

NATIONAL PERSPECTIVES ON THE SYSTEM

Assessing the New WTO Dispute System: A U.S. Perspective

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I. Overview

Among the many changes in international trade rules brought about by the 1994 Uruguay Round/World Trade Organization (WTO) Agreement,¹ none was given greater prominence than the Dispute Settlement Understanding (DSU).² This new, more automatic system for resolving trade disputes was held out by supporters in the United States as one of the major improvements over the previous General Agreement on Tariffs and Trade (GATT) system because it would enable us to effectively enforce our rights vis-à-vis other WTO members and would lock in the market access we had gained through previous GATT/WTO negotiations. At the same time, the agreement's opponents claimed that it would lead to a massive surrender of our sovereignty, gutting the rights and protections U.S. citizens enjoy in areas such as environmental protection and consumer safety.

The first three years of experience under the new DSU tend to validate some of the supporters' hopes for greater enforceability of U.S. rights and also reveal how wildly exaggerated the claims of the agreement's detractors were. Although the first flurry of WTO panel decisions did not—in most

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1. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Final Act].

2. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND (1994), 33 I.L.M. 1226 (1994) [hereinafter DSU].

instances—involve a significant volume of U.S. trade, there have been several important victories in complaints brought by the United States. These decisions have been important in terms of the precedents they have established and in strengthening overall discipline within the trading system. At the same time, the few U.S. losses have not produced the dire consequences predicted by some of the WTO's most vocal opponents. These losses have resulted only in marginal changes in U.S. policy and have not led to the diminution of our health, safety, and environmental laws.

There is, however, one panel decision which represents something of a setback for U.S. efforts to expand its repertoire of market access tools against Japan, namely the decision on Japanese measures regarding photographic film and paper. This case, probably the largest U.S. complaint when measured by the volume of trade involved, suggests that the United States will not be able to extend WTO disciplines to attack structural barriers in Japan as it hoped to do. And the result may lead to calls for greater use of bilateral action against Japan in some quarters, particularly at a time when Japan's economic crises will lead it to limit imports and increase exports. On balance, however, even the disappointment of the *Japan—Film* case does not negate the overall benefit to the U.S. of the new system.

There are also some significant uncertainties about how the United States will fare in the future. First, the application of antidumping measures, a long-standing area of friction between the United States and certain WTO parties, will lead to cases challenging the conformity of our antidumping laws with the WTO Antidumping Agreement.³ Adverse rulings against our law will undoubtedly increase tensions among different industries in the United States and with our trading partners. A second uncertainty stems from the increasing tendency of the United States to utilize trade sanctions for non-trade objectives, particularly in the fields of foreign policy, human rights, and environmental policy. In a system of binding rules, the United States will find it increasingly difficult to play the role of the world's arbiter of such policies by unilaterally imposing trade sanctions.

On balance, however, the new WTO dispute settlement system appears to be favorable to the United States. On the one hand, the United States is securing positive rulings which translate into meaningful export gains. On the other hand, our experience as a defendant seems to confirm that the United States is unlikely to be forced into major changes in the rights and protections we enjoy as U.S. citizens. While WTO rulings may clip our wings in antidumping policy or the use of trade sanctions, it is unlikely to have the massive effects on our health and safety laws that animated so many of the system's original opponents.

3. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, WTO Agreement, *supra* note 2, Annex 1A [hereinafter Antidumping Agreement].

II. Assessment of U.S. Victories

The United States has won several important cases as a complainant during the first three years of the new DSU. It is worth undertaking a brief examination of these decisions in order to analyze their significance for U.S. trade interests and for U.S. rights and benefits under the WTO, particularly given that many of these victories have set important precedents. This overview is not intended to be a detailed legal analysis of each case, and for the sake of brevity, the discussion of legal issues will be very limited. This article is only intended to summarize the basis for the complaint, the conclusions of the panel and Appellate Body, and the significance of the decision for the United States.⁴

A. JAPAN LIQUOR

The Japan liquor tax case strengthened the national treatment principle to discourage arbitrary classification of products for internal taxation in a manner that protects domestic products, even where such classifications appear to be trade neutral.⁵ The United States, joined by the European Union (EU) and Canada, challenged Japan's liquor tax regime which levied a substantially lower tax on Japanese shochu than on imports of whisky, cognac, and spirits. Although the Appellate Body report revealed certain errors in the panel's legal reasoning, it affirmed the main conclusion that Japan's tax system discriminated against imports in violation of GATT article III (national treatment).⁶

The case demonstrates the power of the new Dispute Settlement System. The United States had obtained a GATT ruling against Japan's liquor taxes in 1987; however, at the time, the United States had little ability to enforce it. The binding nature of the current dispute settlement system enabled the United States to obtain a substantial result for U.S. exporters of distilled spirits, whose products faced taxes four to six times higher than those for comparable Japanese products. After haggling with the Japanese for more than a year concerning how Japan should implement the Appellate Body ruling, the United States finally obtained a commit-

4. Since this article was written, the U.S. (along with Japan and the European Union) won a major challenge to Indonesia's National Car Program which a dispute settlement panel found to violate Indonesia's obligations under the GATT and TRIMs Agreements. *Indonesia—Certain Measures Affecting the Automobile Industry—Report of the Panel*, WT/D559/R (July 2, 1998) <<http://www.wto.org/wto/online/ddf.htm>> [hereinafter WTO Website]. The U.S. also was dealt a setback in the computer networking equipment case it brought against the EU. Although the panel originally upheld the U.S. complaint that the EU's reclassification of certain computer equipment was inconsistent with GATT article II, the WTO Appellate Body reversed this conclusion in its report adopted on June 22. *European Communities—Customs Classification of Certain Computer Equipment—Report of the Appellate Body*, WT/DS62/AB/R (June 5, 1998), at WTO Website, *supra*.

5. *Japan—Taxes on Alcoholic Beverages—Appellate Body Report and Panel Report—Action by the Dispute Settlement Body*, WT/DS8/11, WT/DS10/11, WT/DS11/8 (Nov. 8, 1996) (visited June 21, 1998), at WTO Website, *supra* note 4.

6. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.H.S. 1700, 55 U.N.T.S. 194 art. III. [hereinafter GATT].

ment from Japan in December 1997 to adjust its tax rates on several categories of distilled spirits, producing an annual tax savings of nearly \$94 million for the U.S. industry. Japan also agreed to eliminate tariffs on all brown spirits as well as certain other spirits, yielding an additional \$45 million in savings.

B. CANADA PERIODICALS

The United States scored a key victory in the Canada periodicals case which deemed Canada's measures applied to importation and sale of periodical magazines—purportedly maintained on cultural grounds—to be inconsistent with the GATT rules on national treatment under article III and quantitative restrictions under article XI. This decision drew from the Appellate Body ruling in the Japan liquor case to find a dissimilar treatment of imported products with directly competitive or substitutable domestic products.

Specifically, the United States challenged provisions of Canadian law which restricted the importation of periodicals into Canada as violations of the GATT article XI. Additionally, the United States targeted two other measures under article III: (1) a tax on advertising revenues in U.S. or foreign magazines that print in Canada but contain little or no Canadian content and (2) subsidized postal rates for magazines and newspapers. Canada responded that these measures were necessary to protect its magazine industry from U.S. cultural domination. The panel found that the advertising ban represented a violation of article XI and that Canada's excise tax violated Canada's national treatment obligations because it protected the production of magazines in Canada and afforded more favorable tax treatment to domestic products.⁷ However, the panel justified Canada's postal scheme as a permissible subsidy under the GATT article III:8(b).

In a major setback for Canada, which had appealed the decision, the Appellate Body upheld most of the panel's findings regarding the inconsistency of Canada's laws with WTO rules and also reversed the panel's conclusion that the postal rate scheme was a justifiable subsidy.⁸ In other words, both features of Canada's cultural industry protections were deemed WTO-incompatible. This was a significant victory for the United States, particularly for U.S. "cultural industries," which were unable to negotiate away these restrictions in both the U.S.-Canada Free Trade Agreement and the NAFTA. Since those agreements were concluded, the Canadian government has vowed to preserve its "cultural sovereignty" and take additional action against U.S. cultural domination. In light of these decisions, however, Canada finds itself greatly constrained in adopting cultural policies, because many of its proposals have the objective of achieving old-fashioned protection of domestic producers.

7. *Canada—Certain Measures Concerning Periodicals—Report of the Panel*, WT/DS31/R (Mar. 14, 1997), at WTO Website, *supra* note 4.

8. *Canada—Certain Measures Concerning Periodicals—AB-1997-2—Report of the Appellate Body*, WT/DS31/AB/R (June 30, 1997), at WTO Website, *supra* note 4.

C. BANANAS

The decision on the EU banana regime upheld allegations by the United States, Ecuador, Honduras, Guatemala, and Mexico that the EU's banana import regime violated a host of WTO obligations, including those under the GATT, the General Agreement on Trade in Services (GATS),⁹ the Import Licensing Agreement,¹⁰ and the Agreement on Trade-Related Investment Measures (TRIMs).¹¹ In a major loss for the EU, the panel report, strengthened by the Appellate Body ruling, found against the EU on most key issues.¹² For instance, the EU's allocation of its tariff quota shares failed to meet the requirements of the GATT article XIII on non-discriminatory administration of quantitative restrictions. In addition, the EU's licensing regime was found to represent a clear case of discrimination under the GATT article III, as well as a violation of the Import Licensing Agreement. Finally, the EU licensing system was found to violate national treatment under the GATS.

The bananas case has several important implications. The decision represents the first comprehensive interpretation of the GATS and affirms its application to measures challenged simultaneously under provisions of the GATT. The decision, therefore, establishes principles of considerable importance to the United States as the world's major services exporter. The ruling also offers a solid precedent for actions against other sectors managed through complex licensing systems, even those taken by non-producers. Finally, the continued international focus on the EU's plans to implement the WTO ruling underscores the value of the Member "peer" pressure afforded by the new dispute settlement rules.

D. INDIA MAILBOX

The decision against India's patent regime confirms the right of patent applicants in the pharmaceuticals and agriculture sectors to preserve their exclusive marketing rights for such products.¹³ The United States brought its complaint against India in July 1996, alleging a series of violations of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹⁴ The dispute settlement panel, whose main conclusions were affirmed by the Appellate Body,

9. General Agreement on Trade in Services, WTO Agreement, *supra* note 2, Annex 1B, 33 I.L.M. 1167 (1994) [hereinafter GATS].

10. Agreement on Import Licensing Procedures, WTO Agreement, *supra* note 2, Annex 1A.

11. Agreement on Trade-Related Investment Measures, WTO Agreement, *supra* note 2, Annex 1A.

12. *European Communities—Regime for the Importation, Sale and Distribution of Bananas—AB-1997-3*, WT/DS27/AB/R (Sept. 9, 1997), at WTO Website, *supra* note 4.

13. *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products—AB-1997-5*, WT/DS50/AB/R (Dec. 19, 1997), at WTO Website, *supra* note 4.

14. Agreement on Trade-Related Aspects of Intellectual Property Rights, WTO Agreement, *supra* note 2, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 81 (1994) [hereinafter TRIPS].

ruled that India had violated the TRIPS Agreement by failing to establish a “mailbox” mechanism to receive and date patent applications and a system to grant exclusive marketing rights.

This ruling, the first by the Appellate Body in an intellectual property dispute, is an important one as it signals to all countries, particularly developing countries, the enforceability of the TRIPS Agreement. Although developing countries have a ten-year period to phase in their TRIPS obligations, they are also required to establish interim measures (i.e., a “mailbox” system) to allow companies to register their patent applications. India’s failure to formally establish this mechanism is not unique, particularly in the developing world. But now, patent applicants have an important WTO ruling as support in their efforts to push recalcitrant WTO Members to adopt measures for patent registration. In addition, it raises the bar further for WTO-applicants, notably China, in the area of intellectual property rights.

E. HORMONES

The ruling in the so-called beef hormones case¹⁵ strengthens the U.S. hand in assuring that non-science based restrictions on agricultural products will be found to be contrary to the WTO Sanitary and Phytosanitary (SPS) Agreement.¹⁶ The United States and Canada initiated dispute settlement proceedings against EU measures which prohibit imports of meat and meat products treated with growth hormones. The panel found the EU ban to be inconsistent with EU obligations under the SPS Agreement, and the subsequent Appellate Body ruling reaffirms this general finding. However, the Appellate Body report modifies the legal conclusions enough to allow the EU to declare partial victory and possibly delay resolution of the dispute.

Primarily at issue in the appeal was the extent to which a WTO Member can apply a level of health protection more stringent than international standards. The Appellate Body upheld the right to go beyond international guidelines provided that the additional restrictions are justified by scientific evidence. Although the decision offers needed clarification of the rights and obligations under the SPS Agreement, the dispute is far from over. The United States and the EU will remain at loggerheads over whether the Appellate Body ruling will permit the EU to commission yet another “scientific study.” Nevertheless, for future cases, the decision will act as a strong disincentive against the arbitrary application of SPS measures justified on health grounds that are actually based on politics or public opinion. It will also raise the burden for the United States and the EU to

15. *EC Measures Concerning Meat and Meat Products (Hormones)*—AB-1997-4—Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998), at WTO Website, *supra* note 4.

16. Agreement on the Application of Sanitary and Phytosanitary Measures WTO Agreement, *supra* note 2, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND (1994).

support future restrictions against food imports taken in response to growing concerns over mad-cow disease or tainted food.

F. ARGENTINA CUSTOMS DUTIES

The United States also prevailed in a spat against Argentina over duties on textile and apparel imports. The panel report upheld U.S. claims that certain duties were in excess of Argentina's bound rate contrary to the GATT article II and that a statistical tax of three percent ad valorem on imports violated the GATT article VIII.¹⁷ However, the panel report might only represent a partial victory for the United States. The findings only covered duties on textiles and apparel and not the alleged WTO-incompatibility of footwear duties which Argentina withdrew and later reimposed in the form of safeguard measures. As a result, the United States might have to consider another WTO case to challenge these safeguard measures.¹⁸

III. The Film Decision

There is one notable exception to the list of successful U.S. complaints is the panel decision in the photographic film case.¹⁹ Although this dispute involved interpretation of long-standing GATT rules—namely article III and article XXIII (the so-called “nonviolation” principle)—and did not involve any new Uruguay Round agreements or commitments, the decision was a disappointment to the United States, which had hoped that the panel would expand the nonviolation principle to cover more of the systemic barriers inherent in Japan's highly regulated economy. In its submission, the U.S. argued that twenty-three different government measures—enacted in the wake of the trade liberalization of the 1960s and maintained over many years—had the combined effect of granting less favorable treatment to imported products in violation of paragraph four of article III. The U.S. also alleged that application of these measures nullified and impaired the benefits the United States should have received from previous trade negotiations in contravention of paragraph 1b of article XXIII. The panel's decision rested on the conclusion that the United States had not adequately demonstrated that Japan's policies and measures affecting the film sector met the requirements of either article XXIII or article III. According to the panel, the U.S. had

17. *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items—Report of the Panel*, WT/DS56/R (Nov. 25, 1997), at WTO Website, *supra* note 4.

18. Since the time of writing, Argentina appealed the panel decision. However, the Appellate Body upheld most of the panel's conclusions. *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R (March 27, 1998), at WTO Website, *supra* note 4.

19. *Japan—Measures Affecting Consumer Photographic Film and Paper—Report of the Panel*, WT/DS44 (March 31, 1998), at WTO Website, *supra* note 4. In the interest of full disclosure, it should be noted that the authors advised the Eastman Kodak Company during the pendency of the WTO dispute.

not sufficiently demonstrated that Japanese government measures were intended to counteract the effects of trade liberalization nor that these measures had contributed to a marketing environment in which domestic and imported film received separate treatment. The panel therefore found the evidence insufficient to support a claim of either non-violation or denial of national treatment.

From a purely legal perspective, the panel report demonstrates that nonviolation is still a limited concept, one that is unlikely to extend to the realm of longstanding structural barriers such as the overall competitive environment in Japan. In large part, the age of the measures in question became the pivotal issue. The panel found that for most of the measures in place since the 1960s and 1970s, the United States could not claim a nullification and impairment of tariff concessions because it should have "reasonably anticipated" such measures by the time of the Tokyo and Uruguay Rounds. The U.S. argued that the opaque and non-traditional nature of Japan's Ministry of International Trade and Industry's (MITI's) so-called "administrative guidance" often makes it impossible for trading partners to know or understand how regulations act to undermine tariff concessions until intensive investigation is undertaken. In this case, such close examination was not carried out by Kodak and the U.S. government until 1995-1996. The panel, however, evidently found this argument to be unconvincing.

The panel also found that the United States had not made a sufficient showing that Japanese measures upset the competitive balance between imports and domestic products for purposes of either article III or article XXIII. The panel rejected U.S. arguments that the government measures had been responsible for giving Japanese film a more advantageous distribution channel over imported film. Presumably, the panel found that government measures had not contributed to such favorable treatment or else found that the separate distribution channel was not preferential, suggesting that it is more difficult to demonstrate discrimination in cases involving informal government guidance and facially neutral, generic measures. The panel was clearly reluctant to draw conclusions about the real purpose and effect of many of the measures in question. In essence, it maintained the high burden of proof required of those wishing to show that government measures create "less favorable conditions of competition" in violation of paragraph four of article III.

In some quarters of the United States, the outcome of this case will increase dissatisfaction with the WTO. How extensive that dissatisfaction will be remains unclear. At a minimum, it will lead to calls for more assertive bilateral action against Japan, which will undoubtedly cause Japan to react against a possible regrowth of "unilateralism." As Japan's economic crisis translates into greater trade tensions, concerns about asymmetrical access between the United States and Japan may become more of a focal point. Critics will contend that the WTO system, with its tendency to regulate transparent trade restrictions more severely than non-transparent ones, is inherently biased against the United States. The film decision will lend fuel to this fire. On the other hand, supporters will point

to the numerous victories cited above, some of which are against Japan and other Asian members, as evidence of the WTO's relevance to opening Asian markets.

IV. The United States as a Defendant—Modest Losses So Far

Cases challenging U.S. laws have been relatively infrequent, and the scope of the rulings has not forced major changes in U.S. policy. At the time the Uruguay Round was debated in the Congress, there were many cataclysmic predictions from critics such as Ralph Nader and Pat Buchanan that the dispute process would result in the wholesale invalidation of our sovereignty and the shredding of our health, safety, and consumer protection laws. In fact, the three rulings against the United States have found only slight problems and have required only modest changes to adapt to WTO disciplines.²⁰

A. GASOLINE

The gasoline case, brought against the United States by Venezuela and Brazil, found certain aspects of the way the Environmental Protection Agency (EPA) calculated the baseline for foreign refined petroleum products to be a denial of national treatment. As the first loss by any party on appeal, the case presented the system with its first major test. Venezuela and Brazil contended that an EPA rule (the Gasoline Rule) promulgated under the Clean Air Act, discriminated against imports of gasoline by setting different standards for imported and domestic gasoline products. The panel agreed and held that the Gasoline Rule violated GATT article III.²¹ The Appellate Body strengthened this ruling by refusing to justify certain elements of the Gasoline Rule under the general exceptions contained in the GATT article XX.

The gasoline case is significant for two reasons. Systemically, the case tested the U.S. commitment to live by the rules it created. The decision had the potential of opening the Clinton Administration to criticism from nationalists and environmentalists that the United States had been forced to change domestic rules by a Geneva trade body, and that it was surrendering its sovereignty or was sacrificing the environment to trade. However, the Administration artfully dodged these charges, modifying the WTO-incompatible Gasoline Rule at the same time that it successfully portrayed the negative decision as upholding its freedom to protect

20. Since this article was written, the United States lost an additional case as a defendant. A WTO panel upheld a complaint by several countries that a U.S. import ban on shrimp not harvested with a special device designed to protect sea turtles was inconsistent with U.S. obligations under GATT article XI. *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Panel*, WT/DS58/R (May 15, 1998), at WTO Website, *supra* note 4. The U.S. has appealed this finding. See also section V.B. *infra*.

21. *United States—Standards for Reformulated and Conventional Gasoline—Appellate Body Report and Panel Report—Action by the Dispute Settlement Body*, WT/DS2/9 (May 20, 1996), at WTO Website, *supra* note 4.

the U.S. environment. By doing so, U.S. participation in the WTO was spared a potentially damaging crisis.

Substantively similar to its ruling in the hormones case, the Appellate Body's gasoline decision reaffirmed the ability of WTO Members to take measures to protect important domestic interests so long as they also conform to WTO rules. Like the hormones ruling, which recognized members' broad discretion to impose health-based restrictions provided there exists some scientific justification, the gasoline decision affords WTO Members a large degree of autonomy to take national environmental measures, provided that they do not discriminate against imports. The aftermath of the gasoline decision provides clear guidance. To conform to the WTO ruling, the EPA changed its methodology to be trade neutral without any real diminution of the environmental protection afforded by the earlier decision. Of course, the revised EPA regulation does offer less protection to some of the U.S. oil companies that originally lobbied for the earlier methodology, but this simply suggests that the original formula did in fact have a protectionist—rather than environmental—motive.

B. TEXTILES CASES

In two cases involving U.S. safeguard measures on textiles and apparel, the panels found the restrictions to violate the WTO Agreement on Textiles and Clothing (ATC).²² In the first case, the panel upheld Costa Rica's allegations that U.S. restrictions against imports of Costa Rican underwear violated the ATC given the failure of the United States to demonstrate that the imports caused serious damage or threatened serious damage to the domestic industry.²³ In the second case, filed by India, the WTO panel ruled that U.S. temporary safeguard measures taken against imports of woven wool shirts and blouses violated certain articles of the ATC.²⁴ India appealed certain specific conclusions, but the Appellate Body upheld the panel's report in its entirety.²⁵

For developing countries, these cases reaffirm the utility of the WTO in challenging the trade practices of the big traders and provide much needed evidence

22. Agreement on Textiles and Clothing, WTO Agreement, *supra* note 2, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND (1994).

23. *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear—Report of the Panel*, WT/DS24/R (Nov. 8, 1996), at WTO Website, *supra* note 4. The Appellate Body confirmed Costa Rica's narrow appeal regarding the effective date of application of the United States measures and overturned the panel's conclusion that the U.S. was able to apply its import restraints in Costa Rica retroactively. *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear—Report of the Appellate Body*, WT/DS24/AB/R (Feb. 10, 1997), at WTO Website, *supra* note 4.

24. *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India—Report of the Panel*, WT/DS33/R (Jan. 6, 1997), at WTO Website, *supra* note 4.

25. *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India—AB-1997-1—Report of the Appellate Body*, WT/DS33/AB/R (Apr. 25, 1997), at WTO Website, *supra* note 4.

of the value of universal trading rules, particularly at a time when skeptical domestic audiences believe that the WTO favors the United States. At the same time, neither case significantly impacted U.S. trade. In fact, the safeguard measure against Costa Rican underwear lapsed soon after the Appellate Body report, and the measure against Indian wool was withdrawn even before the panel issued its final report. Although these cases indicate that there are some problems with recent U.S. textile restraints, these are mostly small and at the margins of U.S. textile policy. The vast majority of U.S. restraints are consistent with the WTO and remain in force. In addition, the United States was quick to point out that the underwear report recognized the validity of the type of safeguard measures taken by the United States against import surges so long as they are in conformity with the ATC.

V. Pending and Future Cases—Potential U.S. Vulnerability

Although the United States has fared reasonably well as a defendant in the first three years of the new DSU, it is likely to face some stiff future challenges. Two areas stand out as sources of future disputes—antidumping policy and sanctions policy. It is worth reviewing the prospects for WTO challenges in both areas.

A. ANTIDUMPING POLICY

In the field of antidumping, the United States has long faced hostility in Geneva to our administration of such laws. Although the Uruguay Round Antidumping Agreement recognizes our right to use such measures, it also sets forth an extremely comprehensive and tight set of disciplines on the administration of such measures.²⁶ U.S. law has been drafted in a way that permits the Department of Commerce and International Trade Commission, the two bodies responsible for administering the law, to abide by WTO rules.²⁷ However, the law is also broad enough to allow interpretations which could be inconsistent with the agreement. Under the pre-Uruguay Round Antidumping Agreement,²⁸ there were several disputes filed by Asian exporting countries against U.S. and EU antidumping measures and some had resulted in panel decisions disapproving such measures. However, many of these decisions were never adopted due to U.S. and EU opposition.

Under the new DSU, four formal requests for consultations have been made against the United States on antidumping actions, one of which has gone to a

26. Antidumping Agreement, *supra* note 3.

27. Imposition of Antidumping Duties, 19 U.S.C.A. § 1673 (West Supp. 1998).

28. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) 171 (1980) (Tokyo Round Antidumping Agreement).

panel.²⁹ These requests are all based upon different articles of the Antidumping Agreement, but together they suggest that exporting countries are likely to be active in challenging U.S. law.

However, it is not by any means clear that these challenges will be successful. Officials of the Department of Commerce and the International Trade Commission are well aware of the new antidumping rules and, on most issues raised by these cases, have extensively considered how to conform their rulings with WTO obligations. If these cases proceed, it will be interesting to see how much latitude panels grant to importing countries to implement WTO requirements. Interestingly enough, a number of other countries, including developing countries, are now beginning to use antidumping measures, and any decisions limiting our flexibility will also limit others.

B. SANCTIONS POLICY

The second major vulnerability of the United States to possibly adverse WTO rulings lies in our tendency to use unilateral sanctions as a tool of non-trade policies. The recent Helms-Burton legislation³⁰ and Iran/Libya Sanctions Act³¹ are the two most prominent examples of this trend, but the use of trade sanctions for environmental purposes is also receiving increasing scrutiny. In two cases already, U.S. trading partners invoked the dispute settlement process regarding the use of trade sanctions for foreign policy reasons. First, the EU challenged the application of sanctions against European companies under the so-called Helms-Burton law.³² Although the authority of this panel lapsed pending U.S./EU efforts to resolve this issue bilaterally, the EU could choose to reactivate a panel should this solution break down and the United States act against EU companies. Second, the EU and United States remain in consultations over procurement sanctions imposed by the Commonwealth of Massachusetts against Burma for its human rights abuses.³³ This case is interesting because it will involve WTO violations by a sub-federal entity (i.e., Massachusetts). Under

29. *United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabyte or Above from Korea*, WT/DS99/1, at WTO Website, *supra* note 4 (the Dispute Settlement Body established a panel in this case on January 16, 1998); *United States—Anti-Dumping Measures on Imports of Solid Urea from the Former German Democratic Republic*, WT/DS63, at WTO Website, *supra* note 4; *United States—Anti-Dumping Duties on Imports of Color Televisions Receivers from Korea*, WT/DS89/1, at WTO Website, *supra* note 4; *United States—Antidumping Act of 1916*, WT/DS 136, at WTO Website, *supra* note 4.

30. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C.A. § 6032 (West Supp. 1998).

31. Iran and Libya Sanctions Act of 1996, 50 U.S.C.A. § 1701 (West Supp. 1998).

32. *United States—The Cuban Liberty and Democratic Solidarity Act*, WT/DS38, at WTO Website, *supra* note 4. The panel's authority in this case lapsed on April 22, 1998.

33. *United States—Measure Affecting Government Procurement—Request for Consultations by the European Communities*, WT/DS88/1 (June 26, 1997), at WTO Website, *supra* note 4.

the WTO Procurement Agreement,³⁴ the United States made commitments with respect to procurement practices of certain states which, like Massachusetts, had agreed to be covered.

In the environmental field, a panel—acting on a complaint by India, Malaysia, Pakistan, and Thailand—ruled against a U.S. law that trade sanctions on shrimp imports from countries that fail to use certain devices on their fishing nets designed to prevent the killing of sea turtles.³⁵ This panel is significant because it involves a potential clash between WTO rules and the use of measures to further the protection of endangered species, a policy which is itself the subject of other international agreements.

The use of trade sanctions for non-trade objectives raises significant WTO problems. In order to justify such a measure, the United States must either demonstrate that the sanction does not violate a WTO commitment or that it falls within one of the specified GATT exceptions. Since some of these mandate actions that would violate various WTO obligations, the issue in these disputes could well turn on whether the U.S. action falls properly within one of the exceptions. Thus, it is useful to look briefly at these cases and the possible grounds for finding exceptions.

With respect to the foreign policy sanctions (Helms-Burton and the Burma law), direct application of a sanction to a particular country that the United States considers to be a national security threat, such as Cuba or Burma, is probably not a real problem. After all, the United States does not care if these countries counter-retaliate and therefore we have little to lose if they bring a WTO case. In the case of Cuba, for example, we do not wish to maintain normal WTO relations anyway. We have no bilateral trade, so invocation by Cuba of its GATT rights means nothing.

The real problem lies in the extension of these sanctions to our allies and closest trading partners on the grounds that they do business with countries like Cuba. To defend these sanctions, the United States would have to invoke the GATT national security exception under article XXI on the grounds of an “emergency in international relations.” Yet, what basis would the United States have for arguing that such an emergency exists with respect to the EU and Canada? At a minimum, those countries would be able to claim the same type of article XXI “emergency” and then counter-retaliate against the United States. It is unlikely that the United States will be able to obtain a WTO ruling that legitimizes our right to such actions while preventing others from counter-retaliating. Thus, a dispute settlement panel that adopts a broad interpretation of national security in order to legitimize U.S. sanctions against the EU or Canada would be simultane-

34. Agreement on Government Procurement, Apr. 11, 1979, GATT B.I.S.D. (26th Supp.) at 33 (1980) (entered into force Jan. 1, 1981).

35. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58, at WTO Website, *supra* note 4.

ously authorizing them to take similar sanctions against us. The end result would be merely to take trade sanctions policy outside of multilateral disciplines.

The conclusion one might draw from this dilemma is that disputes over the invocation of national security exceptions will not be effectively controlled by the WTO system. Panels will be hard-pressed to judge the validity of a national security claim. Ultimately, these are political questions, and any use of sanctions by the United States will ultimately provoke a politically-motivated response. In the end, these matters will rest more on diplomatic relations than trade rules. However, the United States should not assume that the WTO will uphold our indiscriminate use of "national security" trade sanctions against our major GATT partners while leaving them powerless to do the same to us. That simply will not happen.

The use of trade sanctions for environmental reasons presents the problem of extraterritoriality in even starker terms. The GATT article XX recognizes an exception for measures relating to the conservation of exhaustible natural resources. However, decisions interpreting article XX strongly indicate that application of such measures on the grounds that you are protecting natural resources outside your own territory will not qualify for the exception.³⁶ In the case of the U.S. restrictions on shrimp imports, it is clear that the measures are not designed to protect shrimp; they are designed to force other countries into policies which protect sea turtles within their own territories or on the high seas. The panel decision in this case in addition to prior rulings by GATT panels, such as the unadopted panel report on an analogous case brought by Mexico against U.S. restrictions on tuna imports, suggest that the article XX exception cannot be stretched this far.³⁷

VI. Deterrence—The Threat of Panels as Negotiating Leverage

The WTO Secretariat has recently pointed out that the new DSU is helping to create a more effective deterrent to WTO violations. There is some evidence from the first three years' experience that the mere threat of filing a case can be an effective means of addressing WTO-inconsistent behavior. The case law under the WTO and its predecessor provisions of the GATT is sufficiently authoritative in certain areas (for example on national treatment and MFN questions) that many governments recognize when one of their laws is vulnerable to a successful challenge. In these circumstances, the carefully timed threat of a panel request can bring about a settlement. This has happened recently. For example, the United States and the EU were successful in forcing Japan to change its copyright law with respect to sound recordings because it was clear that their

36. See e.g. Unadopted Panel report on *United States—Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991) (on file with the WTO Secretariat).

37. *Id.*

law did not grant the fifty-year term of protection required by the TRIPS agreement. Rather than face the potential consequences of an adverse ruling, Japan committed to amend its law. There are other examples of the successful use of threatened panels. The United States Trade Representative recently claimed that the United States has achieved favorable settlements in seven cases.³⁸

This use of threats as leverage is particularly valuable to the United States. Under the DSU a prevailing party may ultimately retaliate against an offending country if that country fails to conform its law to a panel decision. As the largest trading partner of most WTO members, the United States simply has more credibility when it threatens such sanctions. Thus a country faced with a possible U.S. challenge and advised by WTO experts that it will lose the case is very likely to want to settle the case prior to such a ruling. Smaller countries with less leverage do not benefit as much from such threats.

VII. Conclusions

Three years of case law is insufficient precedent to draw final conclusions about the value of the new DSU to U.S. trade interests. At best, we can draw some initial impressions:

- (1) The United States has used both the threat of disputes and the filing of cases in an effective manner to obtain some important results for our exporters and to create some valuable precedents for the future;
- (2) The film decision demonstrates the limited utility of WTO rules in attacking certain kinds of non-tariff barriers that are deeply imbedded in some Asian economies;
- (3) The predictions that U.S. health, safety, and environmental laws would be shredded by the new WTO agreements have proven to be untrue, and even the cases we have lost suggest that we can maintain such safeguards as long as we avoid unnecessary trade discrimination; and
- (4) The United States is likely to face stiff challenges to our antidumping policy and our reliance on trade sanctions for foreign policy and environmental reasons, though the outcome of these disputes remains unclear.

In the coming months, there will undoubtedly be congressional and private-sector scrutiny of the new WTO and the dispute settlement process. In fact, the DSU is subject to automatic review by January 1999.³⁹ The real question is whether the results so far justify change or elimination of this new form of binding dispute settlement. However, the critics of this system will be forced to recognize that the renegotiation of the rules would take years and may not result in dramatic changes. Thus, if the United States is unhappy with the outcome of some disputes,

38. *USTR Barshefsky Announces U.S. Victory in WTO Dispute on High-Technology Exports*, USTR PRESS RELEASE, (Feb. 5, 1998).

39. *Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, 33 I.L.M. 152 (1994).

its only real choices are: 1) to accept and implement a ruling; 2) to negotiate a compensation agreement that leaves an offending law in place; or 3) to ignore a ruling and face equivalent retaliation. The United States cannot enjoy the benefits of binding dispute settlement without accepting its drawbacks.

On balance, the United States would be wise to let this system evolve more fully. Most panel and Appellate Body decisions have been sensible and well-reasoned. There are, of course, exceptions in any judicial system. However, the United States now sees itself emerging as the world's most dynamic, competitive exporter with a robust economy and a huge potential to expand market access around the globe. The WTO agreements will underpin those efforts, and in time the United States will find itself living quite comfortably within WTO disciplines.