contribution" issue on November 5, 2003.

On January 19, 2004, the WTO Appellate Body issued a report finding in favor of the United States in all key respects. The Appellate Body reversed the panel's unfavorable finding with respect to the rejection of Canadian prices as a benchmark; upheld the panel's favorable finding that the provincial governments' provision of low-cost timber to lumber producers constituted a "financial contribution" under the SCM Agreement; and reversed the panel's unfavorable finding that the Commerce Department should have conducted a "pass-through" analysis to determine whether subsidies granted to one lumber company were passed through to other lumber companies through the sale of subsidized lumber. The Appellate Body's only finding against the United States was that the Commerce Department should have conducted such a pass-through analysis with respect to the sale of logs from harvester/sawmills to unrelated sawmills.

The DSB adopted the panel and Appellate Body reports on February 17, 2004. The United States stated its intention to implement the DSB recommendations and rulings on March 5, 2004. On

December 17, 2004, the United States informed the DSB that Commerce had revised its CVD order, thereby implementing the DSB's recommendations and rulings.

Following a request by Canada, on January 14, 2005, the DSB established an Article 21.5 compliance panel to review the new Commerce determination. On August 1, 2005, the compliance panel issued a report finding deficiencies in Commerce's implementation, and on September 6, the United States appealed that report to the WTO Appellate Body.

Canada also requested authorization to suspend concessions or other obligations pursuant to Article 22.2 of the DSU, in the amount of C$200,000,000. The United States objected to this level, referring the matter to arbitration. The parties agreed to request that the arbitration be suspended pending completion of the compliance proceeding.

11. United States—Sunset reviews of antidumping and countervailing duty orders on certain steel products from the EC (WT/DS262)

On July 25, 2002, the United States received from the EC a request for consultations regarding ITC and Commerce determinations made in sunset reviews of the antidumping and countervailing duty orders on corrosion-resistant steel from France and Germany and the antidumping and countervailing duty orders on cut-to-length steel from Germany. The EC request also concerns certain provisions and procedures contained in the Tariff Act of 1930, Commerce's regulations, and Commerce's so-called Sunset Policy Bulletin. The EC raises several concerns, including the alleged presumption of continued dumping or subsidization where a party waives its participation in a Commerce sunset review; the application of a 0.5 percent *de minimis* standard in antidumping sunset reviews; the criteria for conducting a cumulative injury analysis and the decision of the ITC to use a cumulative analysis; the assessment of the likely volume of imports in a sunset review; and the alleged failure of the ITC to use publicly available information as a substitute for missing information. Consultations were held September 12, 2002.

12. United States—Final dumping determination on softwood lumber from Canada (WT/DS264)

On September 13, 2002, Canada requested consultations regarding the Department of Commerce's amended final determination of sales at less than fair value of certain softwood lumber from Canada, along with the antidumping duty order with respect to imports of the subject products. Canada contests the initiation of the investigation, arguing that the petition did not contain sufficient evidence to justify initiation and that the Byrd Amendment precludes an objective examination of the degree of support for the petition. Canada further asserts that Commerce, in calculating the margin of dumping, made improper comparisons between sales in the home market and sales in the U.S. market. Canada also challenges Commerce's conduct of the investigation, arguing that Commerce failed to issue timely decisions and provide reasonable briefing schedules. Consultations were held October 11, 2002.

Canada requested the establishment of a panel on December 6, 2002, and the DSB established a panel on January 8, 2003. On February 25, 2003, the parties agreed on the panelists, as follows: Mr. Harsha V. Singh, Chairman, and Mr. Gerhard Hannes Welge and Mr. Adrian Makuc, Members. In its report, the panel rejected Canada's arguments: (1) that Commerce's investigation was improperly initiated; (2) that Commerce had defined the scope of the investigation (*i.e.*, the "product under investigation") too broadly; and (3) that Commerce improperly declined to make certain adjustment based on difference in dimension of products involved in particular transactions compared. The panel

also rejected Canada's claims on company-specific calculation issues. The one claim that the panel upheld was Canada's argument that Commerce's use of "zeroing" in comparing U.S. price to normal value was inconsistent with Article 2.4.2 of the Antidumping Agreement.

On May 13, 2004, the United States filed a notice of appeal regarding the "zeroing" issue. Canada cross-appealed with respect to two company-specific issues (one regarding the allocation of costs to Abitibi, and the other regarding the valuation of an offset to cost of production for Tembec). The Appellate Body issued its report on August 11, 2004. The report upheld the panel's findings on "zeroing" and the Tembec issue. It reversed a panel finding regarding the Abitibi issue concerning interpretation of the term "consider all available evidence" in Article 2.2.1.1 of the AD Agreement; however, it declined to complete the panel's legal analysis. The panel and Appellate Body reports were adopted at the August 31, 2004 DSB meeting. The United States and Canada agreed that the reasonable period of time for implementation in this dispute would expire on April 15, 2005. On February 14, 205, by mutual agreement between the United States and Canada, the reasonable period of time was extended to May 2, 2005.

On May 2, 2005, Commerce issued a revised antidumping determination in which it established the existence of dumping using the transaction-to-transaction comparison methodology, rather than the average-to-average methodology. On May 19, 2005, Canada challenged the measure taken to comply under Article 21.5 of the DSU. Also on that date, Canada sought recourse to Article 22.2 of the DSU. On May 31, 2005, the United States objected to the level of suspension of concessions proposed by Canada pursuant to Article 22.2 and, accordingly, the matter was referred to arbitration under Article 22.6 of the DSU. On June 10, 2005, the United States and Canada jointly asked that the Article 22.6 arbitration be suspended pending conclusion of the Article 21.5 proceeding.

The DSB established an Article 21.5 panel on June 1, 2005. The panel was composed on June 3, 2005, consisting of the same members as the original panel. On August 26, 2005, the Director General appointed Dr. Toufiq Ali to serve as replacement panel chairman for Mr. Singh, who had been appointed to serve as Deputy Director General of the WTO.

13. United States—Subsidies on upland cotton (WT/DS267)

On September 27, 2002, the United States received from Brazil a request for consultations pursuant to Articles 4.1, 7.1 and 30 of the *Agreement on Subsidies and Countervailing Measures*, Article 19 of the *Agreement on Agriculture*, Article XXII of the *General Agreement on Tariffs and Trade 1994*, and Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*. The Brazilian letter requests consultations pertaining to "prohibited and actionable subsidies provided to U.S. producers, users and/or exporters of upland cotton, as well as legislation, regulations, statutory instruments and amendments thereto providing such subsidies (including export credits), grants, and any other assistance to the U.S. producers, users and exporters of upland cotton [footnote omitted]." Brazil claims that these alleged subsidies and measures are inconsistent with U.S. commitments and obligations under the *Agreement on Subsidies and Countervailing Measures*, the *Agreement on Agriculture*, and the *General Agreement on Tariffs and Trade 1994*. Consultations were held December 3-4, 2002. A second round of consultations was held January 17, 2003. Brazil requested the establishment of a panel on February 6, 2003. The DSB established a panel on March 18, 2003. The Director General composed the panel as follows: Mr. Dariusz Rosati, Chairman, and Mr. Mario Matus and Mr. Daniel Moulis, Members.

On September 8, 2004, the panel circulated its report to all WTO Members and the public. The panel made some findings in favor of Brazil on certain of its claims and other findings in favor of the United States:

- **The panel found that the "Peace Clause" in the WTO Agreement on Agriculture did not apply to a number of U.S. measures, including (1) domestic support measures and (2) export credit guarantees for "unscheduled commodities" and rice (a "scheduled commodity"). Therefore, Brazil could proceed with certain of its challenges.**
- **The panel found that export credit guarantees for "unscheduled commodities" (such as cotton and soybeans) and for rice are prohibited export subsidies. However, the panel also found that Brazil had not demonstrated that the guarantees for other "scheduled commodities" exceeded U.S. WTO reduction commitments and therefore breached the Peace Clause. Further, Brazil had not demonstrated that the programs threaten to lead to circumvention of U.S. WTO reduction commitments for other "scheduled commodities" and for "unscheduled commodities" not currently receiving guarantees.**
- **Some U.S. domestic support programs (i.e., marketing loan, counter-cyclical, market loss assistance, and Step 2 payments) were found to cause significant suppression of cotton prices in the world market in marketing years 1999-2002 causing serious prejudice to Brazil's interests. However, the panel found that other U.S. domestic support programs (i.e., production flexibility contract payments, direct payments, and crop insurance payments) did not cause serious prejudice to Brazil's interests because Brazil failed to show that these programs caused significant price suppression. The panel also found that Brazil failed to show that any U.S. program caused an increase in U.S. world market share for upland cotton constituting serious prejudice.**
- **The panel did not reach Brazil's claim that U.S. domestic support programs threatened to cause serious prejudice to Brazil's interests in marketing years 2003-2007. The panel also did not reach Brazil's claim that U.S. domestic support programs *per se* cause serious prejudice in those years.**
- **The panel also found that Brazil had failed to establish that FSC/ETI tax benefits for cotton exporters were prohibited export subsidies.**
- **Finally, the panel found that Step 2 payments to exporters of cotton are prohibited export subsidies, not protected by the Peace Clause, and Step 2 payments to domestic users are prohibited import substitution subsidies because they were only made for U.S. cotton.**

On October 18, 2004, the United States filed a notice of appeal with the Appellate Body; Brazil then cross-appealed. The Appellate Body circulated its report on March 3, 2005. The Appellate Body upheld the panel's findings appealed by the United States. The Appellate Body also rejected or declined to rule on most of Brazil's appeal issues. On March 21, 2005, the DSB adopted the panel and Appellate Body reports and, on April 20, 2005, the United States advised the DSB that it intends to bring its measures into compliance.

On June 30, 2005, the United States announced certain administrative changes relating to its export credit guarantee programs. Further, on July 5, the United States proposed legislation relating to the export credit guarantee and Step 2 programs. On July 5, 2005, Brazil requested authorization to impose countermeasures and suspend concessions in the amount of $3 billion. On July 14, 2005, the United States objected to the request, thereby referring the matter to arbitration. On August 17, 2005, The United States and Brazil agreed to suspend the arbitration. On October 6, 2005, Brazil made a separate request for authorization to impose countermeasures and suspend concessions in the amount

of $1.04 billion per year in connection with the "serious prejudice" findings. The United States objected to Brazil's request on October 17, 2005, and that matter was also referred to arbitration.

14. United States—Sunset review of anti-dumping measures on oil country tubular goods from Argentina (WT/DS268)

On October 7, 2002, Argentina requested consultations regarding DOC and ITC determinations in the sunset review of the antidumping duty order on oil country tubular goods from Argentina, as well as the DOC's determination to continue the order. Argentina also identifies as measures sections 751(c) and 752 of the Tariff Act of 1930, the URAA Statement of Administrative Action, the sunset review regulations of the DOC and the ITC, and the DOC Sunset Policy Bulletin. The specific concerns raised by Argentina are: (1) the DOC's evidentiary standard for initiating a sunset review; (2) the DOC's use of a 0.5 percent *de minimis* standard, as opposed to the 2 percent standard for investigations; (3) the DOC's application of the "likelihood" standard; (4) the U.S. standard for determining whether continued or recurring injury is "likely"; (5) the alleged failure by the ITC to conduct an "objective examination"; and (6) the statutory provisions addressing the time period within which the ITC is to assess the likelihood of continued or recurring injury. Argentina alleges violations of various provisions of the Antidumping Agreement, GATT 1994 and Article XVI:4 of the WTO Agreement. Consultations were held November 14, 2002.

Argentina requested the establishment of a panel on April 3, 2003. The DSB established a panel on May 19, 2003. On September 4, 2003, the Director General composed the panel as follows: Mr. Paul O'Connor, Chairman, and Mr. Bruce Cullen and Mr. Faizullah Khilji, Members. In its report circulated July 16, 2004, the panel agreed with Argentina that the waiver provisions prevent the DOC from making a determination as required by Article 11.3 and that the DOC's Sunset Policy Bulletin is inconsistent with Article 11.3. The panel rejected Argentina's claims that the ITC did not correctly apply the "likely" standard and did not conduct an objective examination. Further, the panel concluded that statutes providing for cumulation and the timeframe for continuation or recurrence of injury were not inconsistent with Article 11.3.

On August 31, 2004, the United States filed a notice of appeal. The Appellate Body issued its report on November 29, 2004. The Appellate Body reversed the panel's finding against the Sunset Policy Bulletin and upheld the other findings described above. The DSB adopted the panel and Appellate Body reports on December 17, 2004.

Argentina requested arbitration in order to determine the reasonable period of time for the United States to implement the recommendations and rulings of the DSB. The arbitrator awarded the United States 12 months, until December 17, 2005. On August 15, 2005, Commerce published proposed regulations to implement the finding that the waiver provisions were inconsistent with Article 11.3. Commerce published the final regulations on October 28, 2005, effective October 31, 2005. Commerce has also begun the process of redetermining whether dumping is likely to continue or recur if the order is revoked.

15. United States—Investigation of the International Trade Commission in softwood lumber from Canada (WT/DS277)

On December 20, 2002, Canada requested consultations with the United States on the USITC's final determination in its investigations concerning softwood lumber from Canada. The Commission determined

that an industry in the United States is threatened with material injury by reason of imports from Canada found to be subsidized and sold in the United States at less than fair value. Canada alleges four flaws in the ITC's determination: (1) basing threat determination on "allegation, conjecture, and remote possibility"; (2) failing to establish that circumstances that would covert threatened injury into actual injury are "clearly foreseen and imminent"; (3) "failing to properly consider all factors relevant to determining the existence of a threat of material injury"; and (4) failing to properly consider the impact of dumped and subsidized imports on the domestic industry. More generally, Canada alleges that the ITC's report lacked "sufficient detail, relevant information and considerations, and proper reasons." Consultations were held January 22, 2003.

Canada requested the establishment of a panel on April 3, 2003, and the DSB established a panel on May 7, 2003. On June 19, 2003, the Director General composed the panel as follows: Mr. Hardeep Singh Puri, Chairman, and Mr. Paul O'Connor and Ms. Luz Elena Reyes De La Torre, Members. In its report circulated on March 22, 2004, the panel agreed with Canada's principal argument was that the ITC's threat of injury determination was not supported by a reasoned and adequate explanation, and agreed with Canada that the ITC had failed to establish that imports threaten to cause injury. However, the panel: declined Canada's request to find violations of certain overarching obligations under the Antidumping and Subsidies Agreements; rejected Canada's argument that a requirement that an investigating authority take "special care" is a stand-alone obligation; rejected Canada's argument that the ITC was obligated to identify an abrupt change in circumstances; agreed with the United States that, where the Antidumping and Subsidies Agreements required the ITC to "consider" certain factors, the ITC was not required to make explicit findings with respect to those factors; and rejected Canada's argument that the United States violated certain provisions of the applicable agreements that pertain to present material injury. The DSB adopted the panel report on April 26, 2004.

At the May 19, 2004 meeting of the DSB, the United States stated its intention to implement the rulings and recommendations of the DSB. On November 24, 2004, the ITC issued a new threat of-injury determination, finding that the U.S. lumber industry was threatened with material injury by reason of dumped and subsidized lumber from Canada. On December 13, Commerce amended the antidumping and countervailing duty orders to reflect the issuance and implementation of the new ITC determination.

At the January 25, 2005 DSB meeting, the United States announced that it had come into compliance with the DSB's recommendations and rulings. Canada sought recourse to Article 21.5 of the DSU, and an Article 21.5 panel was established on February 25, 2005. The panel was composed on March 2, 2005, consisting of the same members as the original panel. Canada also sought recourse to Article 22 of the DSU. The United States objected to the level of concessions that Canada proposed to suspend, and the matter accordingly was referred to arbitration under Article 22.6. The Article 22.6 arbitration was suspended pending the outcome of the Article 21.5 proceeding.

In its report circulated on November 15, 2005, the Article 21.5 panel rejected Canada's claim that the ITC's threat-of-injury determination was not supported by evidence and analysis such that an objective and unbiased investigating authority could have made that determination.

16. United States—Countervailing duties on steel plate from Mexico (WT/DS280)

On January 21, 2003, Mexico requested consultations on an administrative review of a countervailing duty order on carbon steel plate in sheets from Mexico. Mexico alleges that the Department of Commerce used a WTO-inconsistent methodology – the "change-in-ownership" methodology – to determine the existence of countervailable benefits bestowed on a Mexican steel producer. Mexico alleges inconsistency with various articles of the WTO Agreement on Subsidies and Countervailing Measures. Consultations were held April 2-4, 2003. Mexico requested the establishment of a panel on August 4, 2003, and the DSB established a panel on August 29, 2003.

17. United States—Anti-dumping measures on cement from Mexico (WT/DS281)

On January 31, 2003, Mexico requested consultations regarding a variety of administrative determinations made in connection with the antidumping duty order on gray portland cement and cement clinker from Mexico, including seven administrative review determinations by Commerce, the sunset determinations of Commerce and the ITC, and the ITC's refusal to conduct a changed circumstances review. Mexico also challenges certain provisions and procedures contained in the Tariff Act of 1930, the regulations of Commerce and the ITC, and Commerce's Sunset Policy Bulletin, as well as the URAA Statement of Administrative Action. Mexico raises a host of concerns, including case-specific dumping calculation issues; Commerce's practice of zeroing; the analytical standards used by Commerce and the ITC in sunset reviews; the U.S. retrospective system of duty assessment, including the assessment of interest; and the assessment of duties in regional industry cases. Consultations were held April 2-4, 2003. Mexico requested the establishment of a panel on July 29, 2003, and the DSB established a panel on August 29, 2003. On September 3, 2004, the Director-General composed the panel as follows: Mr. Peter Palecka, Chair, and Mr. Martin Garcia and Mr. David Unterhalter, Members.

18. United States—Anti-dumping measures on oil country tubular goods (OCTG) from Mexico (WT/DS282)

On February 18, 2003, Mexico requested consultations regarding several administrative determinations made in connection with the antidumping duty order on oil country tubular goods from Mexico, including the sunset review determinations of Commerce and the ITC. Mexico also challenges certain provisions and procedures contained in the Tariff Act of 1930, the regulations of Commerce and the ITC, and Commerce's Sunset Policy Bulletin, as well as the URAA Statement of Administrative Action. The focus of this case appears to be on the analytical standards used by Commerce and the ITC in sunset reviews, although Mexico also challenges certain aspects of Commerce's antidumping methodology. Consultations were held April 2-4, 2003. Mexico requested the establishment of a panel on July 29, 2003, and the DSB established a panel on August 29, 2003. On February 11, 2003, the following panelists were selected, with the consent of the parties, to review Mexico's claims: Mr. Christer Manhusen, Chairman; Mr. Alistair James Stewart and Ms. Stephanie Sin Far Man, Members.

On June 20, 2005, the panel circulated its report. The panel rejected Mexico's claim that certain aspects of the U.S. administrative review procedures are inconsistent with U.S. WTO obligations, as well as Mexico's claims regarding the USITC's laws and regulations regarding the determination of likelihood of injury and the likelihood determination itself. The panel did find that the Sunset Policy Bulletin and Commerce's likelihood determination itself were inconsistent with Article 11.3.

On August 4, 2005, Mexico filed a notice of appeal regarding the panel's findings on likelihood of injury. The United States appealed the panel's findings regarding the Sunset Policy Bulletin. On November 2, 2005, the Appellate Body issued its report. The report upheld the panel's findings rejecting Mexico's claims regarding likelihood of injury. In addition, the Appellate Body reversed the panel's findings that the Sunset Policy Bulletin breaches U.S. obligations.

19. United States—Measures affecting the cross-border supply of gambling and betting services (WT/DS285)

On March 13, 2003, the United States received from Antigua & Barbuda a request for consultations regarding its claim that U.S. federal, state and territorial laws on gambling violate U.S. specific commitments under the GATS, as well as Articles VI, XI, XVI, and XVII of the GATS, to the extent that such laws prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States. Antigua & Barbuda revised its request for consultations on April 1, 2003. Consultations were held on April 30, 2003.

Antigua & Barbuda requested the establishment of a panel on June 12, 2003. The DSB established a panel on July 21, 2003. On August 25, 2003, the Director General composed the panel as follows: Mr. B. K. Zutshi, Chairman, and Mr. Virachai Plasai and Mr. Richard Plender, Members. The panel's final report, circulated on November 10, 2004, found that the United States breached Article XVI (Market Access) of the GATS by maintaining three U.S. federal laws (18 U.S.C. §§ 1084, 1952, and1955) and certain statutes of Louisiana, Massachusetts, South Dakota, and Utah. It also found that these measures were not justified under exceptions in Article XIV of the GATS. The United States filed a notice of appeal on January 7, 2005. The Appellate Body issued its report on April 7, 2005, in which it reversed and/or modified several panel findings. The Appellate Body found that the three U.S. federal gambling laws at issue "fall within the scope of 'public morals' and/or 'public order'" under Article XIV. To meet the requirements of the Article XIV chapeau, the Appellate Body found that the United States needs to clarify an issue concerning Internet gambling on horse racing.

The DSB adopted the panel and Appellate Body reports on April 20, 2005. The United States stated its intention to implement the DSB recommendations and rulings on May 19, 2005. On August 19, 2005, an Article 21.3(c) arbitrator determined that the reasonable period of time for implementation will expire on April 3, 2006.

20. United States—Laws, regulations and methodology for calculating dumping margins ("zeroing") (WT/DS294)

On June 12, 2003, the European Communities requested consultations regarding the use of "zeroing" in the calculation of dumping margins. Consultations were held July 17, 2003. The EC requested further consultations on September 8, 2003. Consultations were held October 6, 2003. The EC requested the establishment of a panel on February 5, 2004, and the DSB established a panel on March 19, 2004. On October 27, 2004, the panel was composed as follows: Mr. Crawford Falconer, Chair, and Mr. Hans-Friedrich Beseler and Mr. William Davey, Members. The panel issued its report on October 31, 2005, finding that Commerce's use of "zeroing" in antidumping investigations is inconsistent with U.S. obligations, but rejecting the EC's claims that zeroing in other phases of antidumping proceedings is also inconsistent.

21. United States—Countervailing duty investigation on dynamic random access memory semiconductors (DRAMS) from Korea (WT/DS296)

On June 30, 2003, Korea requested consultations regarding determinations made in the countervailing duty investigation on DRAMS from Korea, and related laws and regulations. Consultations were held August 20, 2003. Korea requested further consultations on August 18, 2003, which were held October 1, 2003. Korea requested the establishment of a panel on November 19, 2003. The panel request covered only the Commerce and ITC determinations made in the DRAMS investigation. The DSB established a panel on January 23, 2004. On March 5, 2004, the Director General composed the panel as follows: H. E. Mr. Hardeep Puri, Chair, and Mr. John Adank and Mr. Michael Mulgrew, Members. On February 21, 2005, the panel found that certain aspects of the Commerce and ITC determinations were inconsistent with provisions of the SCM Agreement.

On March 29, 2005, the United States appealed the portion of the panel report dealing with the Commerce determination. On June 27, the Appellate Body issued its report in which it reversed the findings of the panel. The DSB adopted the Appellate Body report and the panel report (as modified by the Appellate Body) on July 20. On August 3, the United States informed the DSB of its intent to implement the panel's adverse finding regarding the ITC determination.

22. United States—Determination of the International Trade Commission in hard red spring wheat from Canada (WT/DS310)

On April 8, 2004, Canada requested consultations regarding the U.S. International Trade Commission's determination on hard red spring wheat. In its request, Canada alleged that the United States has violated Article VI:6(a) of the GATT 1994 and various articles of the Antidumping Agreement and the SCM Agreement. Canada alleged that these violations stemmed from certain errors in the ITC's determination. In particular, Canada claims that the ITC: (1) failed "to properly examine the effect of the dumped and subsidized imports on prices in the domestic market for like products;" (2) failed "to properly examine the impact of the dumped and subsidized imports on domestic producers of like products;" (3) failed "to properly demonstrate a causal relationship between the dumped and subsidized imports and material injury to the domestic industry;" (4) failed "to properly examine known factors other than dumping and subsidizing that were injuring the domestic industry;" and (5) attributed to the dumped and subsidized imports the injuries caused by other factors. Consultations were held on May 6, 2004. On June 11, 2004, Canada requested the establishment of a panel, the United States objected, and Canada made but withdrew a second panel request.

23. United States—Reviews of countervailing duty on softwood lumber from Canada (WT/DS311)

On April 14, 2004, Canada requested consultations concerning what it termed "the failure of the United States Department of Commerce (Commerce) to complete expedited reviews of the countervailing duty order concerning certain softwood lumber products from Canada" and "the refusal and failure of Commerce to conduct company-specific administrative reviews of the same countervailing duty order." Canada alleged that the United States had acted inconsistently with several provisions of the SCM Agreement and with Article VI:3 of the GATT 1994. Consultations were held on June 8, 2004.

24. United States—Subsidies on large civil aircraft (WT/DS317)

On October 6, 2004, the European Communities requested consultations with respect to "prohibited and actionable subsidies provided to U.S. producers of large civil aircraft." The EC alleged that such subsidies violated several provisions of the SCM Agreement, as well as Article III:4 of the GATT. Consultations were held on November 5, 2004. On January 11, 2005, the United States and the EU agreed to a framework for the negotiation of a new agreement to end subsidies for large civil aircraft. The parties set a three-month time frame for the negotiations and agreed that, during negotiations, they would not request panel proceedings. These discussions did not produce an agreement. On May 31, 2005, the EC requested the establishment of a panel to consider its claims. The EC filed a second request for consultations regarding large civil aircraft subsidies on June 27, 2005. This request covered many of the measures covered in the initial consultations, as well as many additional measures that were not covered. A panel was established with regard to the October claims on July 20, 2005. On October 17, 2005, the Deputy Director General established the panel as follows: Ms. Marta Lucía Ramírez de Rincón, Chair, and Ms. Gloria Peña and Mr. David Unterhalter, Members.

25. United States - Section 776 of the Tariff Act of 1930 (WT/DS319)

On November 5, 2004, the European Communities requested consultations with the United States with respect to the "facts available" provision of the U.S. dumping statute and the Department of Commerce's dumping order on Stainless Steel Bar from the United Kingdom. The EC claims that both the statutory provision on adverse facts available and Commerce's determination and order are inconsistent with various provisions of the Antidumping Agreement and the GATT 1994. Consultations were held on January 11, 2005 and May 20, 2005.

26. United States - Continued suspension of obligations in the EC - Hormones dispute (WT/DS320)

On November 8, 2004, the European Communities requested consultations with respect to "the United States' continued suspension of concessions and other obligations under the covered agreements" in the *EC – Hormones* dispute. Consultations were held on December 16, 2004. The EC requested the establishment of a panel on January 13, 2005, and the panel was established on February 17, 2005. Australia, Canada, China, Mexico, and Chinese Taipei reserved their third-party rights. On June 6, 2005, the Director General composed the panel as follows: Mr. Mr Tae-yul Cho, Chairman, and Ms. Claudia Orozco and Mr. William Ehlers, Members. The panel, in a communication dated August 1, 2005, granted the parties' request to open the substantive meetings with the parties to the public via a closed-circuit television broadcast. The panel's meeting with third parties remain closed.

27. United States – Measures relating to zeroing and sunset reviews (WT/DS322)

On November 24, 2004, Japan requested consultations with respect to: (1) the Department of Commerce's alleged practice of "zeroing" in antidumping investigations, administrative reviews, sunset reviews, and in assessing the final antidumping duty liability on entries upon liquidation; (2) in sunset reviews of antidumping duty orders, Commerce's alleged irrefutable presumption of the likelihood of continuation or recurrence of dumping in certain factual situations; and (3) in sunset reviews, the waiver provisions of U.S. law. Japan claims that these alleged measures breach various provisions of the AD Agreement and Article VI of the GATT 1994. Consultations were held on December 20, 2004. On April 15, 2005, the Director-General composed the panel as follows: David Unterhalter, Chair, and Simon Farbenbloom and Jose Antonio Buencamino, Members.

28. United States – Provisional antidumping measures on shrimp from Thailand (WT/DS324)

On December 9, 2004, Thailand requested consultations with respect to the Department of Commerce's imposition of provisional antidumping duties on certain frozen and canned warm water shrimp from Thailand. Specifically, Thailand has alleged that Commerce's use of a "zeroing" methodology is inconsistent with Article 2.4 of the AD Agreement. Thailand also has alleged that Commerce's resort to "adverse facts available" in calculating normal value for one Thai producer violates provisions of Article 6 and Annex II of the AD Agreement; and that Commerce's alleged failure to make due allowances for certain factors in its calculations for the Thai exporters violates Article 2.4 of the AD Agreement.

29. United States – Anti-Dumping Determinations Regarding Stainless Steel from Mexico (WT/DS325)

On January 5, 2005, Mexico requested consultations with respect to the Department of Commerce's alleged use of "zeroing" in an antidumping investigation and three administrative reviews involving certain stainless steel products from Mexico. Mexico claims these alleged measures breach several provisions of the AD Agreement, the GATT 1994 and the WTO Agreement. Consultations were held February 4, 2005.

United States Trade Representative.

U.S. Briefs Filed in WTO Dispute Settlement Proceedings – Pending.

(01/31/2006)

http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Index_-Pending.html

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United States - Measures Relating to Zeroing and Sunset Reviews (WT/WT/DS322)

- **U.S. First Written Submission -- 06/14/2005**
- **Opening Statement of the United States at the First Substantive Meeting of the Panel -- 06/28/2005**
- **Answers of the United States to the Panel's Questions to the Parties in Connection with the First Substantive Meeting -- 07/20/2005**
- **Answers of the United States to the Second Set of Questions from the Panel -- 10/19/2005**
- **Response of the United States to Japan's Opening Statement at the Second Substantive Meeting of the Panel -- 10/19/2005**

United States – Continued Suspension of Obligations in the EC – Hormones Dispute (WT/WT/DS320)

- **First Written Submission of the United States -- 08/08/2005**
- **Oral Statement of the United States at the First Substantive Meeting of the Panel -- 09/12/2005**
- **Answers of the United States to the First Set of Questions from the Panel -- 10/03/2005**
- **Answers of the United States to the Questions from the European Communities -- 10/03/2005**
- **Rebuttal Submission of the United States -- 11/16/2005**

European Communities – Selected Customs Matters (WT/WT/DS315)

- **First Written Submission of the United States -- 07/12/2005**
- **Executive Summary of the First Written Submission of the United States -- 07/19/2005**
- **Opening Statement of the United States at the First Panel Meeting -- 09/14/2005**
- **Answers of the United States to the Panel's Questions in Connection with the First Substantive Meeting -- 09/23/2005**
- **Answers of the United States to the European Communities' Questions in Connection with the First Substantive Meeting -- 09/23/2005**
- **Second Written Submission of the United States -- 10/18/2005**
- **Executive Summary of the Second Written Submission of the United States -- 10/25/2005**

- **Opening Statement of the United States at the Second Meeting of the Panel -- 11/22/2005**
- **Closing Statement of the United States at the Second Meeting of the Panel -- 11/23/2005**
- **Executive Summary of the Opening Statement of the United States at the Second Meeting of the Panel -- 11/30/2005**
- **Executive Summary of the Closing Statement of the United States at the Second Meeting of the Panel -- 11/30/2005**
- **Answers of the United States to the Panel's Questions in Connection with the Second Substantive Meeting -- 12/07/2005**
- **Comments of the United States on the Replies of the European Communities to the Questions of the Panel in Connection with the Second Substantive Meeting -- 12/14/2005**
- **Answers of the United States of America to the Panel's Supplementary List of Questions Regarding Part III of the U.S. Second Oral Statement -- 12/22/2005**

Korea – Anti-dumping Duties on Imports of Certain Paper from Indonesia (WT/WT/DS312)

- **U.S. Third Party Submission -- 01/11/2005**
- **Executive Summary of U.S. Third Party Submission -- 01/21/2005**
- **Oral Statement of the United States at the Third Party Session -- 02/02/2005**
- **U.S. Answer to the Question from Korea -- 03/01/2005**

United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") (WT/WT/DS294)

- **First Written Submission of the United States -- 01/31/2005**
- **Executive Summary of the First Written Submission of the United States -- 02/10/2005**
- **Opening Statement of the United States at the First Substantive Meeting -- 03/16/2005**
- **Closing Statement of the United States at the First Substantive Meeting -- 03/17/2005**
- **Questions from the United States to the European Communities -- 03/18/2005**
- **U.S. Answers to the Panel's Questions in Connection with the First Substantive Meeting -- 04/07/2005**
- **Second Written Submission of the United States -- 04/13/2005**
- **Executive Summary of the Second Written Submission of the United States -- 04/22/2005**
- **Opening Statement of the United States at the Second Panel Meeting -- 04/26/2005**
- **Closing Statement of the United States at the Second Panel Meeting -- 04/27/2005**
- **U.S. Answers to the Panel's Questions in Connection with the Second Substantive Meeting -- 05/13/2005**
- **U.S. Comments on the EC's Replies to the Panel's Questions in Connection with the Second Substantive Meeting -- 05/18/2005**

Mexico - Tax Measures on Soft Drinks and Other Beverages (WT/DS308)

Panel Proceedings

- **First Written Submission of the United States -- 09/30/2004**
- **Executive Summary of the First Written Submission of the United States -- 10/14/2004**
- **Opening Statement of the United States at the First Panel Meeting -- 12/02/2004**
- **Closing Statement of the United States at the First Panel Meeting -- 12/03/2004**
- **U.S. Answers to Questions from the Panel after the First Meeting -- 12/20/2004**
- **U.S. Answers to Question from Mexico -- 12/20/2004**
- **Second Written Submission of the United States -- 01/21/2005**

- **Executive Summary of the Second Written Submission of the United States -- 02/04/2005**
- **U.S. Opening Statement at the Second Meeting -- 02/23/2005**
- **U.S. Closing Statement at the Second Meeting -- 02/24/2005**
- **U.S. Answers to Panel Questions in Relation to the Second Substantive Meeting -- 03/15/2005**
- **U.S. Comments on Mexico's Answers to Panel Questions in Relation to the Second Substantive Meeting -- 03/22/2005**

Appeal Proceedings

- **Appellee Submission of the United States -- 01/06/2006**
- **Oral Statement of the United States -- 01/18/2006**

Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes (WT/DS302)

Panel Proceedings

- **Third-Party Oral Statement of the United States -- 05/12/2004**

Appeal Proceedings

- **U.S. Third Participant Submission -- 02/18/2005**
- **Executive Summary of the U.S. Third Participant Submission -- 02/18/2005**
- **Oral Statement of the United States -- 03/09/2005**

European Communities - Measures Affecting Trade in Commercial Vessels (WT/DS301)

- **Third Party Submission of the United States -- 07/08/2004**
- **Third Party Oral Statement of the United States of America -- 08/03/2004**
- **Replies of the United States to the Questions from the European Communities and Korea -- 08/23/2004**

European Communities - Counterveiling Measures on Dynamic Random Access Memory Chips from Korea (WT/DS299)

- **Third Party Submission of the United States -- 06/16/2004**
- **Executive Summary of the Third Party Submission of the United States -- 06/25/2004**
- **Third Party Oral Statement of the United States -- 11/04/2004**

United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea (WT/DS296)

Panel Proceedings

- **First Written Submission of the United States -- 05/21/2004**
- **Opening Statement of the United States at the First Panel Meeting -- 06/23/2004**

- **Closing Statement of the United States at the First Panel Meeting -- 06/24/2004**
- **Executive Summary of the Opening Statement of the United States at the First Panel Meeting -- 07/02/2004**
- **Second Written Submission of the United States -- 07/09/2004**
- **U.S. Answers to the Panel's Questions Following the First Substantive Meeting of the Panel -- 07/09/2004**
- **Executive Summary of the Closing Statement of the United States of America at the Second Substantive Meeting of the Panel -- 08/02/2004**
- **Exective Summary of the Opening Statement of the United States of American at the Second Substantive Meeting of the Panel -- 08/02/2004**
- **Answers of the United States of America to the Panel's Questions to the Parties Following the Second Substantive Meeting of the Panel -- 08/06/2004**
- **Comments of the United States of America on New Factual Information Provided in the Republic of Korea's Answers to the Panel's Questions Following the Second Substantive Meeting -- 08/13/2004**
- **Executive Summary of the Third Party Oral Statement of the United States -- 11/10/2004**

Appeal Proceedings

- **Appellant Submission of the United States -- 04/05/2005**
- **Appellee Submission of the United States -- 04/25/2005**
- **Oral Statement of the United States at the Oral Hearing -- 05/11/2005**

Mexico - Definitive Anti-Dumping Measures on Beef and Rice (Complaint with respect to Rice) (WT/DS295)

Panel Proceedings

- **U.S. First Written Submission -- 03/22/2004**
- **Executive Summary of the U.S. First Written Submission -- 04/01/2004**
- **U.S. Response to Mexico's Preliminary Ruling Request -- 05/07/2004**
- **Opening Statement of the United States at the First Panel Meeting -- 05/17/2004**
- **Closing Statement of the United States at the First Panel Meeting -- 05/18/2004**
- **Executive Summary of the U.S. Opening Statement at the First Panel Meeting -- 05/28/2004**
- **Second Submission of the United States -- 06/14/2004**
- **Executive Summary of the Second Submission of the United States -- 06/24/2004**
- **Closing Statement of the United States Second Meeting of the Panel -- 08/03/2004**
- **Opening Statement of the United States Second Meeting of the Panel -- 08/03/2004**
- **Executive Summary of the Open Statement of the United States of America at the Second Meeting of the Panel -- 08/13/2004**
- **Answers of the United States to Panel Questions Following the First Panel Meeting -- 06/02/2004**
- **Answers of the United States to Panel Questions in Connection with the Second Panel Meeting -- 08/20/2004**

Appeal Proceedings

- **Appellee Submission of the United States -- 09/06/2005**
- **Oral Statement of the United States -- 10/06/2005**

European Communities - Measures Affecting the Approval and Marketing of Biotech Products (WT/DS291)

- **Response of the United States to the Request for a Preliminary Ruling Submitted by the European Communities -- 03/24/2004**
- **Response of the United States to the Questions by the Panel Pertaining to the Request by the European Communities for a Preliminary Ruling -- 03/29/2004**
- **Executive Summary of the Response of the United States to the Request for a Preliminary Ruling Submitted by the European Communities -- 04/15/2004**
- **First Submission of the United States -- 04/21/2004**
- **Executive Summary of the First Submission of the United States -- 04/30/2004**
- **Oral Statement of the United States at the First Panel Meeting -- 06/02/2004**
- **Responses of the United States to the Questions by the Panel and the European Communities Posed in the Context of the First Substantive Meeting with the Parties -- 06/16/2004**
- **Executive Summary of the Oral Statement of the United States at the First Panel Meeting -- 06/17/2004**
- **Comments of the United States on the EC's Final Position on Whether to Seek Advice from Scientific Experts -- 07/27/2004**
- **Executive Summary of the U.S. Rebuttal Position -- 07/29/2004**
- **Rebuttal Submission of the United States -- 07/19/2004**
- **Comments of the United States on Suggested Questions for Scientific or Technical Experts -- 08/16/2004**
- **U.S. Supplementary Rebuttal Submission -- 11/15/2004**
- **Executive Summary of U.S. Supplementary Rebuttal Submission -- 12/03/2004**
- **U.S. Opening Statement at the Second Meeting (Expert Issues) -- 02/21/2005**
- **U.S. Opening Statement at the Second Meeting (Legal Issues) -- 02/22/2005**
- **Responses of the United States to the Additional Questions by the Panel Posed in the Context of the Second Substantive Meeting with the Parties -- 03/11/2005**
- **Comments of the United States on the EC's Responses to the Panel's Questions after the Second Meeting -- 03/18/2005**
- **Executive Summary of the U.S. Opening Statement at the Second Meeting (Legal Issues) -- 03/23/2005**
- **Executive Summary of the U.S. Opening Statement at the Second Meeting (Expert Issues) -- 03/23/2005**

United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (WT/DS285)

Panel Proceedings

- **U.S. Request for Preliminary Rulings -- 10/17/2003**
- **First Written Submission of the United States -- 11/07/2003**
- **Executive Summary of the First Written Submission of the United States -- 11/14/2003**

- **Opening Statement of the United States at the First Panel Meeting -- 12/10/2003**
- **Closing Statement of the United States at the First Panel Meeting -- 12/11/2003**
- **Executive Summary of the U.S. Oral Statements at the First Panel Meeting -- 12/18/2003**
- **U.S. Answers to the First Set of Panel Questions -- 01/09/2004**
- **Second Written Submission of the United States -- 01/09/2004**
- **Executive Summary of the Second Written Submission of the United States -- 01/16/2004**
- **Opening Statement of the United States at the Second Panel Meeting -- 01/26/2004**
- **Closing Statement of the United States at the Second Panel Meeting -- 01/27/2004**
- **U.S. Answers to the Second Set of Panel Questions -- 02/02/2004**
- **Executive Summary of the U.S. Oral Statements at the Second Panel Meeting -- 02/04/2004**
- **U.S. Comments on the Answers of Antigua and Barbuda to the Second Set of Panel Questions -- 02/11/2004**

Appeal Proceedings

- **U.S. Appellant Submission -- 01/14/2005**
- **Executive Summary of the U.S. Appellant Submission -- 01/14/2005**
- **U.S. Appellee Submission -- 02/01/2005**
- **Oral Statement of the United States -- 02/21/2005**
- **Arbitration under Article 21.3(c) of the DSU**
- **Submission of the United States -- 07/12/2005**

United States - Anti-dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico (WT/DS282)

Panel Proceedings

- **First Written Submission of the United States -- 04/21/2004**
- **Executive Summary of the First Submission of the United States -- 05/03/2004**
- **Answers of the United States to Questions from Mexico -- 06/18/2004**
- **Answers of the United States to Questions from the Panel in Connection with the First Panel Meeting -- 06/18/2004**
- **Second Written Submission of the United States -- 07/09/2004**
- **Opening Statement of the United States at the Second Meeting of the Panel with the Parties -- 08/17/2004**
- **Closing Statement of the United States at the Second Meeting of the Panel with the Parties -- 08/18/2004**
- **Answers of the United States to Questions from the Panel in Connection with the Second Substantive Meeting -- 09/13/2004**
- **Answers of the United States to Questions from Mexico in Connection with the Second Substantive Meeting -- 09/13/2004**

Appeal Proceedings

- **Other Appellant Submission of the United States -- 08/19/2005**
- **Appellee Submission of the United States -- 08/29/2005**
- **Oral Statement of the United States -- 09/19/2005**

United States - Antidumping Measures on Cement from Mexico (WT/DS281)

- **Preliminary Ruling Request of the United States -- 10/26/2004**
- **First Written Submission of the United States -- 01/04/2005**
- **Opening Statement of the United States at the First Panel Meeting -- 02/17/2005**
- **Closing Statement of the United States at the First Panel Meeting -- 02/18/2005**
- **Answers of the United States to Questions from the Panel Relating to the Preliminary Ruling Requests -- 03/02/2005**
- **Answers of the United States to Questions from the Panel Relating to the Preliminary Ruling Requests - Attachment -- 03/02/2005**
- **Answers of the United States to Questions from the Panel in Connection with the First Panel Meeting -- 03/18/2005**
- **U.S. Response to Mexico's April 20 Comments to the Additional BCI Procedures Proposed by the United States -- 04/26/2005**
- **U.S. Comments to the Panel's Proposed Additional BCI Procedures -- 04/28/2005**
- **U.S. Letter Regarding the Submission of BCI and Mexico's Letter of May 10 -- 05/12/2005**
- **Answers of the United States to Questions from the Panel on BCI-Related Issues -- 05/20/2005**
- **Comments of the United States on Mexico's Answers to Questions from the Panel on BCI-Related Issues -- 05/25/2005**
- **U.S. Comments on Mexico's June 6, 2005, Responses to the Second Set of Panel Questions -- 06/21/2005**
- **U.S. Comments on Mexico's June 21, 2005, Submission Regarding the 17 March 2005 BCI (Non-Confidential Version) -- 07/11/2005**
- **U.S. Answers to Third Set of Questions from the Panel -- 08/05/2005**

United States - Investigation of the International Trade Commission in Softwood Lumber from Canada (WT/DS277)

Panel Proceedings

- **First Written Submission of the United States -- 08/15/2003**
- **Executive Summary of the First Written Submission of the United States -- 08/25/2003**
- **U.S. Opening Statement at the First Panel Meeting -- 09/04/2003**
- **U.S. Closing Statement at the First Panel Meeting -- 09/05/2003**
- **Executive Summary of the U.S. Oral Statements at the First Panel Meeting -- 09/15/2003**
- **U.S. Answers to the First Set of Panel Questions -- 09/24/2003**
- **Second Written Submission of the United States -- 09/24/2003**
- **U.S. Closing Statement at the Second Panel Meeting -- 10/07/2003**
- **U.S. Opening Statement at the Second Panel Meeting -- 10/07/2003**
- **Executive Summary of the U.S. Oral Statements at the Second Panel Meeting -- 10/17/2003**
- **U.S. Answers to the Second Set of Panel Questions -- 10/17/2003**

Recourse by Canada to Article 21.5 of the DSU

- **First Submission of the United States -- 04/29/2005**
- **Executive Summary of the First Submission of the United States -- 05/04/2005**
- **Second Submission of the United States -- 05/17/2005**
- **Executive Summary of the Second Submission of the United States -- 05/24/2005**

- **Opening Statement of the United States -- 06/28/2005**
- **Closing Statement of the United States -- 06/29/2005**
- **Executive Summary of the Closing Statement of the United States at the Panel Meeting -- 07/07/2005**
- **U.S. Answers to Panel Questions -- 07/11/2005**
- **U.S. Comments on Canada's Answers to Panel Questions -- 07/18/2005**

Recourse to Article 21.5: Appeal Proceedings

- **Appellee Submission of the United States -- 02/07/2006**
- **Oral Statement of the United States -- 02/24/2006**

Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain (WT/DS276)

Panel Proceedings

- **Comments of the United States on the Preliminary Ruling Request of Canada Regarding Article 6.2 of the DSU -- 05/27/2003**
- **Comments of the United States on Canada's Preliminary Ruling Request Regarding BCI Procedures -- 05/28/2003**
- **Oral Statement of the United States Regarding Canada's Preliminary Ruling Request -- 06/06/2003**
- **First Written Submission of the United States -- 08/01/2003**
- **Executive Summary of the first Written Submission of the United States -- 08/11/2003**
- **Oral Statement of the United States at the First Panel Meeting -- 09/08/2003**
- **Executive Summary of the Oral Statement of the United States at the First Panel Meeting -- 09/19/2003**
- **U.S. Answers to the First Set of Questions -- 09/24/2003**
- **Second Written Submission to the United States -- 10/02/2003**
- **Executive Summary of the Second Written Submission of the United States -- 10/10/2003**
- **Oral Statement of the United States at the Second Panel Meeting -- 10/21/2003**
- **U.S. Answers to the Second Set of Panel Questions -- 10/29/2003**
- **Executive Summary of the Oral Statement of the United States at the Second Panel Meeting -- 10/31/2003**
- **U.S. Comments on Canada's Answers to the Second Set of Panel Questions -- 11/04/2003**

Appeal Proceedings

- **Appellant's Submission of the United States -- 06/11/2004**
- **Appellee's Submission of the United States -- 06/28/2004**
- **Oral Statement of the United States -- 07/12/2004**

Korea - Measures Affecting Trade in Commercial Vessels (WT/DS273)

- **Third Party Submission of the United States -- 02/09/2004**
- **Oral Statement of the United States at the Third Party Session -- 03/09/2004**
- **Response of the United States to Questions from the Parties -- 03/22/2004**
- **Answers from the United States to the Question from the Panel Posed to the Third Parties -- 07/02/2004**

European Communities - Customs Classification of Frozen Boneless Chicken Cuts (WT/DS269)

Panel Proceedings

- **Third Party Oral Statement of United States -- 09/29/2004**
- **Answers from the United States to Questions from the Panel -- 10/14/2004**

Appeal Proceedings

- **U.S. Third Participant Submission -- 07/08/2005**
- **U.S. Third Participant Oral Statement -- 07/25/2005**

United States - Sunset Reviews of Antidumping Measures on Oil Country Tubular Goods from Argentina (WT/DS268)

Panel Proceedings

- **First Written Submission of the United States -- 11/07/2003**
- **Oral Statement of the United States at the First Panel Meeting -- 12/09/2003**
- **Answers of the United States to the Questions from Argentina following the First Panel Meeting -- 01/08/2004**
- **Answers of the United States to the Questions from the Panel following the First Panel Meeting -- 01/08/2004**
- **Second Written Submission of the United States -- 01/08/2004**
- **Opening Statement of the United States at the Second Panel Meeting -- 02/03/2004**
- **Closing Statement of the United States at the Second Panel Meeting -- 02/03/2004**
- **Answers of the United States to the Questions from Argentina following the Second Panel Meeting -- 02/13/2004**
- **Answers of the United States to the Questions from the Panel following the Second Panel Meeting -- 02/13/2004**
- **Comments of the United States on Argentina's Reponses to Questions from the Panel in Connection with the Second Substantive Meeting -- 02/20/2004**

Appeal Proceedings

- **Appellant's Submission of the United States -- 09/13/2004**
- **Appellee's Submission of the United States -- 09/27/2004**
- **Oral Statement of the United States -- 10/15/2004**

Arbitration under Article 21.3(c) of the DSU

- **Written Submission of the United States -- 04/22/2005**
- **Oral Statement of the United States at the Arbitration Hearing -- 05/18/2005**

United States -- Subsidies on Upland Cotton (WT/DS267)

Panel Proceedings

- **Initial Brief of the United States of America on the Question Posed by the Panel on May 28, 2003 -- 06/05/2003**

- **Comments of the United States on the Comments by Brazil and the Third Parties on the Question Posed by the Panel on May 28, 2003 -- 06/13/2003**
- **First Written Submission of the United States -- 07/11/2003**
- **Executive Summary of the First Written Submission of the United States -- 07/21/2003**
- **Opening Statement of the United States at the First Panel Meeting -- 07/22/2003**
- **Closing Statement of the United States at the First Panel Meeting -- 07/24/2003**
- **Executive Summary of the Opening Statement of the United States at the First Panel Meeting -- 08/04/2003**
- **Executive Summary of the Closing Statement of the United States at the First Panel Meeting -- 08/04/2003**
- **Answers of the United States to the First Set of Questions from the Panel -- 08/11/2003**
- **Rebuttal Submission of the United States -- 08/22/2003**
- **Comments of the United States of America on New Material in Brazil's Rebuttal Filings and Answer of the United States to the Additional Question from the Panel -- 08/27/2003**
- **Executive Summary of the Rebuttal submission of the United States -- 09/01/2003**
- **Further Submission of the United States -- 09/30/2003**
- **Opening Statement of the United States at the Second Session of the First Panel Meeting -- 10/07/2003**
- **Closing Statement of the United States at the Second Session of the First Panel Meeting -- 10/09/2003**
- **Executive Summary of the Further Submission of the United States -- 10/14/2003**
- **Executive Summary of the Opening Statement of the United States at the Second Session of the First Panel Meeting -- 10/20/2003**
- **Executive Summary of the Closing Statement of the United States at the Second Session of the First Panel Meeting -- 10/20/2003**
- **Answers of the United States to the Questions from the Panel to the Parties following the Second Session of the First Substantive Panel Meeting -- 10/07/2003**
- **Further Rebuttal Submission of the United States -- 11/18/2003**
- **Executive Summary of the Further Rebuttal Submission of the United States -- 11/28/2003**
- **Opening Statement of the United States at the Second Meeting of the Panel with the Parties -- 12/02/2003**
- **Closing Statement of the United States at the Second Meeting of the Panel with the Parties -- 12/03/2003**
- **Answers of the United States to the Questions from the Panel to the Parties following the Second Substantive Panel Meeting -- 12/22/2003**
- **U.S. Comments Concerning Brazil's Econometric Model -- 12/22/2003**
- **Answers of the United States of America to Further Questions from the Panel to the Parties following the Second Panel Meeting -- 01/20/2004**
- **Response of the United States to request for information from the Panel -- 01/20/2004**
- **Comments of the United States on the Answers of Brazil to Questions from the Panel to the Parties Following the Second Substantive Meeting -- 01/28/2004**
- **Comments of the United States on Comments of Brazil on U.S. Comments Concerning Brazil's Econometric Model -- 01/28/2004**
- **U.S. Letter to Panel Concerning Revised Versions of Data Files -- 01/28/2004**
- **Answers of the United States of America to Questions Dated February 3, 2004, from the Panel to the Parties -- 02/11/2004**
- **Comments of the United States of America on the Comments of Brazil on U.S. Data Submitted on December 18 and 19, 2003 -- 02/11/2004**

- **U.S. Letter to Panel regarding Answers to Panel Questions and Panel Supplementary Request for Information -- 02/11/2004**
- **Comments of the United States on the February 11, 2004, Answers of Brazil to Panel Question 276 -- 02/18/2004**
- **Answer of the United States to Question 264(b) from the Panel to the Parties -- 03/03/2004**
- **Comments of the United States on the February 18, 2004, Comments of Brazil -- 03/03/2004**
- **Response of the United States to the Panel's February 3, 2004 Data Request, As Clarified on February 16, 2004 -- 03/03/2004**
- **Comments of the United States on Brazil's March 10 Comments on the U.S. Data Submitted on March 3, 2004 -- 03/15/2004**

Appeal Proceedings

- **U.S. Appellant's Submission -- 10/28/2004**
- **Annex 1 to U.S. Appellant's Submission -- 10/28/2004**
- **U.S. Appellee Submission -- 11/16/2004**
- **U.S. Oral Statement -- 12/13/2004**

European Communities - Export Subsidies on Sugar (WT/DS265)

Panel Proceedings

- **Third-Party Submission of the United States -- 03/18/2004**
- **Third Party Oral Statement of the United States -- 04/01/2004**
- **Third Party Executive Summary of the United States -- 04/08/2004**

Appeal Proceedings

- **Third Participant Submission of the United States -- 02/07/2005**
- **Third Participant Oral Statement of the United States -- 03/07/2005**

United States - Final Dumping Determination on Softwood Lumber from Canada (WT/DS264)

Panel Proceedings

- **First Written Submission of the United States -- 05/12/2003**
- **Executive Summary of the U.S. First Written Submission -- 05/22/2003**
- **Opening Statement of the United States at the First Panel Meeting -- 06/17/2003**
- **Closing Statement of the United States at the First Panel Meeting -- 06/18/2003**
- **Executive Summary of the Oral Presentation of the United States at the First Meeting of the Panel -- 06/27/2003**
- **Answers to the Panel's Questions in Connection with the First Meeting of the Panel -- 06/30/2003**
- **Second Written Submission of the United States -- 07/09/2003**
- **Executive Summary of the Second Written Submission of the United States -- 07/18/2003**
- **Opening Statement of the United States at the Second Panel Meeting -- 08/11/2003**
- **Closing Statement of the United States at the Second Panel Meeting -- 08/12/2003**
- **Executive Summary of the U.S. Oral Presentation at the Second Meeting of the Panel -- 08/21/2003**

- **Answers to the Panel's Questions in Connection with the Second Meeting of the Panel -- 08/26/2003**
- **Attachment to the Answers to the Panel's Questions in Connection with the Second Meeting of the Panel -- 08/26/2003**
- **U.S. Comments on Canada's Answers to the Panel's Questions in Connection with the Second Meeting of the Panel -- 09/05/2003**
- **Answer to Panel Question 140 -- 11/17/2003**

Appeals Proceedings

- **Appellant's Submission of the United States -- 05/24/2004**
- **Appellee's Submission of the United States -- 06/07/2004**
- **Opening Statement of the United States -- 06/22/2004**

Recourse by Canada to Article 21.5 of the DSU

- **First Written Submission of the United States -- 07/07/2005**
- **Executive Summary of the First Written Submission of the United States -- 07/14/2005**
- **Second Written Submission of the United States -- 07/25/2005**
- **Executive Summary of the Second Written Submission of the United States -- 08/01/2005**

Japan - Measures Affecting the Importation of Apples (WT/DS245)

Panel Proceedings

- **First Written Submission of the United States Part One -- 09/04/2002**
- **First Written Submission of the United States Part Two -- 09/04/2002**
- **First Written Submission of the United States Part Three -- 09/04/2002**
- **Executive Summary of the First Written Submission of the United States -- 09/11/2002**
- **U.S. Reply to the Request by Japan for Preliminary Rulings -- 10/16/2002**
- **Opening Statement of the United States at the First Panel Meeting -- 10/21/2002**
- **Closing Statement of the United States at the First Panel Meeting -- 10/22/2004**
- **Executive Summary of the U.S. Oral Presentation at the First Panel Meeting -- 10/28/2002**
- **U.S. Response to Certain Arguments by Third Parties -- 11/01/2002**
- **Second Written Submission of the United States -- 11/13/2002**
- **U.S. Answers to Questions from the Panel -- 11/13/2002**
- **U.S. Answers to Questions from Japan -- 11/13/2002**
- **Executive Summary of the Second Written Submission of the United States -- 11/20/2002**
- **Opening Statement of the United States at the Second Panel Meeting -- 01/16/2003**
- **Closing Statement of the United States at the Second Panel Meeting -- 01/16/2003**
- **Executive Summary of the U.S. Oral Presentation at the Second Panel Meeting -- 01/23/2003**
- **U.S. Answers to Additional Questions from the Panel -- 01/28/2003**
- **U.S. Comments on Japan's Answers to Additional Questions from the Panel -- 01/31/2003**

Appeal Proceedings

- **Other Appellant's Submission of the United States -- 09/12/2003**
- **Appellee's Submission of the United States -- 09/22/2003**
- **Statement of the United States at the Oral Hearing of the Appellate Body -- 10/13/2003**

Recourse by the United States to Article 21.5 of the DSU

- **First Written Submission of the United States -- 08/20/2004**
- **Preliminary Ruling Request of the United States -- 09/27/2004**
- **Second Written Submission of the United States -- 09/27/2004**
- **Opening Statement of the United States at the First Panel Meeting -- 10/28/2004**
- **Closting Statement of the United States at the First Panel Meeting -- 10/28/2004**
- **Answers of the United States to Questions from the Panel -- 11/11/2004**
- **Answers of the United States to Questions from Japan -- 11/11/2004**
- **Executive Summary of U.S. Submissions and Statements to Date -- 11/15/2004**
- **Comments of the United States on the Draft Questions to Experts -- 11/23/2004**
- **U.S. Comments on the Meeting with Experts -- 01/13/2005**
- **Closing Statement of the United States at the Second Panel Meeting -- 01/13/2005**
- **Answers of the United States to Additional Questions from the Panel -- 01/25/2005**
- **Comments of the United States on Japan's Answers to Additional Questions by the Panel -- 02/01/2005**

United States - Continued Dumping and Subsidy Offset Act of 2000 (WT/DS217)

Panel Proceedings

- **First Written Submission of the United States -- 01/14/2002**
- **Executive Summary of the First Written Submission of the United States -- 01/21/2002**
- **Oral Statement of the United States at the First Meeting -- 02/05/2002**
- **Executive Summary of Oral Statement of the United States at the First Panel Meeting -- 02/14/2002**
- **Second Submission of the United States -- 02/27/2002**
- **Executive Summary of Second Written Submission of the United States -- 03/06/2002**
- **U.S. Answers to Questions from the Panel, EC and Chile -- 02/27/2002**
- **Replies of the United States to Questions from the Panel and Parties -- 03/06/2002**
- **Oral Statement of the United States at the Meeting of the Second Panel -- 03/12/2002**
- **Executive Summary of the Oral Statement of the United States at the Second Meeting of the Panel -- 03/20/2002**
- **Responses of the United States to the Panel's Questions from the Second Meeting -- 03/21/2002**
- **Further Response of the United States to Panel Question 13 from the Second Meeting -- 03/25/2002**

Appeal Proceedings

- **Appellant's Submission of the United States -- 10/28/2002**
- **Oral Statement of the United States -- 11/28/2002**

Arbitration Under Article 21.3(c) of the DSU

- **Submission of the United States -- 04/23/2003**
- **Reply of the United States to the Arbitrator's Request for Information -- 05/02/2003**
- **Oral Statement of the United States -- 05/06/2003**

Arbitration Under Article 22.6 of the DSU

- **Preliminary Ruling Requests of the United States -- 02/19/2004**
- **U.S. Written Submission -- 03/12/2004**
- **Oral Statement of the United States -- 04/19/2004**
- **Answers of the United States to the Arbitrators' Questions -- 04/28/2004**
- **Comments of the United States on the Answers of the Requesting Parties of the Questions of the Arbitrators -- 05/04/2004**
- **Answers of the United States to the Arbitrators' Second Set of Questions -- 06/07/2004**
- **Comments of the United States on the Replies of Requesting Parties to the Additional Questions of the Arbitrators -- 06/14/2004**

United States - Countervailing Measures Concerning Certain Products from the European Communities (WT/DS212)

Panel Proceedings

- **Exectutive Summary of the First Written Submission of the United States -- 01/23/2002**
- **First Written Submission of the United States -- 01/23/2002**
- **Oral Statement of the United States at the First Meeting of the Panel -- 02/19/2002**
- **Replies of the United States to Questions from the Panel and from the EC from the First Panel Meeting -- 03/04/2002**
- **Second Written Submission of the United States -- 03/11/2002**
- **Oral Statement of the United States at the Secon Meeting of the Panel -- 03/20/2002**
- **Replies of the United States to the Questions of the Panel from the Second Meeting of the Panel -- 03/26/2002**
- **Replies of the United States to the Questions of the EC from the Second Meeting of the Panel -- 03/26/2002**

Appeal Proceedings

- **Appellants's Submission of the United States -- 09/19/2002**
- **Oral Statement of the United States -- 10/22/2002**

Recourse to Article 21.5 by the European Communities

- **U.S. First Submission -- 12/08/2004**
- **Executive Summary of the U.S. First Submission -- 12/15/2004**
- **U.S. Oral Statement -- 03/01/2005**
- **U.S. Answers to Panel Questions -- 03/14/2005**
- **U.S. Answers to Questions from the EC -- 03/14/2005**
- **U.S. Comments on EC Answers to Panel Questions -- 03/18/2005**
- **U.S. Comments on Brazil's Answers to Panel Questions -- 03/18/2005**

Mexico - Measures Affecting Telecommunications Services (WT/DS204)

- **First Written Submission of the United States -- 10/03/2002**
- **Oral Statement of the United States at the First Meeting of the Panel -- 12/17/2002**
- **Second Written Submission of the United States -- 02/05/2003**
- **U.S. Answers to the Panel's Questions -- 02/05/2003**
- **Opening Statement of the United States at the Second Meeting of the Panel -- 03/12/2003**
- **Closing Statement of the United States at the Second Meeting of the Panel -- 03/13/2003**
- **Answers of the United States to the Panel's Questions to the Parties in the Second Meeting -- 03/27/2003**
- **Comments of the United States on Mexico's Answers to the Panel's Questions at the Second Meeting -- 04/30/2003**

European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (WT/DS174)

- **U.S. Response to the EC's Preliminary Ruling Request -- 03/15/2004**
- **First Submission of the United States -- 04/23/2004**
- **Oral Statement of the United States at the First Panel Meeting -- 06/23/2004**
- **Answers of the United States to Panel and EC Questions in Connection with the First Panel Meeting -- 07/08/2004**
- **Second Submission of the United States -- 07/22/2004**
- **Opening Statement of the United States at the Second Panel Meeting -- 08/11/2004**
- **Closing Statement of the United States at the Second Panel Meeting -- 08/12/2004**
- **Answers of the United States to Panel Questions in Connection with the Second Panel Meeting -- 08/26/2004**
- **Comments of the United States on the EC's Answers to Questions from the Panel and Australia in Connection with the Second Panel Meeting -- 09/02/2004**
- **Comments of the United States on the the Reply of the World Intellectual Property Organization to the Panel's July 9, 2004, Letter -- 09/28/2004**

United States - Tax Treatment for "Foreign Sales Corporations" (WT/DS108)

Article 21.5 Appeal Proceedings

- **Executive Summary of U.S. Appellant Submission -- 11/01/2001**
- **Appellee Submission of the United States -- 11/16/2001**
- **Oral Statement of the United States -- 11/28/2001**
- **Appellant Submission of the United States -- 11/01/2001**
- **Response of the United States to the Appellate Body Question -- 11/28/2001**

Article 22.6 Arbitration

- **U.S. Comments on EC Methodology Paper -- 02/08/2002**
- **First Written Submission of the United States -- 02/14/2002**
- **Second Written Submission of the United States -- 02/26/2002**
- **Oral Statement of the United States -- 03/07/2002**

- **Questions of the United States for the European Communities -- 03/08/2002**
- **Additional Written Submission of the United States -- 03/20/2002**
- **Replies of the United States to the Questions of the Arbitrator -- 03/20/2002**
- **Replies of the United States to the Questions of the European Communities -- 03/20/2002**
- **Comments of the United States on the EC's Replies to the Questions of the arbitrator and the United States -- 03/25/2002**

Second Recourse to Article 21.5

- **U.S. First Written Submission -- 06/02/2005**
- **Opening Statement of the United States at the Substantive Meeting of the Panel -- 06/30/2005**
- **U.S. Answers to the Panel's Questions in Connection with the Substantive Meeting of the Panel -- 07/11/2005**
- **U.S. Comments on the EC's Answers to the Panel's Questions in Connection with the Substantive Meeting of the Panel -- 07/15/2005**

Second Recourse to Article 21.5: Appeal Proceedings

- **Appellant Submission of the United States -- 11/21/2005**
- **Appellee Submission of the United States -- 12/09/2005**
- **Oral Statement by the United States at the Oral Hearing -- 01/09/2006 United States**
- **Oral Statement of the United States of the Second Panel Meeting -- 03/25/2003**
- **Executive Summary of the U.S. Oral Presentation at the Second Panel Meeting -- 04/03/2003**
- **Answers of the United States of America to the Panel's Questions in Connection with the Second Substantive Meeting -- 04/04/2003**

Appeal Proceedings

- **Appellant's Submission of the United States -- 10/21/2003**
- **Appellee's Submission of the United States -- 11/05/2003**

ECONOMIC REPORT OF THE PRESIDENT FOR 2006

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Chapter 7 -- The History and Future of International Trade.

For many decades, the United States has worked to break down trade barriers across the globe through a wide range of institutions and agreements. Both the United States and our trading partners have derived substantial benefits from greater global economic integration. Many American consumers, firms, and workers are better off because of these efforts.

While the economic research and performance of this time period show the benefits of trade outweigh the costs, trade liberalization has always brought anxieties. This has been the case both here in the United States and throughout the world. Temptations to retreat to economic isolationism often occur when trade agreements are negotiated and current negotiations are little different in this regard. Therefore, this chapter provides a retrospective on U.S. trade policy and an evaluation of the payoff from greater trade and investment liberalization that has been at the forefront of this country's international economic policy for the last 70 years.

The key points in this chapter are:

- **Over the past 70 years, policymakers across political parties have consistently recognized the importance of unfettered international commerce to America's standard of living and economic growth, and have achieved major trade liberalization both here and abroad.**
- **The net payoff to America from these achievements has been substantial. Many American consumers, firms, and workers have benefited from increased trade.**
- **A number of barriers to trade, especially in services, remain, and the potential gains to the United States and other countries from further liberalization are still significant. To move beyond trade liberalization in goods, the United States is pursuing greater economic cooperation and more-open markets with our trading partners in order to stimulate economic growth.**

A Retrospective on Trade.

The country's historical influence in promoting global trade liberalization can be traced back to the early part of the twentieth century, and it spans both political parties. The early 1930s proved to be a critical turning point in the evolution of modern American trade policy and heralded the first major American trade liberalization effort. In the decades following, the United States has spearheaded multinational, regional, and bilateral negotiations in the interest of advancing trade liberalization. This retrospective illustrates the undeniable progress toward trade liberalization in the United States. Revenues from tariffs (a tariff is a tax levied on imports coming into the United States) in the early 1900s accounted for about half of Federal revenues compared to less than 2 percent today. From the inception of this country until the Civil War, tariff revenues were a major source of government revenue. The addition of the sixteenth amendment to the U.S. Constitution in 1913 broadened the tax base by introducing the personal and corporate income tax. This change began the shift away from indirect taxation (import duties and excise taxes) toward direct taxation on personal and corporate incomes, thereby reducing this country's dependence on import duties as a form of revenue.

Before the 1930s, U.S. trade practices fluctuated between trade-promoting and trade-restricting policies. Prior to World War I, President Woodrow Wilson pursued an internationalist foreign policy that resulted in import tariff reductions through the Underwood Tariff Act of 1913. The economic depression and subsequent reversion to isolationism that followed the 1929 stock market crash led to a rejection of Wilsonian policies in favor of greater protectionism. The Tariff Act of 1930 (otherwise known as the Smoot-Hawley Tariff) significantly raised average duties on selected imports to an all-time high of 59 percent. Such protectionism was designed to reduce unemployment and increase domestic output. By reducing export markets, however, the heightened tariff and non-tariff trade barriers (such as quotas or quantitative import restrictions) exacerbated the Great Depression. The collapse of world trade from 1929 to 1933—a decline of more than two-thirds in just four years—followed in the wake of protectionist policies as countries depreciated their currencies, raised tariffs, and imposed quotas. These isolationist policies contributed to a spiraling contraction of world trade and a collapse of domestic demand.

The historic Reciprocal Trade Agreements Act of 1934 marked a turning point in modern trade legislation. The 1934 Act departed significantly from previous protectionist policies, and it began the historic shift toward lower U.S. and foreign trade barriers and greater global economic engagement. Signed into law by President Franklin D. Roosevelt, the Act passed Congress with overwhelming support. The 1934 Act was the first of many steps over the twentieth century leading to America's relatively liberal trade stance today. Table 7-1 shows that key milestones in American trade history have been consistently achieved by a number of administrations.

The Trade Act of 1934 changed U.S. trade policy. The 1934 Act made trade a shared Congressional and Executive Branch responsibility, and instituted a so-called bargaining tariff. Up to that point, trade policy had been primarily a product of the legislative exercise of its Constitutional authority over foreign commerce. This Constitutional authority left Congress open to the protectionist demands of specific industries and special interests. President Roosevelt and Secretary of State Cordell Hull recognized this vulnerability and worked with Congress to enact this reciprocal trade program to make lower tariffs more politically durable. With the enactment of the Trade Act of 1934, Congress suspended passage of product-specific trade laws and delegated specific tariff-setting to the Executive Branch. Doing so formally changed the way Congress handled trade issues by insulating elected representatives from the pressures that had led to protectionism in the past. The 1934 law also instituted the so-called bargaining tariff. This concept linked tariff setting to international

negotiations, whereby U.S. tariff cuts were extended in bilateral negotiations to countries that offered reciprocal tariff reductions benefiting U.S. exporters. In this way, the bargaining tariff helped to shift the balance of trade politics by engaging the interests of U.S. exporters. The system effectively allowed the United States to reduce its own trade barriers and to persuade the rest of the world to reciprocate. In the aftermath of World War II, policymakers correctly predicted that postwar trade expansion would help to usher in a remarkable era of world prosperity and contribute to conditions for a stable peace.

A commitment to the Wilsonian notion that prosperity and peace go hand in hand is at the core of postwar trade liberalization for both political parties in the United States. An extension of the reciprocal trade agreement, which Presidents Roosevelt and Truman both had recommended as a keystone of the country's postwar international economic policy, passed Congress with strong support in 1945. The enabling legislation put the Administration in a position to begin in earnest the process of dismantling global trade barriers. President Harry S. Truman signed the General Agreement on Tariffs and Trade (GATT) in 1947, bringing the United States into the multilateral trade regime by executive agreement. The GATT took effect in 1948 and served as a forum for trade negotiations whereby every signatory country could enjoy the concessions of every other signatory (otherwise known as most-favored nation status). Membership in the GATT not only brought the United States into the multilateral trade regime but also provided a vehicle to rebuild the postwar economies of Europe and Japan. The lessons of Smoot-Hawley contributed to broad support for freer trade that was to become a critical component of U.S. international economic policy. This political consensus marked a shift toward a broadly accepted liberal market and free-trade philosophy that set the stage for the various multilateral negotiating rounds that were to follow.

The next major acknowledgment of the necessity of liberalizing trade came in the 1960s. President John F. Kennedy led the Trade Expansion Act of 1962, which was approved with substantial support in Congress. The Act authorized the U.S. government to negotiate tariff cuts of up to 50 percent, which persuaded other countries to actively participate in the Kennedy Round (1962–1967) of multilateral trade negotiations. Congressional support was partly due to the inclusion of legislation to assist workers affected by trade, also known as Trade Adjustment Assistance. At the time, the Kennedy Round signified the most ambitious series of trade negotiations ever attempted under the auspices of the GATT. The Round included negotiations on agriculture for the first time, and reduced barriers to exporters for developing countries.

The Tokyo Round (1973–1979) led to further tariff reductions and provided new disciplines on nontariff barriers. The Tokyo Round included "codes of conduct" that were designed to curtail the use of such barriers as instruments of protection. Launched under President Richard M. Nixon, continued by President Gerald R. Ford, and signed into law by President Jimmy Carter with the Trade Agreements Act of 1979, the Round demonstrated a strong, consistent bipartisan commitment toward freer trade. As trade liberalization negotiations moved increasingly beyond tariff reductions in nonagricultural products, progress toward greater liberalization became more difficult for many countries. The Uruguay Round (1986–1994) launched under President Ronald Reagan nearly collapsed in 1990 over disagreements about lowering barriers on agricultural products. Following a redrafting of the agreement by GATT Director-General Arthur Dunkel, President George H.W. Bush spearheaded efforts to complete negotiations of the Uruguay Round, and in 1994 President Bill Clinton signed legislation implementing the final agreement. The Uruguay Round achieved the most fundamental reform of global trade rules since the creation of the GATT. The Round established the World Trade Organization (WTO), extended international trade rules beyond goods to include

intellectual property rights and trade in services, and greatly improved procedures for countries to resolve disputes over international trade.

At present, the United States is actively engaged in the current Doha Development Round of multilateral trade negotiations that began in 2001. This round aims to liberalize agricultural trade, lower remaining barriers in nonagricultural goods trade, and reduce trade barriers in services. The Round focuses on increasing market access for developing countries as a means to encourage economic development. Progress has been slower than anticipated, but the eventual success of the previous Uruguay Round suggests that a favorable outcome from Doha will emerge.

United States has signed a number of bilateral and regional trade agreements. The protracted nature of multilateral negotiations has been one factor that has led the United States to aggressively pursue other avenues toward free trade outside of the major negotiating rounds. Under President Reagan, the United States signed its first bilateral free trade agreement (FTA) with Israel in 1985. The United States and Canada signed a bilateral FTA in 1988 after three years of negotiations. The Bush Administration initiated negotiations for the North American Free Trade Agreement (NAFTA) in 1991, which President Clinton signed into law in 1993 and went into effect the following year. In addition to trade, NAFTA explicitly recognized the benefits of investment liberalization and included provisions designed to extend national (i.e., nondiscriminatory) treatment, among other protections to investors.

The United States has recently embarked on a renewed series of bilateral and regional free trade agreements. The ability of the United States to negotiate trade-liberalizing agreements was strengthened significantly when the President signed the Trade Act of 2002 into law. That legislation provides the Executive Branch with the ability to negotiate international agreements that are subject to an up or down vote, but not amendment, by Congress. The President's leadership was vital in securing this important authority to pursue a full trade agenda including multilateral, regional, and bilateral trade agreements. The President has implemented bilateral FTAs with Jordan, Chile, Singapore, and Australia. The Administration also has concluded FTAs with an additional ten countries: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, the Dominican Republic (the Central American-Dominican Republic FTA, or CAFTA-DR), Morocco, Bahrain, Oman, and Peru. The United States is currently engaged in negotiations with the United Arab Emirates, the five nations of the Southern African Customs Union (Botswana, Lesotho, Namibia, South Africa, and Swaziland), Thailand, Panama, Colombia, and Ecuador. The adoption of CAFTA-DR is the latest chapter in America's trade book, which demonstrates the country's ongoing commitment toward trade liberalization and economic development.

Decades of U.S. trade liberalization achieved on a number of fronts have had a dramatic impact on U.S. openness to trade. Chart 7-1 shows how average U.S. tariffs have fallen since 1930. The average tariff on dutiable goods approached 60 percent at the height of the Great Depression and has dropped to 4.6 percent. The current average U.S. tariff on all goods (both dutiable and nondutiable) is just 1.4 percent.

Trade expansion has reached an important juncture, and resistance both here and abroad to further trade and investment expansion could jeopardize increased domestic and international economic growth. The retrospective presented above illustrates America's historic achievements in trade liberalization, and, as the next section demonstrates, Americans, on average, have accrued immense gains along with our trading partners from this liberalization. The United States has a large stake in

the current multilateral negotiations of the Doha Round. The gains from prior trade agreements provide grounds to stay the course on trade liberalization.

The Payoff to America from Global Economic Integration.

Trade liberalization remains a controversial subject because competition invariably raises both anxieties and opportunities. Reducing obstacles to trade can help economies grow more rapidly and efficiently in the long run and create better, higher-paying jobs, while global competition can lead to hardships for others in the short run. (Impacts of international trade on labor markets are discussed in Box 7-2 later in the chapter.) The appropriate social and political response to these hardships is a critical issue. For instance, at the macro level, pro-growth government policies can help set the environment for economic growth and job creation. Constructive policies that help displaced workers train for and find new work and increase the portability of pension and health benefits can also ease adjustment.

The gains from trade liberalization are more widely dispersed than the losses and often not readily apparent. These gains are evident in lower consumer prices and the greater variety of products available to consumers. International commerce helps countries focus resources on strengths and forces firms to innovate and to set prices more competitively. Studies show that firms that are engaged in the international marketplace tend to exhibit higher rates of productivity growth and pay higher wages and benefits to their workers. An economy with higher overall productivity growth can support faster GDP growth without generating inflation. And higher productivity growth means higher sustainable living standards. Taken together, the net benefits from increased economic integration (greater trade and investment liberalization) historically have been positive for the United States.

Taking Stock of the Benefits of Trade to America.

The decades of American efforts to advance trade liberalization described above have generated substantial gains for the country overall. On the consumption side, households have enjoyed lower product prices and greater product variety. On the production side, firms have more efficiently allocated resources by focusing on areas in which they have a comparative advantage. Those firms directly engaged in international commerce tend to be more innovative, more productive, and pay higher wages and benefits to their workers. Overall, there is substantial evidence that trade has contributed to high and rising living standards for the average American.

Having discussed the different ways through which freer trade benefits America, the bottom-line question is how much has America benefited in total from decades of trade liberalization? Studies have estimated that the annual payoff from U.S. trade and investment liberalization to date, including from the Tokyo Round, Kennedy Round, and Uruguay Round, NAFTA, and other FTAs, is over $5,000 per capita or $20,000 for an average American family of four. These gains arise through many channels: higher long-term levels of trade exposure in goods and services that come from trade and investment liberalization; increased product variety; more efficient allocation of resources; and better transportation and communication technology. Some economists have conjectured that trade liberalization alone has accounted for about half of these gains, which implies that the annual income gain from trade liberalization to date is over $10,000 for an average American family of four.

The Policy Scene Today: Avenues to Further Liberalization.

Trade liberalization to date has had substantial benefits. Still, barriers to international trade and investment remain and limit growth opportunities for many countries. With the United States accounting for just 5 percent of the world's population, 95 percent of the potential consumers of U.S. goods and services live outside our borders. The prospective gains from further liberalization, particularly in services (e.g., finance, insurance, information technology, and professional and business services), are substantial for the United States and our trading partners through greater efficiency of production and higher national incomes. The extent to which different countries experience gains depends on both the range of sectors that are liberalized and the extent of liberalization within each sector. The United States is pressing for freer trade, especially in services, through bilateral, regional, and multilateral agreements.

Prospective Gains from Further Liberalization.

Prospective Gains for the United States

The prospective gains for the United States from further trade reform are substantial. One study suggests that global free trade in manufacturing and agriculture would generate annual economic gains of over $16 billion for the United States, or roughly $220 for the typical family of four. The gains from removing all remaining barriers to trade in services are substantially larger, amounting to about an additional $520 billion for the United States, or over $7,000 for the average American family of four. This is additional income each year that will not be available in the absence of trade reform. These income gains would be fully realized in about a decade from the date of liberalization.

These large gains reflect the United States having a comparative advantage in services sectors and the high barriers to services trade in other countries, which are often investment restrictions that effectively block the main conduit for trade in services. These restrictions include limits on the number of service providers, minimum local-content requirements that limit the participation of foreign firms, nontransparent and burdensome standards and licensing procedures, and discriminatory access to distribution networks.

Prospective Gains for the Rest of the World.

Further liberalization in trade would bring significant global economic gains, particularly for developing countries. One study reports that the reduction of all remaining barriers to trade in services would generate over agriculture and manufactured goods, the World Bank reports that reducing trade barriers would generate about $290 billion of additional income to the world economy each year once the full effects of liberalization are realized, about a decade out. The income gains are even higher at $460 billion with more generous assumptions of trade's effect on economic growth. Nearly half of those income gains would go to developing countries. Various studies find that at least half of the developing-country gains would be obtained from agriculture trade reform by industrialized countries (including the United States), including tariff reductions and the elimination of subsidies and domestic support programs. (Agricultural trade reform is discussed in detail in Chapter 8.)

Debt relief and foreign aid can help to reduce poverty, but trade is a more powerful tool. For instance, in 2004, industrialized countries spent over $78 billion on development assistance to poor countries and industrialized countries are currently considering debt relief of $56 billion. Even the conservative

estimate of the $140 billion effect of trade liberalization to developing countries exceeds both assistance and debt relief combined. Studies show that reducing barriers to global trade has the potential to lift hundreds of millions out of poverty. Agriculture liberalization is particularly important since roughly 75 percent of the world's poor live in rural areas and farmers constitute the majority of the poor in developing countries.

The gains from integrating developing countries into the global economy are not one-sided. As developing countries increasingly participate in the global economy, industrialized countries benefit from increased export and investment opportunities in those markets. Over the past decade, U.S. export growth to developing countries exceeded the rate to industrialized countries. Yet tariffs and other trade barriers in developing countries remain high (Chart 7-3). Realizing these market opportunities and encouraging development in these countries requires further trade liberalization efforts while promoting transparency, good governance, and sound institutions, all necessary building blocks for economic growth.

Persuading developing countries to reduce trade barriers continues to be an important objective for the United States. As developing countries become more active participants in the global economy, they experience higher rates of economic growth and are better able to reduce poverty. Studies show that over the past two decades, developing countries that have been more open to free trade have experienced higher rates of economic growth. During the 1990s, per capita GDP in developing countries that liberalized more increased 5 percent compared to 1.4 percent growth in other developing countries. China's integration into the world economy is discussed in Box 7-4.

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Avenues for Further Liberalization.

Countries are increasingly employing negotiations at the bilateral, regional, and multilateral levels to achieve further liberalization. These avenues are not mutually exclusive. The United States employs a multi-faceted approach, and in recent years has signed a number of bilateral and regional free trade agreements. These agreements set rules for trade, increase market access for firms, and strengthen the effective enforcement of intellectual property rights and environmental and labor laws. Other trading partners such as the European Union (EU) have pursued an even greater number of bilateral

and regional agreements. The WTO nevertheless remains the most important forum for trade liberalization due to its global reach and the interdependence of the world economy.

The general consensus on the WTO among academics and practitioners is that the organization has facilitated increased trade and openness. By establishing a rules-based system, the organization provides a forum for all members to resolve trade disputes and offers a greater voice to developing countries in the establishment of global trade rules. These rules help to foster better business climates, particularly among developing countries, which can help to reduce corruption and attract more foreign direct investment. The United States fully supports the role of the WTO in promoting a rules-based global trading system, opening markets, and encouraging economic growth.

The 149 WTO members are currently engaged in the Doha Development Round of negotiations, which recognizes that global trade expansion can make a significant contribution to spurring economic growth and reducing global poverty. The Doha Round focuses on better integrating developing countries into the international trading system and enabling them to benefit from increased trade.

Moving Beyond Goods Trade Liberalization.

To date, most trade liberalization has been in the form of reduction in barriers to goods trade. Using existing trade agreements and partnerships, trade and investment ties can be strengthened to include services and other nontariff measures that limit international commerce. This section discusses how the United States is pursuing deeper economic cooperation across North America and with the European Union.

Services Liberalization

From telecommunications and finance to health and education, services are the single largest sector in most industrialized and many developing countries. Not only do services provide the bulk of employment and income in many countries, but services provide critical input for the production of other goods and services. An in-depth look at financial services illustrates many of the key issues involved in liberalizing trade in services.

The unprecedented growth of global financial markets in recent years has given prominence to the issues associated with financial services liberalization. Liberalizing international trade in the financial services can be a very market-based means to strengthen financial systems. It is often an important catalyst in improving the quality of capital flows through exposure to foreign competition and in strengthening financial systems—particularly in developing and transitioning economies. Enhanced financial services trade can improve technology transfer and encourage better risk management across borders. Foreign competition challenges domestic firms to improve the quality of their financial services through broader opportunities for trade and portfolio diversification.

This results in more consumer choice and competitive pricing. Financial services liberalization for developing countries offers many possibilities for strengthening weak domestic financial systems through trade openness, competition, and sound regulation. Countries with fully open financial service sectors grow on average one percentage point faster than other countries. Foreign-backed financial institutions in developing countries often possess a greater ability to lend to those countries during economic downturns and thereby stabilize capital flows in times of crisis. Foreign banks that

can extend credit to local businesses can be critical for stabilizing developing- country economies in the absence of more limited capacity of domestic financial intermediaries.

The General Agreement on Trade in Services (GATS) of the WTO is the most comprehensive framework to date that supports national programs of financial services liberalization within an international context. Insurance, banking, and financial services trade exists primarily in two forms: cross-border trade and commercial presence. In cross-border trade, domestic consumers purchase services from a foreign supplier abroad. In the case of commercial presence, a foreign supplier establishes itself in a country through direct investment.

Conclusion.

The expansion of international trade and investment over the past two decades has created an increasingly interdependent global economy. Achievements in trade liberalization have had substantial payoffs for the United States and our trading partners. With just 23 members (or "contracting parties") in 1948, the purview and membership of the GATT have grown dramatically. Today the WTO (the formal international organization of the GATT) has 149 members with many countries eager to join. While this increased engagement by countries in international commerce presents immense opportunities for U.S. consumers, workers, and firms, reaching consensus among all these countries on further reductions in trade barriers can be difficult. Like many other countries, the United States has pursued multilateral, regional, and bilateral agreements to achieve its goals. These avenues all lead to the same destination of more-open markets and greater economic growth. Existing trade partnerships and formal agreements can be platforms for further economic cooperation in areas such as services and investment. Recognizing the payoff to date and the prospective gains from further liberalization, the United States is committed to working with all countries to open markets and create favorable conditions for economic growth both here and abroad.

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Chapter 8 – Modern International Trade.

Achievements in Trade Negotiations.

The Administration has pushed aggressively to open global markets to trade. This has been done through multilateral talks under the auspices of the World Trade Organization (WTO) and through agreements to liberalize trade between the United States and various partners. The Administration has worked to ensure that the benefits promised under the agreements are realized for U.S. consumers, workers, manufacturers, farmers, and service providers. At the same time, lower trade barriers benefit people in U.S. trading partner countries. When U.S. trading partners do not fulfill their obligations, the Administration has sought their compliance through a practical, problem solving approach. When that fails, however, the Administration has utilized formal dispute-settlement mechanisms.

This section addresses the progress made in fostering global trade, which provides mutual advantages to the United States and to all nations. The section also discusses efforts to make sure that all nations live up to the agreements they have signed. Because China has grown in importance as a U.S. trading partner, this section begins with a discussion of U.S. trade with this emerging economy. It then describes efforts to ensure the protection of intellectual property rights. It concludes with a description of progress in the negotiation of bilateral and multilateral trade agreements.

Trade with China.

Prior to China's accession to the WTO, exports from the People's Republic of China were granted access to the U.S. market on substantially similar terms as exports from members of the WTO. This access, however, depended on an annual Congressional vote to grant China "Normal Trading Relations" status (also known as "Most Favored Nation" status). There were some exceptions to China's equal access, most notably in textiles and apparel. Because China was not a member of the WTO, it was not subject to the sort of reciprocal obligations to lower trade barriers that WTO members undertook in decades of trade negotiations. The Administration's efforts to bring China into the WTO culminated in China's December 2001 accession. WTO membership offered China the stability of Permanent Normal Trade Relations and access to the WTO's rules based dispute-

settlement mechanisms, but demanded of China extensive, far-reaching, and often complex commitments to change its trade regime, at all levels of government, and open its market to greater competition. China committed to lower trade barriers in virtually every sector of the economy, provide national treatment (treat imports on an equal basis with domestically produced goods), improve market access to goods and services imported from the United States and other WTO members, and protect intellectual property rights (IPR). In light of the state's large role in the Chinese economy, China also agreed to special rules regarding subsidies and the operation of state owned enterprises. In accepting China as a fellow WTO member, the United States also secured a number of significant commitments from China that protect U.S. interests during the period in which China implements its WTO obligations. The United States in turn agreed to accord China the same treatment it accords the other 146 members of the WTO. That treatment includes a gradual liberalization of the market for textiles and clothing. This is a sector that has been gradually transformed by advances in technology and transportation, as well as by the opening of this sector through trade agreements. Much of the world textile and apparel market had been governed for decades by a global agreement that set bilateral quotas.

Those countries that were founding members of the WTO in the mid-1990s agreed to liberalize textiles and apparel trade over the ensuing 10 years, a process that culminated with the elimination of quotas on January 1, 2005. Since China's WTO accession, the Administration has worked to secure access to China's market for U.S. companies and their workers, farmers, and service providers, as promised by China's WTO membership, and to protect U.S. rights within Chinese markets. Where possible, the Administration has tried to resolve differences through negotiation. This approach has shown concrete results; in April 2004, for example, meetings of the Joint Commission on Commerce and Trade resolved seven potential WTO disputes involving high-technology products, agriculture, and intellectual property protection. When successful, this negotiated approach can deliver more-immediate results than those available through the sometimes protracted legal procedures of a formal WTO dispute.

When this pragmatic approach has not produced prompt and effective results, however, the Administration has also pursued dispute resolution under WTO procedures. It filed the first-ever WTO case against China to address discriminatory tax treatment of U.S. semiconductors in China. Within four months of the filing, the Chinese government agreed to eliminate the problematic tax program to address U.S. concerns, resolving the dispute without lengthy litigation. A central point of discussion with the Chinese has been about the benefits of moving to a flexible, market-based exchange rate. The U.S. government and organizations such as the International Monetary Fund (IMF) have argued that the exchange rate should have greater flexibility. Greater flexibility in China's exchange rate would allow for smooth adjustments in international accounts and would help protect China from the "boom-bust" economic cycles of the past. Such a change poses a number of economic challenges. The Department of the Treasury has been actively engaged with the Chinese in working toward such a transition and has established a technical cooperation program to address areas the Chinese view as impediments to greater flexibility, leading to three missions in 2004 that covered currency risk management, banking system best practices, and developing an exchange rate futures market in China.

Amidst these changes in policy, trade between the United States and China has been growing rapidly. For goods trade through November 2004, China ranked as the third-largest trading partner of the United States. For most of the period since China's WTO accession, U.S. exports to China have been growing at a rate faster than its imports from China (from 2002 to 2003, for example, U.S. goods exports to China grew by 28 percent while imports from China grew by 22 percent), but this export

growth is occurring from a much smaller base and so the bilateral trade deficit has grown. The growing bilateral deficit has led to concerns in some circles about China's rising prominence in world trade. In fact, the data suggest that the increased imports from China are largely coming at the expense of imports from other countries in the Pacific Rim (Chart 8-3). This change is due in large part to China's role as a final assembly platform for exports for Asian manufacturing firms. The total share of imports from the Pacific Rim has fallen from its recent high in the mid-1990s. This helps to demonstrate why bilateral trade deficits have little economic significance and why they are not a useful measure of the benefits of a trading relationship; these bilateral measures can be driven by a reallocation of trade among partners of the sort that is common in a world of hundreds of trading nations.

Intellectual Property Rights.

In 2004, the Administration launched a major initiative to protect intellectual property rights. This initiative is called STOP! (for Strategy Targeting Organized Piracy) and is the most comprehensive initiative ever advanced to combat trade in pirated and counterfeit goods. The initiative is a government-wide effort to empower American businesses to secure and enforce their intellectual property rights in overseas markets, stop fakes at our borders, expose international pirates and counterfeiters, keep global supply chains free of infringing goods, dismantle criminal enterprises that steal America's intellectual property, and reach out to like-minded trading partners and build an international coalition to stop piracy and counterfeiting worldwide. This initiative builds on the Administration's strong existing record of global enforcement and negotiation.

Such efforts are particularly important to the United States, which is a major producer of innovative goods. Recordings, films, books, and software are among the most successful U.S. exports. Property rights in general are vital to the functioning of a market economy (see Chapter 5, *Expanding Individual Choice and Control*). The enforcement of intellectual property rights ensures that creators of innovative products capture the returns to their efforts. This enforcement is vital as well to provide incentives to encourage future innovation (see Chapter 7, *The Global HIV/AIDS Epidemic*). Empirical studies have shown that improvements in a nation's intellectual property protection can lead to increased trade. These studies found the effect to be particularly strong in goods that were easy to imitate, providing evidence that theft of intellectual property displaces legitimate imports. One study found that strengthened patent protection in large developing countries could increase their imports by almost 10 percent.

Trade Liberalization.

Tariffs and other barriers to trade in developing countries are still much higher than those in the United States, so there remains considerable scope for lowering barriers both to benefit our trading partners and expand market access for U.S. firms. Imposing barriers to trade means higher prices for consumers and firms and a lower standard of living. To dismantle these barriers and make the benefits of free trade available to U.S. exporters, producers, and consumers, the Administration has pursued trade agreements on several fronts. After intense diplomacy at meetings in Geneva in July of last year, the United States achieved international agreement on a framework for moving forward on the Doha Development Agenda of WTO trade negotiations. These talks, which were launched in 2001 in Doha, Qatar, have focused on measures that will especially benefit developing nations, including the elimination of agricultural export subsidies. The Administration has also pursued free trade agreements (FTAs) that set modern rules for commerce, meet high standards of market access for goods, and break new ground in areas such as services, e-commerce, intellectual property protection,

transparency and the effective enforcement of environmental and labor laws. Agreements were concluded in 2004 with Australia, Morocco, Bahrain, and with the participants in the Central American Free Trade Agreement (CAFTA), including Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic. At the same time, the United States continued negotiations with the five nations of the Southern African Customs Union (Botswana, Lesotho, Namibia, South Africa, and Swaziland) while launching new negotiations with Thailand, Panama, and the Andean nations Colombia, Ecuador, and Peru. The President has also announced to Congress his intention to begin FTA negotiations with the United Arab Emirates and Oman.

Tariff reduction commitments negotiated in our bilateral FTAs in 2004 will save foreign consumers and businesses from paying higher prices for imports and would be expected to spur increased productivity and thus higher incomes in liberalizing countries. When combined with agreements already negotiated by the Administration, partner countries accounting for almost $50 billion in 2003 trade have committed to eventually eliminate tariffs on almost all U.S. exports. Tariffs that averaged as high as 19.6 percent for U.S. exports will be reduced to zero as a result of these agreements. Opening markets expands opportunities for U.S. farmers, businesses, and workers. An example of the benefits of open markets can be seen in the impact of the recent trade agreement with Chile. Caterpillar Corporation manufactures mining trucks in Decatur, Illinois, that it sells around the world. The Escondida copper mine in Northern Chile—the largest copper mine in the world—uses mining vehicles to move more than 350 million tons of material per year. Before the free trade agreement with Chile went into effect in January, Caterpillar's mining trucks were subject to tariffs of $60,000 or more. These mining trucks now enter Chile duty-free, and have become Illinois' biggest export. In 2004, Caterpillar tripled its sales to Chile and added nearly 2,700 people to its U.S. payrolls.

The increase in market access for U.S. exports gained through trade diplomacy is especially noteworthy because the United States enters these negotiations with trade barriers that are very low. Central American nations, for example, already had extensive access to the U.S. market through the Caribbean Basin Initiative. Under the terms of the CAFTA, those countries are now making reciprocal commitments to allow in U.S. goods and services. Bilateral FTAs can also strengthen opportunities for progress in regional and WTO negotiations. In his first term, the President made multilateral trade negotiations a priority. In the second term, concluding multilateral trade negotiations held under the auspices of the WTO will be a top priority for the Administration. Under the President's leadership, the United States successfully led the effort to ensure that 2004 was not a "lost year" for the Doha Development Agenda negotiations. Early in 2004, the United States mounted an intensive effort to get the Doha negotiations on a practical track toward success. U.S. negotiators pressed trading partners to narrow differences, establish key frameworks for detailed negotiations, and push forward to reach an agreement that would foster increased economic growth, development, and opportunity.

The diplomatic effort focused on the key market access areas of agriculture, industrial goods, and services; the effort in 2004 developed frameworks that will be built upon in moving forward with the wider WTO agenda. At the end of July 2004, negotiations were successfully put back on track. WTO ministers are scheduled to meet in Hong Kong, China, at the end of 2005, to chart the final course for the negotiations. To ensure continued U.S. global leadership on trade, two legislative steps are necessary. First, Congress needs to reaffirm the United States' commitment to the WTO in its regular review. Second, Trade Promotion Authority (TPA) must be renewed. TPA leaves the power to regulate international commerce in the hands of the Congress.

Conclusion.

The United States is the world's leader in many ways and remains the leading advocate for pro-growth policies around the world. Connecting the world's economies through trade provides economic benefits at home while offering opportunities to other nations that are embracing economic reforms. Peace and prosperity go hand in hand, each reinforcing the other. The President's policies are designed to foster rising living standards at home, while encouraging other nations to follow our lead.

SUBSIDIES ENFORCEMENT ANNUAL REPORT TO THE CONGRESS (2004).

(USTR & Department of Commerce 2004)

http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Subsidies_Enforcement/asset_upload_file596_5700.pdf

EXECUTIVE SUMMARY.

The use of trade-distorting subsidies by foreign governments can seriously threaten the interests of American workers and industries. The United States Government, therefore, is committed to eliminating or neutralizing the unfair trade practices which harm U.S. interests. Toward that end, the Office of the U.S. Trade Representative (USTR) and the U.S. Department of Commerce (Commerce) continued their close cooperation during 2003 to monitor and challenge unfair foreign government subsidy practices by pursuing our rights under the agreements of the World Trade Organization (WTO) and by ensuring that our trading partners adhere to their obligations under those agreements. Among the joint responsibilities assigned to USTR and Commerce is the submission of an annual report to the Congress describing the Administration's monitoring and enforcement activities throughout the previous year. This report constitutes the ninth annual report to be transmitted to the Congress.

Multilateral disciplines on subsidies are established under the Agreement on Subsidies and Countervailing Measures (Subsidies Agreement, or Agreement), which is the principal tool available to WTO Members to remedy harmful subsidy practices worldwide. The United States ensured the continued effectiveness of the Subsidies Agreement through its active participation in the WTO Subsidies Committee, which oversees WTO Members' subsidy-related activities. We also sought to deter or remedy harm caused to U.S. producers and workers from distortive subsidies through bilateral contacts, multilateral pressure and, where justified, WTO dispute settlement proceedings.

Additionally, the United States was actively engaged in ongoing efforts to strengthen and deepen existing multilateral disciplines on subsidies through the Doha Development Agenda negotiations and in the steel talks at the Organization for Economic Cooperation and Development (OECD). By working to address some of the most important causes of unfair trade distortions, the subsidies enforcement program continues to help strengthen the open, competitive trading environment that is of enormous benefit to American consumers, producers and workers alike.

Doha Development Agenda.

In March of 2003, the United States submitted its second subsidies paper to the Rules Negotiating Group. This paper establishes the fundamental subsidy position of the United States in the Rule Negotiating Group. It calls for subsidy discipline enhancement and identifies a broad array of issues with respect to the existing rules as well as the need to develop new disciplines where none currently exist. Addressed within the ambit of our negotiating position on subsidies were issues relating to the negotiating objectives set forth in the Trade Act of 2002, including addressing the existing rules on the treatment of indirect taxes. Consistent with our core negotiating principles, the identification of enhanced disciplines on trade distorting practices, including subsidies – broadly defined – is particularly important because it is these practices that are often one of the root causes of trade friction. In particular, the U.S. subsidy paper argues for the expansion of the prohibited ("red light") category of subsidies – beyond the two types currently prohibited, export and import substitution subsidies – and tougher rules on indirect subsidies, government investment in private sector companies, and government pricing of natural resources. More generally, the U.S. subsidy paper advocates the continued progressive deepening of subsidy disciplines, which has been an integral component of the historic development of rules governing the world trading system. In 2004, the Administration will continue to take strong, proactive steps to address the impact of distortive subsidies on American firms and their workers in both the United States and foreign markets.

With regard to fisheries subsidies, much of the discussion of fisheries subsidies prior to 2003 focused on whether fisheries subsidies have, in fact, led to environmentally harmful over-fishing, and whether fisheries subsidies pose particularly unique problems which justify a stronger and/or separate set of rules. While some countries have questioned the link between subsidies and over-fishing, in 2003 the negotiations progressed beyond this threshold issue, with the United States and others submitting proposals for possible approaches to improving disciplines on fisheries subsidies. In its March 2003 submission, the United States proposed a framework that includes an expanded prohibited category and a presumptively harmful ("dark amber") category for fisheries subsidies. Mindful of U.S. industry and environmental issues, the United States intends to continue playing a leading role as these negotiations evolve into the next phase of shaping the structure and content of new fisheries subsidy disciplines.

Steel.

The Administration continues to dedicate significant resources towards fulfillment of the President's 2001 Initiative on Steel, which seeks to address the structural problems of the global steel industry that have contributed to a decades-long, cyclical proliferation of unfair trade competition and trade remedy responses. U.S. government officials have helped to spearhead ongoing international efforts in the OECD to bring about marketdriven rationalization of the world's excess, inefficient steelmaking capacity, while also formulating better disciplines over practices that can distort markets and artificially sustain such capacity. The leading example of such efforts was the continued work by a group chaired by the United States to develop the elements of an agreement that would substantially reduce or eliminate trade-distorting government subsidies to the steel sector, a process which was initiated shortly before publication of last year's report. In the intervening year, the nearly 40 participating governments representing the world's major steel-producing countries have made good progress in outlining an agreement and defining its core elements. The U.S. objective is to complete negotiations by the year's end.

Conclusion.

During 2004, the U.S. Government will further energize its efforts to level the playing field for American workers and companies harmed by distortive subsidy practices in both domestic and foreign markets. This commitment will be strengthened by the establishment of a new Unfair Trade Practices Task Force in the Department of Commerce. This team will broaden and more effectively focus existing U.S. Government resources to identify and challenge a wide range of unfair foreign government practices that adversely affect the interests of the United States. Commerce and USTR will also further strengthen the subsidies enforcement program's monitoring, counseling and advocacy activities. The fundamental aim of these activities is to seek ways of addressing the interests of those U.S. parties facing particular problems from subsidized competition without imposing additional costs and obstacles to international commerce and investment. By identifying and rooting out distortive subsidies at their source, whether through advocacy, negotiation or legal action, the Administration seeks to free U.S. firms and workers from the unfair burden of having to compete with subsidized competition. In doing so, we will also help ensure that U.S. consumers enjoy the full range of choice, quality and affordable prices that can only be obtained through engagement in a dynamic and competitive global economy.

NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (2006).

(USTR March 2006)

http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_NTE_Report/asset_upload_file597_9220.pdf

SCOPE AND COVERAGE.

This report is based upon information compiled within USTR, the U.S. Departments of Commerce and Agriculture, and other U.S. Government agencies, and supplemented with information provided in response to a notice in the *Federal Register,* and by members of the private sector trade advisory committees and U.S. Embassies abroad.

Trade barriers elude fixed definitions, but may be broadly defined as government laws, regulations, policies, or practices that either protect domestic products from foreign competition or artificially stimulate exports of particular domestic products. This report classifies foreign trade barriers into ten different categories. These categories cover government-imposed measures and policies that restrict, prevent, or impede the international exchange of goods and services. They include:

- **Import policies (e.g., tariffs and other import charges, quantitative restrictions, import licensing, customs barriers);**
- **tandards, testing, labeling and certification (including unnecessarily restrictive application of sanitary and phytosanitary standards and environmental measures, and refusal to accept U.S. manufacturers' self-certification of conformance to foreign product standards);**
- **Government procurement (e.g., buy national policies and closed bidding);**
- **Export subsidies (e.g., export financing on preferential terms and agricultural export subsidies that displace U.S. exports in third country markets);**
- **Lack of intellectual property protection (e.g., inadequate patent, copyright, and trademark regimes);**
- **Services barriers (e.g., limits on the range of financial services offered by foreign financial institutions,i regulation of international data flows, and restrictions on the use of foreign data processing);**
- **Investment barriers (e.g., limitations on foreign equity participation and on access to foreign government-funded research and development (R&D) programs, local content and export performance requirements, and restrictions on transferring earnings and capital);**

- **Anticompetitive practices with trade effects tolerated by foreign governments (including anticompetitive activities of both state-owned and private firms that apply to services or to goods and that restrict the sale of U.S. products to any firm, not just to foreign firms that perpetuate the practices);**
- **Trade restrictions affecting electronic commerce (e.g., tariff and nontariff measures, burdensome and discriminatory regulations and standards, and discriminatory taxation); and**
- **Other barriers (barriers that encompass more than one category, e.g., bribery and corruption, or that affect a single sector).**

The NTE covers significant barriers, whether they are consistent or inconsistent with international trading rules. Many barriers to U.S. exports are consistent with existing international trade agreements. Tariffs, for example, are an accepted method of protection under the General Agreement on Tariffs and Trade (GATT). Even a very high tariff does not violate international rules unless a country has made a bound commitment not to exceed a specified rate. On the other hand, where measures are not consistent with international rules, they are actionable under U.S. trade law and through the World Trade Organization (WTO).

This report discusses the largest export markets for the United States, including: 58 nations, the European Union, Taiwan, Hong Kong, the Southern African Customs Union and one regional body. Some countries were excluded from this report due primarily to the relatively small size of their markets or the absence of major trade complaints from representatives of U.S. goods and services sectors. However, the omission of particular countries and barriers does not imply that they are not of concern to the United States. Based on an assessment of the evolving nature of U.S. trade and investment relationships in the various regions of the world, in particular the continued movement away from central planning toward a market orientation, Cambodia and Laos have been added to the report. This recognizes the impact of a number of factors as both countries rapidly increase their integration into the world trading system. Both countries are implementing trade agreements with the United States. Cambodia is also implementing its WTO accession obligations while Laos is negotiating WTO accession.

TRADE IMPACT ESTIMATES AND FOREIGN BARRIERS.

Wherever possible, this report presents estimates of the impact on U.S. exports of specific foreign trade barriers or other trade distorting practices. However, it must be understood that these estimates are only approximations. Also, where consultations related to specific foreign practices were proceeding at the time this report was published, estimates were excluded, in order to avoid prejudice to those consultations.

The estimates included in this report constitute an attempt to assess quantitatively the potential effect of removing certain foreign trade barriers on particular U.S. exports. However, the estimates cannot be used to determine the total effect upon U.S. exports to either the country in which a barrier has been identified or to the world in general. In other words, the estimates contained in this report cannot be aggregated in order to derive a total estimate of gain in U.S. exports to a given country or the world.

Trade barriers or other trade distorting practices affect U.S. exports to another country because these measures effectively impose costs on such exports that are not imposed on goods produced domestically in the importing country. In theory, estimating the impact of a foreign trade measure

upon U.S. exports of goods requires knowledge of the (extra) cost the measure imposes upon them, as well as knowledge of market conditions in the United States, in the country imposing the measure, and in third countries. In practice, such information often is not available.

In some cases, particular U.S. exports are restricted by both foreign tariff and nontariff barriers. For the reasons stated above, it may be difficult to estimate the impact of such nontariff barriers on U.S. exports. When the value of actual U.S. exports is reduced to an unknown extent by one or more than one nontariff measure, it then becomes derivatively difficult to estimate the effect of even the overlapping tariff barriers on U.S. exports.

The same limitations that affect the ability to estimate the impact of foreign barriers upon U.S. goods exports apply to U.S. services exports. Furthermore, the trade data on services exports are extremely limited and of questionable reliability. For these reasons, estimates of the impact of foreign barriers on trade in services also are difficult to compute.

With respect to investment barriers, there are no accepted techniques for estimating the impact of such barriers on U.S. investment flows. For this reason, no such estimates are given in this report. The NTE includes generic government regulations and practices which are not product-specific. These are among the most difficult types of foreign practices for which to estimate trade effects.

In the context of trade actions brought under U.S. law, estimations of the impact of foreign practices on U.S. commerce are substantially more feasible. Trade actions under U.S. law are generally product-specific and therefore more tractable for estimating trade effects. In addition, the process used when a specific trade action is brought will frequently make available non-U.S. Government data (U.S. company or foreign sources) otherwise not available in the preparation of a broad survey such as this report.

NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (2005).

(USTR March 2005)

http://www.ustr.gov/Document_Library/Reports_Publications/2005/2005_NTE_Report/Section_Index.html

FOREWORD.

The 2005 National Trade Estimate Report on Foreign Trade Barriers (NTE) is the twentieth in an annual series that surveys significant foreign barriers to U.S. exports.

In accordance with section 181 of the Trade Act of 1974 (the 1974 Trade Act), as amended by section 303 of the Trade and Tariff Act of 1984 (the 1984 Trade Act), section 1304 of the Omnibus Trade and Competitiveness Act of 1988 (the 1988 Trade Act), section 311 of the Uruguay Round Trade Agreements Act (1994 Trade Act), and section 1202 of the Internet Tax Freedom Act, the Office of the U.S. Trade Representative is required to submit to the President, the Senate Finance Committee, and appropriate committees in the House of Representatives, an annual report on significant foreign trade barriers.

The statute requires an inventory of the most important foreign barriers affecting U.S. exports of goods and services, foreign direct investment by U.S. persons, and protection of intellectual property rights. Such an inventory facilitates negotiations aimed at reducing or eliminating these barriers.

The report also provides a valuable tool in enforcing U.S. trade laws, with the goal of expanding global trade, which benefits all nations, and U.S. producers and consumers in particular. The report provides, where feasible, quantitative estimates of the impact of these foreign practices on the value of U.S. exports. Information is also included on some of the actions taken to eliminate foreign trade barriers. Opening markets for American goods and services either through negotiating trade agreements or through results-oriented enforcement actions is this Administration's top trade priority. This report is an important tool for identifying such trade barriers.

SCOPE AND COVERAGE.

This report is based upon information compiled within USTR, the U.S. Departments of Commerce and Agriculture, and other U.S. Government agencies, and supplemented with information provided in response to a notice in the *Federal Register,* and by members of the private sector trade advisory committees and U.S. Embassies abroad.

Trade barriers elude fixed definitions, but may be broadly defined as government laws, regulations, policies, or practices that either protect domestic products from foreign competition or artificially stimulate exports of particular domestic products. This report classifies foreign trade barriers into ten different categories. These categories cover government-imposed measures and policies that restrict, prevent, or impede the international exchange of goods and services.

They include:

- **Import policies (e.g., tariffs and other import charges, quantitative restrictions, import licensing, customs barriers);**
- **Standards, testing, labeling and certification (including unnecessarily restrictive placation of sanitary and phytosanitary standards and environmental measures, and refusal to accept U.S. manufacturers' self-certification of conformance to foreign product standards);**
- **Government procurement (e.g., buy national policies and closed bidding);**
- **Export subsidies (e.g., export financing on preferential terms and agricultural export subsidies that displace U.S. exports in third country markets);**
- **Lack of intellectual property protection (e.g., inadequate patent, copyright, and trademark regimes);**
- **Services barriers (e.g., limits on the range of financial services offered by foreign financial institutions, regulation of international data flows, and restrictions on the use of foreign data processing);**
- **Investment barriers (e.g., limitations on foreign equity participation and on access to foreign government-funded research and development (R&D) programs, local content and export performance requirements, and restrictions on transferring earnings and capital);**
- **Anticompetitive practices with trade effects tolerated by foreign governments (including anticompetitive activities of both state-owned and private firms that apply to services or to goods and that restrict the sale of U.S. products to any firm, not just to foreign firms that perpetuate the practices);**
- **Trade restrictions affecting electronic commerce (e.g., tariff and nontariff measures, burdensome and discriminatory regulations and standards, and discriminatory taxation); and**
- **Other barriers (barriers that encompass more than one category, e.g., bribery and corruption, 2 or that affect a single sector).**

The NTE covers significant barriers, whether they are consistent or inconsistent with international trading rules. Many barriers to U.S. exports are consistent with existing international trade agreements. Tariffs, for example, are an accepted method of protection under the General Agreement on Tariffs and Trade (GATT). Even a very high tariff does not violate international rules unless a country has made a bound commitment not to exceed a specified rate. On the other hand, where measures are not consistent with international rules, they are actionable under U.S. trade law and through the World Trade Organization (WTO).

This report discusses the largest export markets for the United States, including: 56 nations, the European Union, Taiwan, Hong Kong, the Southern African Customs Union and one regional body. Some countries were excluded from this report due primarily to the relatively small size of their markets or the absence of major trade complaints from representatives of U.S. goods and services sectors. However, the omission of particular countries and barriers does not imply that they are not of concern to the United States.

In prior reports, most non-market economies also were excluded, since the trade barriers in those countries were qualitatively different from those found in other economies. However, as the economies of the republics of the former Soviet Union and most economies of the countries of Central Europe evolve away from central planning toward a market orientation, most of them have changed sufficiently to warrant an examination of their trade regimes. Where such examination has revealed trade barriers, those barriers have been included in this report. Based on an assessment of the evolving nature of U.S. trade and investment relationships in the various regions of the world, the following additional modifications were made to the report: (1) in recognition of their accession to the European Union, individual sections for Poland and Hungary have been dropped and these countries are treated as part of the European Union section; (2) the entry for the Gulf Cooperation Council has been replaced by the individual sectors for each of the Gulf Cooperation Council members; and (3) South Africa, along with Botswana, Lesotho, Namibia, and Swaziland, is treated as part of one NTE section for the Southern African Custom Union.

The merchandise trade data contained in the NTE report are based on total U.S. exports, free alongside (f.a.s.)3 value, and general U.S. imports, customs value, as reported by the Bureau of the Census, Department of Commerce. (NOTE: These data are ranked according to size of export market in the Appendix). The services data are from the October 2004 issue of the Survey of Current Business (collected from the Bureau of Economic Analysis, Department of Commerce). The direct investment data are from the September 2004 issue of the Survey of Current Business (collected from the Bureau of Economic Analysis, Department of Commerce).

TRADE IMPACT ESTIMATES AND FOREIGN BARRIERS

Wherever possible, this report presents estimates of the impact on U.S. exports of specific foreign trade barriers or other trade distorting practices. However, it must be understood that these estimates are only approximations. Also, where consultations related to specific foreign practices were proceeding at the time this report was published, estimates were excluded, in order to avoid prejudice to those consultations.

The estimates included in this report constitute an attempt to assess quantitatively the potential effect of removing certain foreign trade barriers on particular U.S. exports. However, the estimates cannot be used to determine the total effect upon U.S. exports to either the country in which a barrier has been identified or to the world in general. In other words, the estimates contained in this report cannot be aggregated in order to derive a total estimate of gain in U.S. exports to a given country or the world.

Trade barriers or other trade distorting practices affect U.S. exports to another country because these measures effectively impose costs on such exports that are not imposed on goods produced domestically in the importing country. In theory, estimating the impact of a foreign trade measure upon U.S. exports of goods requires knowledge of the (extra) cost the measure imposes upon them, as well as knowledge of market conditions in the United States, in the country imposing the measure, and in third countries. In practice, such information often is not available.

Where sufficient data exist, an approximate impact of tariffs upon U.S. exports can be derived by obtaining estimates of supply and demand price elasticities in the importing country and in the United States. Typically, the U.S. share of imports is assumed to be constant. When no calculated price elasticities are available, reasonable postulated values are used. The resulting estimate of lost U.S. exports is approximate, depends upon the assumed elasticities, and does not necessarily reflect changes in trade patterns with third countries. Similar procedures are followed to estimate the impact upon our exports of subsidies that displace U.S. exports in third country markets.

The task of estimating the impact of nontariff measures on U.S. exports is far more difficult, since there is no readily available estimate of the additional cost these restrictions impose upon imports. Quantitative restrictions or import licenses limit (or discourage) imports and thus raise domestic prices, much as a tariff does. However, without detailed information on price differences between countries and on relevant supply and demand conditions, it is difficult to derive the estimated effects of these measures upon U.S. exports. Similarly, it is difficult to quantify the impact upon U.S. exports (or commerce) of other foreign practices such as government procurement policies, nontransparent standards, or inadequate intellectual property rights protection.

In some cases, particular U.S. exports are restricted by both foreign tariff and nontariff barriers. For the reasons stated above, it may be difficult to estimate the impact of such nontariff barriers on U.S. exports. When the value of actual U.S. exports is reduced to an unknown extent by one or more than one nontariff measure, it then becomes derivatively difficult to estimate the effect of even the overlapping tariff barriers on U.S. exports.

The same limitations that affect the ability to estimate the impact of foreign barriers upon U.S. goods exports apply to U.S. services exports. Furthermore, the trade data on services exports are extremely limited and of questionable reliability. For these reasons, estimates of the impact of foreign barriers on trade in services also are difficult to compute.

With respect to investment barriers, there are no accepted techniques for estimating the impact of such barriers on U.S. investment flows. For this reason, no such estimates are given in this report. The NTE includes generic government regulations and practices which are not product-specific. These are among the most difficult types of foreign practices for which to estimate trade effects.

In the context of trade actions brought under U.S. law, estimations of the impact of foreign practices on U.S. commerce are substantially more feasible. Trade actions under U.S. law are generally product-specific and therefore more tractable for estimating trade effects. In addition, the process used when a specific trade action is brought will frequently make available non-U.S. Government data (U.S. foreign sources) otherwise not available in the report's preparation.

2005 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE.

USTR Report (December 11, 2005).
http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/asset_upload_file293_8580.pdf

EXECUTIVE SUMMARY.

With regard to WTO compliance, for the last four years, China has taken important steps in implementing the numerous commitments that it undertook upon its WTO accession on December 11, 2001. With most of China's key commitments scheduled to be phased in fully by December 11, 2004, this past year provided a first critical glimpse at what to expect of China as a WTO member with its full range of commitments in place. At this point, however, China's implementation work is still incomplete. While China has made important progress in implementing specific commitments and in adhering to the ongoing obligations of a WTO member, there are still serious problems in some important areas, especially in the enforcement of intellectual property rights (IPR).

Many of the shortfalls in China's WTO compliance efforts seem to stem from China's incomplete transition from being a state-planned economy. As several U.S. trade associations highlighted in their written comments and testimony before USTR and the other agencies that comprise the Trade Policy Staff Committee, China has not yet fully embraced the key WTO principles of market access, non-discrimination and national treatment, nor has China fully institutionalized market mechanisms and made its trade regime predictable and transparent. While China has made some important progress, it continued to use an array of industrial policy tools in 2005 to promote or protect favored sectors and industries, and these tools at times collide with China's WTO obligations. The problems that result continue to foster a view of China in some quarters as an unfair and protectionist trader rather than an open and non-discriminatory economy that is one of the major engines of growth in the world.

When the United States and other WTO members concluded 15 years of negotiations with China over the specific terms of China's entry into the WTO at the end of 2001, China had agreed to extensive, far-reaching and often complex commitments to change its trade regime, at all levels of government. China had committed to implement a set of sweeping reforms that required it to lower trade barriers in virtually every sector of the economy, provide national treatment and improved market access to goods and services imported from the United States and other WTO members, and protect intellectual property rights. China had also agreed to special rules regarding subsidies and the operation of state-owned enterprises, in light of the state's large role in China's economy. The United States and other WTO members envisioned that faithful WTO mplementation by China would reduce the ability of non-market forces, including

government policies and directives from government officials, to intervene in the market to direct or restrain trade flows. Eventually, it was expected that China's economy would operate on market principles, like its trading partners' economies.

As previously reported, the first year of China's WTO membership – 2002 – saw significant but uneven progress, as China took steps to repeal, revise or enact more than one thousand laws, regulations and other measures, in an effort to bring its trading system into compliance with WTO standards. By 2003, however, China's WTO implementation efforts had lost a significant amount of momentum, and we identified numerous specific WTO-related problems. As those problems mounted in 2003, the Administration responded by stepping up its efforts to engage China's senior leaders, culminating in December 2003, when President Bush and Premier Wen committed to upgrade the level of discussions and undertake an intensive program of bilateral interaction – with a view to resolving problems in the U.S.-China trade relationship and facilitating increased U.S. exports to China. This new approach began to take shape with the high-level Joint Commission on Commerce and Trade (JCCT) meeting in April 2004. At that meeting, the two sides resolved no fewer than seven potential disputes over China's WTO compliance. Three months later, the United States and China were also able to mutually resolve the first-ever dispute settlement case brought against China at the WTO, in which the United States, with support from four other WTO members, had challenged discriminatory value-added tax (VAT) policies that favored Chinese-produced semiconductors over imported semiconductors.

By the end of last year, expectations for significant WTO implementation progress by China were high, given the success of the April 2004 JCCT meeting and promises by China's senior leaders that China would fully and in a timely manner adhere to the scheduled phase-in of key commitments on trading rights and distribution services by December 11, 2004. However, in 2005, old problems like ineffective IPR enforcement persisted and new problems in areas like distribution services began to emerge. The Administration utilized high-level engagement, expert-to-expert discussions and WTO mechanisms to address these problems, and in particular, initiated a comprehensive new strategy (outlined below) for obtaining improvements in China's IPR enforcement. Many of these efforts culminated in a meeting of the JCCT in July 2005, cochaired by Vice Premier Wu Yi on the Chinese side and Secretary of Commerce Gutierrez and United States Trade Representative Portman on the U.S. side. That meeting achieved measured progress on a range of concerns, but it fell short of realizing the many win-win outcomes of the April 2004 JCCT meeting.

As 2005 was drawing to an end, many U.S. companies described achievement of the full market access and predictability and transparency in trade envisioned by China's WTO accession agreement as "essential." These companies saw Chinese governmental efforts to manage trade as the root cause of many of the problems they faced. As one trade association expressed it, "we hope that China, under the auspices of its WTO obligations, continues its progress towards removing the state from the Chinese economy. . . . [W]e believe the Chinese government must recognize that the market, left to its own devices, is the most effective vehicle for Chinese economic growth." Another trade association emphasized that "without concrete, sustained, and visible progress, China's political challenge in the United States will become more serious."
The areas of particular concern to the United States and U.S. industry, and most in need of improved WTO compliance efforts, are summarized below.

Intellectual Property Rights.

China has undertaken substantial efforts to implement its commitment to overhaul its legal regime to ensure the protection of intellectual property rights in accordance with the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). While the United States continues to work with China in some problem areas, China has done a relatively good job of overhauling its legal regime. However, China has been much less successful in enforcing its laws and regulations and ensuring the effective IPR enforcement required by the TRIPS Agreement. With most in U.S. industry reporting no significant reduction in IPR infringement levels in 2005, IPR enforcement remains problematic. Counterfeiting and piracy in China remain at epidemic levels and cause serious economic harm to U.S. businesses in virtually every sector of the economy.

The Administration places the highest priority on improving IPR enforcement in China. Building on its engagement with China at the April 2004 JCCT meeting, the United tates took several aggressive steps in 2005 in an effort to obtain meaningful progress. First, the United States conducted an out-of-cycle review under the Special 301 provisions of U.S. trade law, which involved a systematic evaluation of China's entire IPR enforcement regime, supported by submissions from U.S. manufacturers and businesses to document IPR infringement to the extent possible. At the conclusion of this review in April 2005, the Administration elevated China to the Special 301 "Priority Watch" list and set forth a comprehensive strategy for addressing China's ineffective IPR enforcement regime, which included the possible use of WTO mechanisms, as appropriate. The United States immediately began to pursue this strategy during the run-up to the July 2005 JCCT meeting, as the United States sought to strengthen the commitments that China had made at the April 2004 JCCT meeting and to obtain China's commitment for greater involvement of its police authorities in IPR enforcement matters. China subsequently agreed to take a series of specific actions designed to increase criminal prosecutions of IPR violators, improve enforcement at the border, counter piracy of movies, audio-visual products and software, address Internet-related piracy and assist small- and medium-sized U.S. companies experiencing China-related IPR problems, among other things. Because lack of transparency on IPR infringement levels and enforcement activities in China has hampered the United States' ability to assess the effectiveness of China's efforts to improve IPR enforcement since the April 2004 JCCT meeting, the United States also submitted a request to China under Article 63.3 of the TRIPS Agreement in October 2005. The United States' request, made in conjunction with similar requests by Japan and Switzerland, seeks detailed information from China on its IPR enforcement efforts over the last four years. China's response to these requests, anticipated in early 2006, will help the United States further evaluate whether China is taking all necessary steps to address the rampant IPR infringement found throughout China.

The United States is committed to working constructively with China to significantly reduce IPR infringement levels in China and continues to devote extra staff and resources, both in Washington and in Beijing, to address the many aspects of this problem. At the same time, the United States remains prepared to take whatever action is necessary and appropriate to ensure that China develops and implements an effective system of IPR enforcement, as required by the TRIPS Agreement.

Trading Rights and Distribution Services.

China was scheduled to phase in two key WTO commitments by December 11, 2004. These commitments called for full liberalization of trading rights – the right to import and export – and distribution services, including wholesaling services, commission agents' services, retail services and

franchising services, as well as related services. As had been agreed at the JCCT meeting in April 2004, China implemented its trading rights commitments nearly six months ahead of schedule, permitting companies and individuals to import and export goods in China directly without having to use a middleman. However, delay and confusion characterized China's efforts to implement its distribution services commitments, substantially hindering the ability of U.S. and other foreign companies to begin engaging freely in the distribution of goods in China. It took several months and repeated U.S. engagement for China to address many of the problems that arose in this critical area, and some problems still remain. In addition, China only issued the regulations implementing its commitment to open its market for sales away from a fixed location, also known as "direct selling", in September 2005, and these regulations contain several problematic provisions that the United States has urged China to reconsider. The Administration will continue to pursue these important issues in 2006 to ensure that China fully meets its commitments.

Industrial Policies.

Since acceding to the WTO, China has increasingly resorted to industrial policies that limit market access by non-Chinese origin goods or bring substantial government resources to support increased exports. The objective of these policies seems to be to support the development of Chinese industries that are higher up the economic value chain than the industries that make up China's current labor-intensive base, or simply to protect less competitive domestic industries.

In 2005, examples of these industrial policies are readily evident. They include the issuance of regulations on auto parts tariffs that serve to prolong prohibited local content requirements for motor vehicles, the telecommunications regulator's interference in commercial negotiations over royalty payments to intellectual property rights holders in the area of 3G standards, the pursuit of unique national standards in many areas of high technology that could lead to the extraction of technology or intellectual property from foreign rights-holders, draft government procurement regulations mandating purchases of Chinese-produced software, a new steel industrial policy that calls for the state's management of nearly every major aspect of China's steel industry, continuing export restrictions on coke, and excessive government subsidization benefitting a range of domestic industries in China. Some of these policies appear to conflict with China's WTO commitments in the areas of market access, national treatment and technology transfer, among others.

The United States and China made important progress in resolving U.S. concerns regarding the draft software procurement regulations at the July 2005 JCCT meeting. However, serious disagreements over a number of the other industrial policies remain, particularly regarding China's regulations on auto parts tariffs and China's export restrictions on coke. The United States will continue to press China on these issues and will take further appropriate actions seeking elimination of these policies.

Services.

Overall, the United States continued to enjoy a substantial surplus in trade in services with China in 2005, and the market for U.S. service providers in China remains promising. However, in some sectors, the expectations of the United States and other WTO members when agreeing to China's commitments to increase market access and remove restrictions have not been fully realized. Chinese regulatory authorities continue to frustrate efforts of U.S. providers of insurance, telecommunications, construction and engineering and other services to achieve their full market potential in China through the use of an opaque regulatory process, overly burdensome licensing and operating requirements, and other means. In 2005, China did follow through on commitments made at the April

2004 and July 2005 JCCT meetings by resuming a dialogue on insurance issues, and China also was moving forward with a promised dialogue on telecommunications issues.

Agriculture.

U.S. agricultural exports to China in 2004 totaled $5.5 billion, and so far 2005 has also been a very successful year, with China becoming the United States' fourth largest agricultural export market. U.S. exports of agricultural commodities, particularly cotton and wheat, have increased dramatically in recent years, and U.S. exports of soybeans continued to perform strongly – on target in 2005 to well exceed $2 billion for the third year in a row, with China remaining the leading export destination for U.S. soybeans. While U.S. exports of agricultural commodities largely fulfill the potential envisoned by U.S. negotiators during the years leading up to China's WTO accession, China's WTO implementation in the agricultural sector is beset by uncertainty, largely because of selective intervention in the market by China's regulatory authorities.

Transparency.

One of the fundamental principles of the WTO Agreement, reinforced throughout China's WTO accession agreement, is transparency. Adherence to this principle permits markets to function effectively and reduces opportunities for officials to engage in trade-distorting practices behind closed doors. While China's transparency commitments in many ways require a profound historical shift, China has made important strides to improve transparency across a wide range of national and provincial authorities.

Conclusion.

In 2006, the Administration will continue its relentless efforts to ensure China's full compliance with its WTO commitments, with particular emphasis on reducing IPR infringement levels in China, and on pressing China to make greater efforts to institutionalize market mechanisms and make its trade regime more predictable and transparent. Throughout this process, the Administration remains committed to working constructively with China to ensure that all of the benefits of China's WTO membership are fully realized by U.S. workers, businesses, farmers, service providers and consumers and that problems in our trade relationship are appropriately resolved. When this cooperative process is not successful, however, the Administration will not hesitate to employ the full range of dispute settlement and other tools available as a result of China's accession to the WTO. At the same time, the Administration will continue to strictly enforce its trade laws to ensure that U.S. interests are not harmed by unfair trade practices.

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