International Trade

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I. Negotiating Developments

A. INTRODUCTION

This year's achievements in the negotiation of international trade agreements were promising on a number of fronts, despite the fact that few agreements were actually concluded. Perhaps the biggest trade headlines of 2000 involved China's efforts to accede to the World Trade Organization (WTO). Though progress has slowed in the last, difficult stages of the negotiation process between China and some of its major trading partners (including the United States), it appears that the momentum has become irreversible toward China's historic entry into the multilateral trade organization. Other notable developments in the year 2000 include some international trade firsts—a trade agreement between the United States and Vietnam, and the incorporation of labor and environmental provisions in the main text of another bilateral trade agreement (between the United States and Jordan). These and other highlights in the negotiation of international trade agreements in the year 2000 are summarized below.

B. WTO DEVELOPMENTS

1. China's Proposed Accession to the WTO

Preparations for bringing China into the WTO, as with every acceding country, have included both bilateral and multilateral components. First, China has been required to negotiate a market access package with interested WTO Members, and second, it must

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negotiate a multilateral "protocol of accession." In November 1999, after years of negotiation, the United States and China concluded a comprehensive bilateral agreement regarding China's accession to the WTO. Having concluded a bilateral agreement with the United States, the focus shifted during 2000 to China's bilateral agreements with the European Union (EU) and other major trading partners, and the development of China's protocol of accession.

a. The U.S.-China Bilateral Agreement

The bilateral agreement between the United States and China is comprehensive and is intended, inter alia, to reduce trade barriers into China of a wide range of goods, services, and agricultural products; eliminate or reduce restrictions on the freedom to import and distribute goods; address industrial policies traditionally favoring China; and strengthen fair trade commitments. The testimony of Ambassador Charlene Barshefsky, the former U.S. Trade Representative, to the Senate Banking Committee in May 2000, identified the following key provisions in the agreement:

**Services:** China agreed to open markets across the spectrum of distribution services, financial services (including, in joining the WTO, agreeing to participate in the Financial Services Agreement), telecommunications (including the Internet), business and computer services, motion pictures, environmental services, and others.

**Industry:** China agreed to cut tariffs on industrial goods from an average of 24.6 percent in 1997 to 9.4 percent by 2005 and bind them at these new, lower rates. China will eliminate quotas and other quantitative restrictions. China will also allow U.S. firms to import and distribute their products throughout China.

**Agriculture:** China will substantially reduce tariffs both on accession to the WTO and over time, and will adopt tariff rate quotas that will provide market access for certain bulk agricultural commodities for U.S. farmers. China will eliminate agricultural export subsidies and cap and reduce trade-distorting domestic subsidies. Further, China will agree to apply science-based sanitary and phytosanitary standards.

**Protocol:** China agreed to a twelve-year product-specific safeguard provision that will allow the United States to respond to increased imports from China that cause market distortion in the United States. The United States will be permitted to apply such safeguard measures specifically against imports from China, and to do so based on legal standards that differ from the WTO Agreement on Safeguards. China will eliminate mandated offsets, local content, and export performance requirements. Further, China agreed that the United States may maintain its current methodology (treating China as a non-market economy) in antidumping proceedings involving China for fifteen years following accession. Special characteristics of China's economy may also be taken into account when identifying and measuring any subsidy benefits that may exist.\(^2\)

The United States, in turn, agreed to grant China normal trade relations (NTR) status, heretofore determined annually, on a permanent basis. (See infra part II) On May 24, 2000,

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the U.S. House of Representatives voted to extend permanent normal trade relations (PNTR) to China upon China's accession to the WTO, after certification by the president that China's formal terms of WTO accession are at least as favorable to the United States as those negotiated with the United States in 1999. The Senate approved an identical bill in September 2000, which the president then signed.

b. The EU-China Bilateral Agreement

The year's negotiations between the European Union (EU) and China began in earnest in January and continued regularly until a bilateral market access agreement was reached in May. The agreement expanded a number of trade benefits negotiated between the United States and China, and included the following key provisions:

- **Telecommunications**: China agreed to an accelerated timetable for opening its market in mobile telephony. Foreign companies will be allowed 25 percent investment upon accession, 35 percent one year later, and 49 percent after three years. China will open its leasing market to foreign businesses in three years.
- **Insurance**: China agreed to extend seven new licenses to EU firms before accession. Foreign brokers will be allowed to operate in China as of accession on a fifty-fifty basis. There will be no joint venture requirement five years after accession.
- **Monopoly state import/export restrictions**: China agreed to open its state monopolies governing the importation of crude and processed oil and NPK fertilizer upon accession. The state monopoly on exporting silk will be removed by 2005.
- **Tariffs**: China agreed to reduce import tariffs on more than 150 European export products to approximately 8 to 10 percent.
- **Distribution**: China agreed to lift the joint venture restriction on large department stores and for almost all chain stores.
- **Agriculture**: China agreed to improve market access for key EU products.
- **Horizontal Measures**: China agreed to remove a number of measures that distort trade, including export performance and local content requirements, and industrial export subsidies. China will abolish preferences to domestic producers in select fields, including pharmaceuticals, chemicals, cigarettes, and spirits.

c. Status of the Protocol of Accession

Substantive discussions on the text and annexes of the draft Protocol of Accession began at the WTO mid-year after it was clear that a substantial number of bilateral agreements had been reached between China and interested WTO Members. Although initial advancements were made in the drafting of the accession protocol, negotiations stalled over a number of key provisions, including the treatment of Taiwan, the status of China as a developing country, and the implementation of certain provisions of bilateral agreements into the accession package, in particular with the United States and the EU. While the United States and the EU pushed China for additional detailed commitments on how it will implement the market access concessions it made in the bilateral agreements, China


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proposed either more limited language or proposed language that runs counter to the initial demands.\(^5\) Disagreement over outstanding issues, including services, agriculture, and technical barriers to trade, prevented conclusion of the accession package by year's end.\(^6\)

Although important hurdles were overcome in the process of China's accession during the year (in particular, the attainment of a negotiated agreement between the EU and China, and the passage of PNTR by the U.S. Congress), difficult issues remain outstanding in the multilateral process on the protocol of accession. Prospects for reaching agreement with the United States under the new administration, however, are good. Moreover, remaining bilateral agreements with countries such as Mexico are expected to conclude within the first half of 2001. Thus, prospects for China's concluding its accession package and joining the WTO in 2001 are promising.

2. Scheduled Negotiations

Mandated WTO negotiations on agriculture and services required under Article 20 of the Agreement on Agriculture and Article XIX of the General Agreement on Trade in Services, respectively, began on January 1, 2000. The objectives of the mandated negotiations are to further liberalize trade in services,\(^7\) and to continue the agricultural reform program pursuant to which Members have agreed to reduce subsidies and tariffs and other barriers.\(^8\) Mandatory negotiations regarding geographical indicators (which relate to place

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7. Article XIX of the General Agreement on Trade in Services states:

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 interest of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.


8. Article 20 of the Agreement on Agriculture states:

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) that further commitments are necessary to achieve the above mentioned long-term objectives.

Agreement on Agriculture, art. 20, in WTO Texts, supra note 7, at 43.

9. Mandated negotiations aimed at increasing the protection of geographic indications is provided for under Article 24.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).
names or words associated with places, used to describe the type, characteristics and quality of products) and a review of the entire TRIPS Agreement were also required. Further, a mandatory review of the provisions in Article 27.3(b) of the TRIPS Agreement regarding the exclusion from patentability of certain plants and animals begun in 1999 continued in the year 2000. These mandatory negotiations began notwithstanding the fact that the WTO failed to launch a new round of trade negotiations as anticipated in Seattle the previous year.

a. Agriculture

i. Status of the Negotiations.

The negotiations in agriculture began in March 2000 and neared the end of their first phase by the end of the year. At the first negotiating session, the Members reached an agreement on how to continue the reform process for trade in agriculture. The Members agreed to submit negotiating proposals at various meetings throughout the year, with a "stock taking" exercise planned for March 2001.


The United States, the European Communities (EC), the Cairns Group, Canada, and several developing countries submitted substantial proposals during the year. In accordance with the long-term objectives of establishing a fairer, more market-oriented trading system, the United States submitted specific proposals concerning, inter alia, market access (reduction of tariffs, increase of tariff rate quotas), export competition (elimination of export subsidies and variable export taxes and discipline on export state trading enterprises), domestic support (creation of exempt and non-exempt support categories, and elimination of non-exempt support), and special and differential treatment (improvement in market access opportunities for developing countries, greater flexibility for exempt support measures essential to development objectives).

Taking into account the aim of achieving further reductions in support and protection under the Agreement on Agriculture, the EC submitted proposals concerning trade in agriculture, including market access (overall average reduction of bound tariffs and minimum reduction per tariff line, set of rules and disciplines to increase the transparency, reliability and security of tariff rate quotas, fair competition opportunities for products whose quality and reputation are linked to their geographical origin and traditional know-how, continuation of the safeguard clause), export competition (integrate rules and disci-

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Article 24.1 specifically states, "Members agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23." TRIPS Agreement, art. 24.1, in WTO Texts, supra note 7, at 171.

10. Article 71.1 of the TRIPS Agreement states, "[t]he Council for TRIPS shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65." TRIPS Agreement, art. 71.1, in WTO Texts, supra note 7, at 402. Article 65.2 of the TRIPS Agreement, in turn, refers to a four-year period in addition to the initial one-year period following the date of entry into force of the WTO Agreements. See id. art. 65.2, supra note 7, at 398.

11. Article 27.3(b) of the TRIPS Agreement specifically states that "[t]he provisions of this subparagraph regarding the exclusion from patentability of certain plants and animals shall be reviewed four years after the date of entry into force of the WTO Agreement." TRIPS Agreement, art. 27.3(b), in WTO Texts, supra note 7, at 379-80.

f. News-Related Developments. In March 2000, the EC submitted proposals concerning non-trade issues, concerning the protection of the environment, the alleviation of poverty, food safety, consumer concerns, and discussed issues concerning developing countries and special or differential treatment of those countries. Additionally, the EC advocated continuation of the so-called "peace clause," which defines the conditions under which specific support measures may be granted.13

b. Services

i. Status of the Negotiations. A special session of the Council for Trade in Services on February 25, 2000, formally launched the new negotiations on services. Members agreed to work on guidelines and procedures for the new negotiations, which they agreed to divide into two phases. The first year’s phase is to concentrate on rule making, during which Members will negotiate new rules for services on subsidies, safeguards, and government procurement. Negotiations for new commitments, the market access phase, will begin in 2001. Members were requested to submit their proposals regarding the modalities and scope of the market access negotiations by the end of December 2000.14

ii. Current Proposals. In July 2000, the United States submitted broad proposals regarding general interests, objectives, and approaches for negotiations.15 In December, the United States submitted a second proposal that elaborated on the July submission and provided greater detail of the U.S. objectives regarding specific sectors. In particular, the United States sought to identify significant restrictions faced by service providers in specific sectors and to provide a basis upon which to focus future negotiations. Sectors that the United States believes should be taken up in the second phase of the negotiations are wide-ranging and include: accountancy, audiovisual and related services, distribution services, education and training services, energy services, environmental services, express delivery services, financial services, legal services, movement of natural persons, telecommunications, value added networks and complementary services, and tourism.16

Similarly, in December, the EC submitted to the Council for Trade in Services a list of the sectors that it considered important and on which the scope of the negotiations in the second phase ought to be focused. The sectors identified by the EC include: professional services, business services (other than professional), telecommunications, construction and related engineering services, distribution, environmental services, financial services (e.g.,

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banking, insurance, securities), tourism, and transportation (e.g., air, maritime, land). For each sector, the EC identified restrictions maintained by WTO Members and proposed less trade restrictive alternatives.

c. Intellectual Property

As noted above, the TRIPS Agreement mandates negotiations regarding geographical indications. The agreement does not specify when the talks should begin, but negotiations are already underway. A review of the entire TRIPS Agreement, required under Article 71.1, also began in 2000. Further, a review of the patentability of certain plants and animals, required to begin in 1999 under Article 27.3(b) of the TRIPS Agreement, continued in 2000.

C. Negotiating Agreements Outside the WTO—Bilateral and Multilateral Agreements Involving the United States

The United States negotiated several significant bilateral and multilateral trade agreements during the year 2000, concluding a free trade agreement with Jordan and a bilateral trade agreement with Vietnam. Negotiations also commenced or continued on the U.S.-Singapore Free Trade Agreement, the U.S.-Chile Free Trade Agreement, and the Free Trade Agreement of the Americas.

1. U.S.-Jordan Free Trade Agreement

The U.S.-Jordan Free Trade Agreement (FTA) was signed by President Clinton on October 24, 2000. One of several trade agreements as to which negotiations proceeded in the final months of the Clinton Administration, the U.S.-Jordan FTA is notable, in that it is the first bilateral trade agreement whose text includes provisions governing labor and the environment. Further, under the non-binding dispute settlement agreement, a panel can apply sanctions if one of the countries is found to violate persistently its own labor and/or environmental laws. While the U.S.-Jordan FTA was initially offered as a model for other trade agreements, questions have arisen within the new administration regarding the appropriateness of incorporating the labor and environmental provisions in future trade agreements. The agreement also addresses trade in services, intellectual property, e-commerce, government procurement, and agriculture. The U.S.-Jordan FTA and implementing legislation will be taken up in the 107th Congress.

2. U.S.-Vietnam Bilateral Trade Agreement

The U.S.-Vietnam Bilateral Trade Agreement (BTA) marks the conclusion of negotiations between the two countries that began in 1996 with the aim of improving opportunities

19. See id.
20. See id. art. 71.1.
21. See TRIPS Agreement, art. 27.3(b), supra note 9.
and the protection available to U.S. firms wishing to invest in Vietnam. An agreement in
principle was reached in July 1999, and a formal agreement was reached in July 2000.23
Through this agreement, Vietnam has made a comprehensive set of commitments regarding
tariff and non-tariff barriers for industrial and agricultural goods, protection of intellectual
property rights, investment, business facilitation, transparency, and market access to a broad
array of services. The agreement marks the first time a broad array of Vietnamese markets
will be open to investors from the United States.

In order for Vietnam to receive annual NTR status under U.S. law, a bilateral agreement
must be completed and approved by Congress, and the president must waive the require-
ments imposed by the Jackson-Vanik provision of the Trade Act of 1974.24 President Clinton
waived Jackson-Vanik every year since 1998.25 With the expected approval of the BTA by
Congress in the next session,26 the way will be cleared for Vietnam to receive NTR status
on an annual basis without going through the Jackson-Vanik waiver process. Additionally,
the agreement provides a major step in Vietnam’s commitment toward its integration into
the global economic community and lays a foundation for its eventual membership in the
WTO.

3. Other Developing Trade Agreements with the United States

a. U.S.-Singapore Free Trade Agreement

President Clinton and the prime minister of Singapore announced in November 2000
that they would launch negotiations for a bilateral free trade agreement. The U.S. and
Singapore governments began negotiating a free trade agreement in December. The Clin-
ton Administration hoped to conclude the negotiations by the end of the year, but com-
lications developed regarding the scope of the agreement, making it unlikely that an agree-
ment will be completed soon.27

The scope of the agreement is still undetermined. Proposals have been made concerning
market access for goods, safeguards, trade in services, intellectual property, dispute settle-
ment, institutional arrangements related to free trade, competition policy, customs rules,
textiles, labor and environment.28 One controversial issue is whether the agreement should
include labor and environment provisions. At the start of the negotiations, it appeared that
the Clinton Administration wanted to model the agreement after the U.S.-Jordan FTA.
With the change in administration, however, the Singapore government appears less willing
to commit to such provisions.29 Additional complications have surrounded the possibility
of including a mechanism that allows investors to challenge government decisions. While

23. See Agreement between the United States of America and the Socialist Republic of Vietnam on Trade
25. Fact Sheet, Vietnam Bilateral Trade Agreement, Historic Strengthening of the U.S. Vietnam Relation-
26. See U.S. Will Ressert Leadership on Trade, Pushing EU and Japan Aside, Zoellick Says, INSIDE U.S.
27. See Administration Works on Investment Position for Singapore FTA, INSIDE U.S. TRADE, Dec. 15, 2000,
28. See Singapore Wants to Create FTA Momentum for Bush Takeover, INSIDE U.S. TRADE, Jan. 12, 2001,
business groups seek to maintain the standard articulated under Chapter 11 of the North American Free Trade Agreement (NAFTA), labor leaders have expressed great concern over using the NAFTA standard. With the incoming administration, the status of the agreement is currently unclear.

b. U.S.-Chile Free Trade Agreement

Chile and the United States announced the start of negotiations on a bilateral trade agreement in November 2000. Negotiations officially began in January 2001. During the negotiations, Chile and the United States are expected to discuss market access, rules of origin, intellectual property, investment, sanitary and phytosanitary requirements, and other topics. Chile would like to model the FTA on the NAFTA, particularly with regard to services and investment issues. Chile also wants binding dispute settlement and would prefer the non-application of antidumping measures among signatories. The two sides, however, may disagree on how to handle labor and environmental issues. When the United States announced the negotiations, it referenced using the U.S.-Jordan FTA as a model. Chile, though not averse to including provisions governing labor and environment as part of the agreement, does not want the agreement to include the use of trade sanctions in those areas.

Negotiations will continue in early 2001. Chile expects an agreement to be concluded within one year. Conclusion of the U.S.-Chile FTA could help build momentum for the Free Trade Agreement of the Americas (FTAA).

c. Free Trade Agreement of the Americas

Technical work continued throughout 2000 within the various FTAA negotiating groups. The nine groups cover the areas of agriculture, antidumping/countervailing duties, competition policy, dispute settlement, government procurement, intellectual property, investment, market access, and services. The negotiating groups completed an initial draft of bracketed FTAA text at the end of the year, and summaries of the U.S. positions on each of these areas were released at the beginning of 2001. The summaries outline the United States' positions in each area and will provide a basis for continued dialogue between the United States and other FTAA countries.

II. Legislative Activity

A. Summary

For the past five years, Congress was unable to pass significant trade legislation. The year 2000 was a banner year, however, as the 106th Congress made up for past inactivity by debating and enacting legislation making permanent China's trading status, changing U.S. tax law regarding the treatment of overseas income, enacting a controversial provision allowing U.S. companies to receive the revenue generated from antidumping and countervailing duties, and encouraging trade with sub-Saharan Africa. The 106th Congress also affirmed the U.S. role in the World Trade Organization, enacted assorted changes to import

duty rates, renewed the president’s export control authority and limited the president’s ability to utilize economic sanctions.

B. MAJOR TRADE LEGISLATION

1. China’s Permanent Normal Trading Relations Status

By far the most controversial and visible congressional trade debate of 2000 was the vote to grant China permanent Normal Trade Relations (NTR) status. Historically, under U.S. trade law, China has been provided NTR trading status through a Presidential waiver of the provisions of Title IV of the Trade Act of 1974 (Jackson-Vanik). This waiver has been exercised on a yearly basis despite heated debate in Congress, and has reflected the temporary nature of China’s trading status under U.S. law.

The Trade Act of 1974 is one of the statutes that regulate the grant of NTR status to communist countries. NTR treatment means that any tariff or import restriction that is applied to a particular country must also be applied to all countries on an equal basis. Title IV of the Act applies a prohibition on NTR trading status for most communist countries, but allows the president to provide NTR to these countries through a “waiver” mechanism for those that allow the free emigration of their citizens. This is done through an initial presidential certification that the country in question is not engaged in improper activities related to emigration, and then an issuance of a waiver that states that the purposes of Title IV (i.e., the promotion of free emigration) will be enhanced through the waiver. Once an annual waiver has been issued, Congress has ninety days to pass a joint resolution that disapproves of this extension of the waiver. The president must renew the waiver every twelve months. To remove this conditional aspect of China’s NTR status, Congress must pass legislation that authorizes the president to determine that Title IV of the Trade Act of 1974 is no longer applicable to China.

On June 2, 2000, President Clinton exercised his authority and waived the Jackson-Vanik restrictions. Subsequently, on June 23, 2000, Representative Dana Rohrabacher (R-CA) introduced a joint resolution (H.J. Res. 103), calling for the disapproval of the president’s waiver.

In order to provide for permanent NTR status and eliminate the need for the yearly presidential Jackson-Vanik waiver, Representative Phil Crane (R-IL) introduced H.R. 4444. This bill authorized the president to permanently extend NTR status to imports from China, provided that prior to such determination the president certifies to Congress that China’s accession to the WTO contains provisions that are at least equivalent to those agreed between the United States and China in the bilateral market access agreement signed on November 15, 1999.

Among its other provisions, H.R. 4444 incorporates language sponsored by Representatives Levin (D-MI) and Bereuter (R-NE) providing for a safeguard mechanism in order
to address market disruptions that could occur as the result of certain imports from China. Specifically, this language directs the president to increase duties and impose other import restrictions on products from China that are “being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the U.S. producers of a like or directly competitive product . . .”37 The Levin-Bereuter provisions also direct the United States Trade Representative’s office (USTR) to regularly report to Congress on China’s compliance with its WTO commitments and its bilateral commitments to the United States. Finally, the Levin-Bereuter language establishes a commission to monitor human rights in China, with a particular focus on core labor standards, religious freedoms, and the development of the rule-of-law and democracy.

Lastly, the legislation expresses the sense of Congress that once China accedes to the WTO, the United States should make a formal request to the WTO that Taiwan should be immediately considered for membership.

The House approved H.R. 4444 on May 24, 2000, by a vote of 237-197. On September 19, 2000, the Senate passed the bill without amendment by a vote of 83-15, and on October 10, 2000, President Clinton signed the bill into law.38

2. Foreign Sales Corporations

The United States and the European Union have been embroiled in a dispute over the Foreign Sales Corporation (FSC) provision in U.S. law, which excludes from income tax the earnings of foreign subsidiaries of U.S. companies. (See infra part III) In July 1998, the European Union requested that a WTO dispute panel determine whether the FSC regime complies with WTO rules, including the Agreement on Subsidies and Countervailing Measures. On October 8, 1999, the panel ruled that the FSC regime was not in compliance with WTO obligations and that the United States would have to change its tax law by October 1, 2000. Subsequently, the WTO Appellate Body affirmed the lower panel’s ruling and concluded that the FSC regime constituted a prohibited export subsidy.

In response to the WTO ruling, the EU and the United States engaged in negotiations to find an amicable solution to this dispute. These negotiations delayed implementation of the WTO ruling to allow the United States to pass legislation remedying the prohibited provision. H.R. 4986, “The FSC Repeal and Extraterritorial Income Exclusion Act of 2000,” was approved by the House on September 14, 2000 and by the Senate on November 1, 2000. The president signed it into law on November 15, 2000.39

The Act replaced the FSC provisions in U.S. law with an exclusion for extraterritorial income similar to that granted by most European corporate tax systems. It is intended to comply with WTO rules because it changes U.S. tax law so that its exclusion provisions are applied to all foreign sales regardless of where the property is manufactured and whether it is exported.

In particular, H.R. 4986 identifies gross income for tax purposes as not including extraterritorial income provided that such income is qualifying foreign trade income. Extraterritorial income means gross income of the taxpayer attributable to foreign trading gross receipts. One important difference between H.R. 4986 and the previous FSC law is that, under the bill,

37. Id. § 421(a), 114 Stat. at 882.
a parent U.S. corporation is not required to establish a separate corporate affiliate abroad to obtain the benefits of the law's extraterritorial income exclusion. This exclusion is available for income from any transaction that meets certain requirements including: (1) performance of foreign economic processes; (2) solicitation, negotiation or making of a contract performed by the taxpayer outside of the United States; and (3) the incurrence of foreign direct costs in connection with the transaction exceeding 50 percent or satisfying an alternative 85 percent test. Foreign trading gross receipts include the sale of qualifying foreign trade property or the lease of qualifying foreign trade property for use by a lessee outside the United States.40

The new law became effective for transactions entered into after September 30, 2000; however, a transition provision allows FSCs that engage in transactions in the ordinary course of their trade or business to continue to use the old FSC provision until January 1, 2002.

In the opinion of the EU, H.R. 4986 did not remedy the violations identified by the WTO Panel and Appellate Body. On November 17, 2000, the EU asked the WTO to authorize trade sanctions in the amount of $4.04 billion.

3. African Growth and Opportunity Act

The African Growth and Opportunity Act, H.R. 434, passed both houses of Congress on May 11. The president signed it on May 18, 2000.41 Among the notable features of this bill were changes to the eligibility criteria for the GSP program, the creation of a “carousel” procedure for trade retaliation and a more complete package of preferential treatment for Caribbean Basin Initiative (CBI) countries.

The Act outlines congressional support of trade and development in sub-Saharan Africa primarily through reductions in U.S. tariffs on sub-Saharan goods. It also is designed to encourage the eventual creation of free trade areas with the region and encourage U.S. investment in the region.

In particular, the Act authorizes the president to designate sub-Saharan African countries as beneficiary countries under the Generalized System of Preferences program (GSP), qualifying the countries to receive duty-free treatment for certain products produced there. The legislation also grants duty-free treatment, without quantitative limitations, to textile and apparel articles imported from selected sub-Sahara African countries. The Act also encourages the president to engage in negotiations in order to create free trade agreements between the U.S. and sub-Saharan countries.

As a part of the incorporated “U.S.-Caribbean Basin Trade Partnership Act” (CBTPA), H.R. 434 also amends the Caribbean Basin Economic Recovery Act and provides for beneficiary countries designated by the CBTPA to receive preferential tariff and quota treatment for certain textile and apparel articles.

Section 407 of H.R. 434 amends the Trade Act of 1974 in relation to the manner in which the United States may retaliate against countries that do not comply with a ruling of the WTO. Specifically, if the United States receives a favorable ruling of a WTO Panel

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40. Qualifying foreign trade property includes: (1) property manufactured in the United States or manufactured outside the United States by a U.S. corporation or a U.S. taxed foreign corporation; (2) property with at least 50 percent of content and labor cost in the United States; and (3) the property will be used primarily outside the United States.

or Appellate Body, and the subject country does not comply with the ruling, the retaliation list that the United States identifies is to be periodically revised to reflect different products. This so-called "carousel" provision requires the USTR to periodically rotate or alter the retaliation list to reflect new products and categories. Under its provisions, however, if the USTR determines an offending country will imminently implement the WTO ruling, or through consultations with affected domestic industry there is agreement that it is unnecessary to change the retaliation list, the USTR is not required to make revisions. The carousel provisions have prompted strong objections from other WTO members.

Lastly, the Act removes duty-free eligibility under the GSP program for any country that has not eliminated egregious forms of child labor and generally strengthens worker rights protections under the program.

C. Other Trade Legislation

1. Byrd Amendment

The "Continued Dumping and Subsidy Offset Act of 2000," H.R. 4461, was introduced in the Senate in January 1999 as a means to address persistent dumping or subsidization of imported products that continues even after an antidumping or countervailing duty order is issued. With the 106th Congress winding down, Senator Robert Byrd (D-WV) was successful in incorporating its provisions into the Fiscal Year 2001 Agriculture Appropriations bill (H.R. 4461), without committee hearings or mark-up. The conference report passed the House on October 11, and the Senate on October 18. The president signed the bill into law on October 28.

Title X of the Act provides that any monies actually collected as the result of antidumping or countervailing duty orders may be distributed to affected domestic producers, in order to offset certain of their qualifying expenditures. Those eligible domestic producers include manufacturers and producers that are currently operating, and that were petitioners or interested parties in support of a particular countervailing duty or antidumping duty petition.

The expenditures that qualify for this offset payment include those incurred after the issuance of an antidumping or countervailing duty order. These expenditures must be related to: (1) manufacturing facilities; (2) equipment; (3) research and development; (4) personnel training; (5) acquisition of technology; (6) health care benefits to employees paid for by the employer; (7) pension benefits to employees paid for by the employer; (8) environmental equipment; (9) training or technology; (10) acquisition of raw materials and other inputs; (11) working capital; or (12) other funds needed to maintain production. Finally, the Customs Service is directed to create regulations so that eligible producers can file claims, and funds will be distributed proportionately based on the claims and duties collected.

The Byrd Amendment provoked an immediate WTO challenge from nine U.S. trading partners (see supra part II), and will be a topic of heated debate in 2001.

42. These include: (1) child slavery; (2) children used for the production and trafficking of drugs; (3) children working in conditions that are a threat to their health and safety; and (4) child prostitution or pornography.


44. See id. § 754, 114 Stat. at 1549A-73.
2. Export Administration Act

The president's authority to restrict the export of high technology products is contained in several statutes under U.S. law. The Export Administration Act (EAA) provides the President with the authority to control the export and re-export of dual-use products (i.e., those products that are predominantly for civil application, but have the potential for military use.)

Since 1979, the EAA has been renewed several times and modified to reflect changes in U.S. policy and technological development. The most recent extension of the statute expired in 1994 requiring the president to exercise his emergency authority to control exports under the International Emergency Economic Powers Act.45

In an attempt to fashion a wholesale rewrite of the statute, Senator Phil Gramm (R-TX), the chair of the Senate Banking Committee, and Senator Michael Enzi (R-WY), the chair of the subcommittee on International Trade and Finance, drafted legislation (S. 1712) designed to provide the necessary presidential authority, but also to make significant changes to the U.S. export control system. These changes included relaxation of certain export licensing procedures as well as export restrictions on products that have mass-market status. Due to a protracted jurisdictional battle between Senator Gramm's committee and the Armed Services, Foreign Relations and Government Affairs Committees, the bill was not brought up for full Senate consideration. Disputes arose between the committee chairmen on the extent to which U.S. export controls should reflect technological change and the ability of different government agencies to participate in the export licensing process.

As a stopgap measure, on November 13, President Clinton signed into law H.R. 5239 to re-authorize the EAA through August 2001.46 By renewing the EAA, this law extends protection of export license information from Freedom of Information Act (FOIA) disclosure, providing essential short-term legal protection to companies' proprietary business information when it is submitted as part of an export license application. The extension also increases the existing penalties for export control violations.

3. Economic Sanctions Reform

After much debate and negotiation, Congress adopted a measure that eased sanctions on exports of agricultural products and medicines. Title IX of the Fiscal Year 2001 Agriculture Appropriations Bill provides that the president cannot impose new economic sanctions affecting exports of agricultural products or medicine or medical products unless he prepares a report on the proposed sanction detailing the sanctioning activity and the actions of the target country. The law then requires congressional approval of this action through a joint resolution. Importantly, this provision is retroactive and requires that existing economic sanctions on agricultural products and medicines be subject to the new review and approval procedure. The language does provide a waiver authority permitting the president to impose sanctions in situations of war, for products controlled under the Export Administration Act or the Arms Export Control Act among others.

The provision also places time limits on unilateral agricultural or medical sanctions. All sanctions must terminate two years after becoming effective, unless the president provides to Congress a recommendation for continuation, and Congress enacts a joint resolution supporting the recommendation.

Finally, the language prohibits U.S. government assistance to Cuba, Iran, Libya, North Korea, and Sudan. Such assistance includes export assistance and U.S. credit or guarantees. This prohibition can only be waived by the president for reasons of national security or humanitarian concerns. A controversial provision in the bill also codifies current Department of Treasury regulations that prohibit tourist travel to Cuba.

4. Miscellaneous Trade and Tariff Bill

The “Miscellaneous Trade and Technical Corrections Act of 2000,” H.R. 4868, was introduced on July 18, 2000 by Representative Phil Crane. The bill passed the House on July 25, the Senate on October 26, and was signed by the president on November 9, 2000. The Act provides for temporary duty suspensions, reductions in duties and extensions of existing duty suspensions for a variety of products including pharmaceuticals, chemicals, television picture tubes, film and polymers among others.

H.R. 4868 also incorporates the “Product Development and Testing Act of 2000,” allowing for duty-free treatment to imports of prototypes used to promote product development, testing, product evaluation or quality control in the United States.

The legislation also decreased the duty rate for goods purchased abroad and brought back into the United States by U.S. travelers.

5. U.S. Participation in the WTO

Section 125(a) of the Uruguay Round Agreements Act (URAA) requires the president to present a report to the Congress that “include(s) an analysis of the effects of the WTO Agreement on the interests of the United States, the costs and benefits to the United States of its participation in the WTO and the value of the continued participation of the United States in the WTO.” Section 125(a) further states that upon reviewing this report, Congress may adopt a joint resolution that would rescind congressional approval of the Uruguay Round Agreements. On March 6, Representative Ron Paul (R-TX) introduced such a resolution. Under the provisions of the URAA, the resolution must be considered in committee and then automatically brought to the floor of one of the chambers for consideration. Representative Paul’s resolution was considered by the House Ways and Means Committee and reported adversely to the full House for a vote. On June 21, the House of Representatives soundly rejected Resolution 56-363.

III. WTO Dispute Settlement Activity

The WTO dispute settlement system saw more activity in 2000 than ever before. The Dispute Settlement Body (DSB) received twenty-eight requests for consultation, sixteen

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48. The complete list includes: certain HIV-AIDS drugs; specified chemicals and dyes; instant print film in rolls; certain compound optical microscopes; certain cathode-ray tubes; certain categories of raw cotton; rhinovirus drugs; tungsten concentrates; certain ion-exchange resins; vision inspection systems; anode presses; trim and form for forming capacitor leads; certain assembly machines; certain herbicides, fungicides, and pesticides; rackers used for attaching raw anodes to process bars; certain self-adhesive sheets; certain polyamides; certain plastic additives; a certain organic surface-active agent; monochrome glass envelopes; ceramic coater for laying down and drying ceramic; color instant print film; and certain semi-manufactured forms of gold. Id.
50. Id.
requests for the establishment of a panel, and thirteen appeals to the Appellate Body. Eleven Appellate Body and twenty panel reports were adopted by the DSB during the course of the year. As of this writing, five disputes are before panels, three are pending DSB approval (and may still be appealed), three are before the Appellate Body, and thirty-nine are in the implementation phase.

It was an exciting year for those interested in the development of the DSB's interpretation of WTO agreements, particularly the agreements covering antidumping and safeguard measures. After a full year in which no disputes were decided concerning antidumping measures during 1999, six panel reports were issued in 2000 involving such disputes. In these and other disputes, panels and the Appellate Body both appeared more willing than anticipated to undertake intensive review of the factual grounding for the challenged determinations before them. In many instances, the reports adopted by the DSB found violations of WTO agreements requiring that important changes be made to members' laws and/or specific measures.

It remains to be seen, however, whether WTO members are truly committed to implementing rulings adopted by the DSB. So far, the record on implementation is mixed. Some members have simply refused to comply, thus accepting the suspension of concessions by complaining members. Others have chosen to adopt merely cosmetic or case-specific changes to their laws in a somewhat veiled effort to comply, which inevitably leads to repeat litigation. The result is a concern that the integrity of the WTO dispute settlement system is at stake.

We summarize below the most important panel and Appellate Body decisions from 2000, as well as the implementation status of various disputes as of the end of the year.

A. Final Appellate Body and Panel Reports

1. Reports on Anti-Dumping Measures

Several decisions were made by panels and the Appellate Body during 2000 concerning various countries' adoptions and applications of laws pursuant to the Anti-Dumping Agreement (AD Agreement).\(^1\) The rulings provided authorities with broad leeway concerning procedural matters—such as the information necessary for initiation of an investigation—and set important parameters for the calculation of antidumping margins and the determination of injury.

In a dispute filed by the United States, the panel in Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States\(^2\) found on January 28, 2000, that Mexico had acted inconsistently with the AD Agreement in several respects. First, with respect to the injury analysis, the panel found violations of Articles 3.1, 3.4, and 3.7 of the AD Agreement due to Mexico's inadequate analysis of the subject imports' impact on the domestic industry, as well as its failure to adequately assess the impact of other factors. It also found that the Mexican authority had based its determination of threat of material injury on only a part of the industry's production rather than on the industry as a whole, in violation of Articles 3.1, 3.2, 3.4, and 3.7 of the AD Agreement. The panel

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also found that the procedures and analysis Mexico used for applying provisional measures did not conform to Articles 7.4, 10.2, 10.4, 12.2, or 12.2.2. The panel found no violation with respect to the other U.S. procedural challenges regarding initiation and negotiation under Articles 5 and 12 of the AD Agreement. Mexico did not appeal the ruling, and the panel report was adopted by the DSB on February 24, 2000. The dispute in United States—Anti-Dumping Act of 1916 involved an antiquated U.S. law seldom used until the late 1990s that permits private claims against, and criminal prosecutions of, parties that import or assist in importing goods into the United States at a price substantially less than the actual market value or wholesale price. Despite the existence of separate antidumping laws later passed pursuant to GATT agreements, this law remains in effect and was recently used by the U.S. steel industry against imports of product from Japan and the European Communities (EC). Both Japan and the EC complained that the 1916 Act violated the AD Agreement. In a report issued on March 31, 2000, the panel agreed with the complainants, finding that (a) the specific intent requirement of the Act does not satisfy the material injury test required by the AD Agreement, (b) that civil and criminal penalties allowed by the Act surpass the antidumping duty remedy contemplated by the AD Agreement, and (c) that the procedural requirements set forth in the AD Agreement were not provided for by the Act. The United States appealed the panel’s findings, but the Appellate Body’s report upheld the panel in all respects. The DSB adopted the reports on September 26, 2000.

In its request for a panel in Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (Thailand—H-Beams), Poland argued that Thailand’s antidumping measures violated Articles 2, 3, 5 and 6 of the AD Agreement.

53. Note that the U.S. claims under Article 5 (initiation) concerned the fact that the industry petitioning the case produced sugar while the imported product was high fructose corn syrup (HFCS). Yet, oddly, the United States did not separately claim under Article 2.6 that the Mexican authority had inappropriately defined the like product or that the petition was WTO-inconsistent because the industry producing the like product had not been shown to support the petition as required by Article 5. Rather, the United States merely argued that because the like product (sugar) and the imported product (HFCS) were not identical, the question of production of HFCS in Mexico was important to defining the domestic industry for purposes of initiation, and that any decision concerning the issue should have been reflected in the notice of initiation. Because the standard for initiation (as well as initiation notification) is relatively low under the AD Agreement, this proved to be an ineffective method of challenging the mismatched imported and like product. The panel noted the failure of the United States to make this argument. Id. at n.555.


56. See Wheeling-Pittsburgh Steel Corp. v. Mitsui Co., 35 F. Supp. 2d. 597 (S.D. Ohio 1999), aff'd 221 F.3d 924 (6th Cir. 2000) (holding that plaintiff is not required to allege predatory intent on part of defendant in order to state claim for violation of Anti-Dumping Act; and allegations were thus sufficient to state claim under the Act but state law claims asserted by plaintiff were completely preempted by the Act). See also Geneva Steel Co. v. Ranger Steel Supply Corp., 980 F. Supp. 1209 (D. Utah 1997) (holding that the producer was not required to allege antitrust injury or predatory pricing in order to state a claim under the Act).


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The panel agreed with Poland on several counts, finding in its October 13, 2000, report that Thai authorities: (a) did not consider the price effects of dumped imports on the basis of an objective examination of positive evidence as required by Articles 3.1 and 3.2; (b) 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 as required by Article 3.1; and (c) due to the failure to comply with Articles 3.1, 3.2, and 3.4, failed to meet the requirements for finding a causal relationship between dumped imports and any possible injury as required by Article 3.5. The panel also concluded, however, that Poland failed to establish that Thailand’s initiation of the antidumping investigation on imports of H-beams from Poland was inconsistent with the requirements of Articles 5.2, 5.3 and 5.5 of the AD Agreement or Article VI of the GATT 1994. The panel also found that Thailand had acted consistently with its obligations under Article 2 of the AD Agreement or Article VI of the GATT 1994 in the calculation of the amount for profit in constructing normal value. DSB adoption of this report is delayed pending Thailand’s appeal to the Appellate Body, noticed on October 23, 2000.60 The Appellate Body’s report is due on March 12, 2001.

In Guatemala—Definitive Anti-Dumping Measure Regarding Grey Portland Cement from Mexico61 the panel found that Guatemala had violated nearly all procedural and substantive aspects of the AD Agreement, having failed to bring its antidumping law into conformance with the AD Agreement prior to applying its measures on cement imports from Mexico. In an uncommonly strong recommendation, the panel stated “In light of the nature and extent of the violations in this case, we do not perceive how Guatemala could properly implement our recommendation without revoking the anti-dumping measure at issue in this dispute.”62

In European Communities—Anti-Dumping Measures on Imports of Cotton Type Bed-Linen from India63 (EC—Bed Linen), India challenged various aspects of an EC antidumping measure. In a report circulated on October 30, 2000, the panel concluded that the European Communities acted inconsistently with its obligations under the AD Agreement when it: (a) calculated dumping margins using a methodology that increases negative margins on individual matches to zero, in violation of Article 2.4.2; (b) failed in its injury analysis to evaluate all relevant factors having a bearing on the state of the domestic industry, as required by Article 3.4; (c) considered information for producers not included in the defined domestic industry in analyzing the state of that industry, in contravention of Article 3.4; and (d) failed to explore possibilities of constructive remedies before applying antidumping duties, as required by Article 15. The panel found no violations of the AD Agreement in the manner by which the EC: (a) calculated profit in constructing normal value; (b) included all cumulated subject imports (from India, Egypt, and Pakistan) in its analysis of injury,

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62. Id. at 381.
regardless of whether all such imports were in fact dumped; (c) considered information for producers comprising the domestic industry but not among the sampled producers in analyzing the state of the industry; (d) examined the accuracy and adequacy of the evidence prior to initiation; (e) established industry support for the application of antidumping measures; and (f) provided public notice of its final determination.

Most of the issues decided here were unsurprising, but the panel's ruling on zeroing—a practice by which negative dumping margins are increased to zero and therefore effectively ignored in weighted average dumping calculations—could have a significant impact on dumping margin calculations conducted not only by the EC but by other authorities as well (particularly the U.S. Department of Commerce). DSB adoption of this report, however, is delayed pending the EC's appeal to the Appellate Body, noticed on December 1, 2000.  

The Appellate Body's report is due on March 1, 2001.

In United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea (U.S.—Stainless Steel), Korea complained that the United States had violated several provisions of the AD Agreement as well as GATT 1994. Whereas most other disputes involving the AD Agreement raised important methodological issues, this dispute addressed mostly fact-specific issues. Korea, for instance, argued that the U.S. Department of Commerce (USDOC) had performed an unnecessary and impermissible double currency conversion of certain home market sales in calculating normal value. The panel agreed with Korea for some but not all sales, saying that USDOC had violated Article 2.4.1 in conducting its double conversion. Korea had also argued that this unnecessary conversion resulted in a violation of Article X:3(a) of GATT 1994 because USDOC had departed from an established policy, thus making the conversion non-uniform with previous decisions. The panel disagreed, finding that the United States had not departed from an established policy, but also noting that even if it had so departed, Article X:3(a) was not intended to address such departures: "In our view, the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated; it cannot be understood to require identical results where relevant facts differ."

Korea also complained that USDOC treated the value of unpaid export sales as "direct selling expenses" warranting price adjustments in its dumping margin calculation. The panel found that such treatment did not comport with Article 2.4 of the AD Agreement, particularly given the unforeseen nature of the cost associated with the customer's nonpayment. To the extent USDOC had used such expenses to adjust normal value, the panel found that such adjustment did not fall within the category of "differences in conditions and terms of sale" in the third sentence of Article 2.4; to the extent USDOC had used the expenses to construct export price, the panel found that they were not "costs... incurred between importation and resale" as set forth in the fourth sentence of Article 2.4.

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66. Id. at para. 6.51.
67. Id.
68. Id.
69. Id.
Korea also alleged that USDOC inappropriately divided its investigation into two averaging periods to take account of a major devaluation of the Korean won during the first half of the yearlong investigation period. Although the panel found that Article 2.4 does not preclude the use of multiple averages per se, it ruled that multiple averaging in this case 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." In the panel's view, the devaluation of the won alone did not make normal value and export price non-comparable.

As of this writing, notices of appeal had not yet been made in this dispute. Given the case-specific nature of the findings, and the relatively uncommon set of facts subject to dispute, this may be a case the United States chooses to let stand.

2. Reports on Safeguard Measures

The most important safeguards case to be decided in 2000 was United States—Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities. In its complaint, lodged on March 17, 1999, the EC argued that the U.S. safeguard measures of May 30, 1998, in the form of a quantitative limitation on imports of wheat gluten, violated 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.

In its report circulated July 31, 2000, the panel found that the U.S. measure was inconsistent with Articles 2.1 and 4 of the Safeguards Agreement in that (a) the causation analysis applied by the U.S. International Trade Commission (ITC) did not ensure that imports were "by themselves" causing serious injury to the domestic industry and, in turn, that any injury caused by other factors was not attributed to imports; and (b) imports from Canada (a NAFTA partner) were excluded from the application of the measure even though they had been included in the ITC's analysis of serious injury by reason of increased imports. The panel also found that the United States 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. The panel further concluded that, in notifying its decision to take the measure after the measure was already implemented, the United States did not make timely notification under Article 12.1(c), and did not provide adequate opportunity for prior consultations on the measure under Article 12.3. The panel also concluded that the United States had violated its obligation under Article 8.1 of the Safeguards Agreement to endeavor to maintain a substantially equivalent level of concessions and other obligations to that existing under the GATT 1994 between it and the exporting Members that would be affected by such measures, in accordance with Article 12.3 of the Safeguards Agreement.

Both the United States and the EC appealed the Wheat Gluten panel's decision to the

70. Id.
72. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A—Agreement on Safeguards, (Dec. 15, 1993).
73. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A—Agreement on Agriculture, (Dec. 15, 1993).
Appellate Body, which ruled on December 22, 2000.\(^7\) In its report, the Appellate Body overruled the panel on certain important issues, but agreed with the panel's conclusion that the U.S. safeguard measure had violated the Safeguards Agreement. The most important issue on which the Appellate Body reversed the panel concerned causation. Although it agreed that it remains necessary for authorities to ensure that the injury caused by other factors are not attributed to imports, the Appellate Body disagreed with the panel's ruling that increased imports alone must be the cause of serious injury under Article 4.2(b) of the Safeguards Agreement.\(^7\) In doing so, however, the Appellate Body failed to make clear—perhaps purposefully—what standard for causation should be applied by authorities considering the application of safeguards measures.

In *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand & Australia*\(^7\) (U.S.—Lamb Meat), Australia and New Zealand claimed that the United States' safeguard measure on lamb meat imports violated Articles 2, 3, 4, 5, 8, 11 and 12 of the Safeguards Agreement, and Articles I, II, and XIX of GATT 1994. In a report circulated on December 21, 2000, the panel largely agreed with the complainants, finding that the United States had acted inconsistently with its WTO obligations by: (a) failing to demonstrate as a matter of fact the existence of "unforeseen developments" as required by Article XIX:I (a) of GATT 1994; (b) defining the domestic industry as including input producers (i.e., growers and feeders of live lambs) as producers of the like product (i.e., lamb meat) in violation of Article 4.1(c) of the Safeguards Agreement; (c) failing to obtain data in respect of producers representing a major proportion of total domestic production by the domestic industry as defined by the investigation; and (d) failing to establish that increased imports were by themselves a necessary and sufficient cause of threat of serious injury and, in turn, that the effects of other factors were not attributed to increased imports.\(^7\)

As of year-end, the United States had indicated in press reports its intent to appeal this panel report to the Appellate Body.\(^8\) This appeal will without doubt address the causation standard, particularly given that the panel in *U.S.—Lamb Meat* relied on certain aspects of the causation standard analysis adopted by the panel in *U.S.—Wheat Gluten*, which was subsequently overruled by the Appellate Body.

3. Reports on Intellectual Property Protection

The year 2000 was an important year for consideration of disputes involving intellectual property, as protected under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).\(^8\)

In *Canada—Patent Protection of Pharmaceutical Products*,\(^8\) the EU challenged the Canadian Patent Act as being incompatible with the TRIPS Agreement, arguing that the Act allows

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\(^6\) See id. at para. 70 & 91.


\(^8\) See id.


generic drug manufacturers to produce and stockpile patented drugs, during the patent term, in order to obtain regulatory approval of the generic drug, and of marketing it without delay after the patent expires. The EU claims that the Act discriminated against legitimate inventions and provided inadequate protection to patent holders. In a report issued on March 17, 2000, the panel concluded that the production of patented drugs for the purpose of obtaining regulatory approval is consistent with the TRIPS Agreement, but that the stockpiling of such drugs is not. The panel report was adopted on April 7, 2000. The implementation period, set by an arbitrator, ended on October 7, 2000. On October 23, 2000, Canada informed the DSB that it had implemented the recommendations by the October 7, 2000 deadline.

The dispute in United States—Section 110(5) of the U.S. Copyright Act involved a U.S. provision of the Fairness in Music Licensing Act of 1998, which provided that certain retail establishments (including bars, shops, restaurants) may play radio and television music without paying royalties to songwriters and music publishers under two exemptions. The EU claimed that these exemptions violated Article 9.1 of the TRIPS Agreement. In a report circulated on June 15, 2000, and adopted by the DSB on July 27, 2000, the panel agreed that the “business” exemption violated the TRIPS Agreement; however, it found that the “homestyle” exemption met the requirements of the Agreement. The “business” exemption allowed for food service, drinking, and retail establishments to play music in their places of business without special authorization or payment of a fee, provided that the businesses did not exceed the size limitation. The “homestyle” exemption only permitted the use of equipment commonly used in private homes and did not have a limitation on the size of the establishment that would qualify. The reasonable period of time for implementation went to an arbitrator, and the arbitrator determined that this period would expire on July 27, 2001.

In Canada—Term of Patent Protection, the United States argued that the Canadian Patent Act was inconsistent with the TRIPS Agreement, which obligates WTO members to grant a term of protection for patents that runs at least twenty years from the filing date of the underlying application, and requires each Member to grant this minimum term to all patents existing as of the date of the Agreement to that Member. Under Canada’s law, the term granted to patents issued pursuant to applications filed before October 1, 1989, is only seventeen years from the date on which the patent was issued. In a report issued on May 5, 2000, the panel agreed with the United States. Upon Canada’s appeal, the Appellate Body confirmed the panel’s ruling in all respects. The DSB adopted both reports on
October 12, 2000. On December 17, 2000, the United States requested that the period of time for implementation be decided by an arbitrator.

4. Reports on Subsidy and Other Measures

The Appellate Body issued its report on February 24, 2000 in United States—Tax Treatment for “Foreign Sales Corporations.” In this dispute, the EC had challenged a provision of the U.S. Internal Revenue Code under which foreign sales corporations (FSCs)—corporations created, organized, and maintained in a qualified foreign country or U.S. possession outside U.S. customs territory—were provided tax exemptions for foreign trade income. The EC claimed that such exemptions constituted prohibited export subsidies and import substitution subsidies under the Agreement on Subsidies and Countervailing Measures (SCM Agreement), as well as export subsidies under the Agreement on Agriculture.

The panel agreed, in an October 8, 1999 report, with the EC’s export subsidy claims under both the SCM Agreement and the Agreement on Agriculture, but not the import substitution subsidy claim. Following a U.S. appeal, the Appellate Body found that the panel was correct with respect to the SCM Agreement, but not the Agreement on Agriculture; rather, the United States had violated provisions of the Agreement on Agriculture that the panel had not identified. The reports were adopted on March 20, 2000. The United States promised to comply with the recommendations—though, as discussed below, the U.S. method of compliance has met opposition from the EC.

The panel in Canada—Certain Measures Affecting the Automotive Industry addressed complaints brought by both the EU and Japan regarding measures adopted by the Canadian government to implement the 1965 U.S.-Canada Automotive Products Agreement (Auto Pact). The EU and Japan argued that under the Auto Pact, Canada limits duty-free importation and distribution of vehicles to a small number of manufacturers in the United States. Japan further claimed that this duty-free treatment was contingent on (a) a value-added requirement and (b) a manufacturing and sales requirement. A single panel considered the complaints and issued its report on February 11, 2000. The panel found that the conditions under which Canada granted its import duty exemption were inconsistent with the most favored nation principle set forth in Article I of GATT 1994 and not justified under the free trade area exception of Article XXIV of GATT 1994. It further found the application of the Canadian Value Added (CVA) requirements to be inconsistent with the national treatment rule under Article I:4 of GATT 1994. The panel also found that the import duty exemption constitutes a prohibited export subsidy in violation of Article 3.1(a)

93. See id., Agreement on Agriculture.

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of the SCM Agreement, as well as a subsidy conditioned on the use of domestic and imported goods in violation of SCM Article 3(b). In addition, the panel found that the manner in which Canada conditioned access to the import duty exemption is inconsistent with the most-favored-nation principle of Article II of the General Agreement on Trade in Services (GATS)\(^\text{96}\) and could not be justified under any exceptions of Article V of GATS. Finally, the panel found that the application of the CVA requirements constitutes a violation of the national treatment requirements of Article XVII of the GATS.

Canada appealed certain aspects of the panel's report. In a report circulated on May 31, 2000,\(^\text{97}\) the Appellate Body upheld the panel's finding with respect to the GATT 1994 violations and Article 3(a) of the SCM Agreement. The Appellate Body, however, reversed the panel's conclusion that Canada had violated Article 3.1(b) of the SCM Agreement due to a lack of adequate factual findings. The Appellate Body also found 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 and therefore reversed the panel's conclusion that the import duty exemption was inconsistent with the requirements of Article II:1 of the GATS. The DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report, on June 19, 2000. An arbitrator set the deadline for implementation as February 19, 2001.\(^\text{98}\)

The dispute in Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef\(^\text{99}\) addressed claims by the United States and Australia that Korea maintained a regulatory scheme that discriminates against imported beef by confining sales of imported beef to specialized stores (the so-called “dual retail system”), limiting the manner of its display, and otherwise constraining the opportunities for the sale of imported beef. The complainants also 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 that, combined with other supports, exceed the aggregate measure reflected in Korea's schedule accompanying the WTO Agreements. Because these restrictions apply only to imported beef and therefore deny national treatment to beef imports, and because the support provided to the domestic industry amounts to domestic subsidies, the complainants 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.

The panel found that a number of the contested Korean measures benefited, by virtue of a Note in Korea's Schedule of Concessions, from a transitional period until January 1, 2001, by which date they had to be eliminated or otherwise brought into conformity with the WTO Agreement. The panel went on to find that the requirement that the supply of beef from the LPMO's wholesale market be limited to specialized imported beef stores and that those stores bear a special sign “Specialized Imported Beef Store” was in violation of national treatment under Article III:4 of GATT 1994. The panel further found that the

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more stringent record keeping requirements imposed on purchasers of imported beef also violated national treatment.

The panel also found that the LPMO's lack of and delays in calling for tenders and its discharge practices in 1997 and 1998 constituted import restrictions contrary to Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Moreover, the panel determined that the LPMO's calls for tenders that were made subject to distinctions between grass-fed and grain-fed cattle, constituted a restriction inconsistent with Article XI:1. They also treated imports of beef from grass-fed cattle less favorably than provided for in Korea's Schedule, in violation of Article II:1(a) of the GATT 1994. The panel found, in addition, that Korea's domestic support for beef in 1997 and 1998 was not correctly calculated and therefore (a) exceeded the de minimis levels set forth in Article 6 of the Agreement on Agriculture; (b) exceeded Korea's commitment levels, as specified in Section 1, Part IV of its Schedule, contrary to Article 3.2 of the Agreement on Agriculture; and (c) was not included in Korea's Current Total Aggregate Measurement of Support (AMS), contrary to Article 7.2(a) of the Agreement on Agriculture.

Korea appealed the panel report to the Appellate Body, which circulated a report on December 11, 2000 in which it upheld most of the panel's findings but reversed those related to Korea's domestic support for beef in 1997 and 1998. Having found a mistake in the panel's calculations, the Appellate Body could not support the panel's conclusions with respect to Articles 3.2, 6, and 7 of the Agreement on Agriculture. The DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report, on January 10, 2001.

B. IMPLEMENTATION

Implementation of European Communities—Regime for Importation, Sale and Distribution of Bananas is underway following a difficult arbitration process. Both the United States and Ecuador had complained of the EC's failure to implement the DSB-adopted reports of the panel and Appellate Body by the agreed upon deadline of January 1, 1999. Procedures had been developed for the DSB to respond to these complaints, but the arbitrators proved unable to meet their deadline of March 2, 1999 to reach a decision. The arbitrators informed the parties of their need for more time and information. The U.S. Customs Service nonetheless issued on March 4, 1999 a memorandum instructing its Customs Area and Port Directors to impose sanctions on imports from the EC estimated to be worth $500 million in sales per year. This action precipitated the EC's separate request for establishment of a panel in which it claimed that the United States took retaliatory action without approval of the DSB.

While this dispute brewed, the arbitrators issued their decision on April 9, 1999, granting U.S.$191.4 million in annual concessions to the United States and U.S.$201.6 million to

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On the same day, the United States altered its March 3, 1999 measure to comply with the arbitrators’ decision. Both the United States and Ecuador requests for authorization of suspension of concessions or other obligations were approved by the DSB. The EC later informed the DSB on November 19, 1999 of its new two-stage process for reforming the banana regime. This process was to begin with a tariff rate quota system, which would be replaced by a tariff-only system no later than January 1, 2006. However, due to divergent views within the EC, this system was never implemented. On October 23, 2000, the EC proposed that it would establish a tariff-rate quota and manage it on a “first-come first-served” basis. In the meantime, the EC would initiate Article XXVIII negotiations to work towards a tariff-only system. As of November 30, 2000 the EC was in the process of implementing this system. Meanwhile, the U.S. and Ecuador sanctions remain in place.

When the United States implemented its $500 million in concessions in March 1999, without prior DSB approval, the EC brought the issue to the WTO. The panel considering the EC complaint against the United States found on July 17, 2000, that the United States had violated the DSU by implementing its measures before the DSB had given its authorization. The United States appealed this decision, but the Appellate Body held on December 11, 2000, that though the panel had erred in certain respects, its overall finding was correct. However, it further found that the issue was moot because the offending measure was no longer in existence. Therefore, it chose not to make any recommendation to the DSB.

The other well-publicized dispute between the United States and the EC—European Communities—Measures Affecting Meat and Meat Products (Hormones)—has not progressed beyond the suspension of concessions. The period of implementation of the panel report expired on May 13, 1999. After this period expired, both the United States and Canada requested the DSB to authorize a level of suspension of concessions. The EC requested

103. See Arbitration Decision on Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WT/DS27/ARB (Apr. 9, 1999), at http://www.wto.org.
104. See Recourse by the United States to Article 22.7 of the DSU, Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/49 (Apr. 9, 1999), at http://www.wto.org; Recourse by Ecuador to Article 22.2 of the DSU, Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/52 (Nov. 9, 1999), at http://www.wto.org. Note that Ecuador, given its developing country status, opted to suspend concessions or obligations stemming from the trade-related intellectual property rights under various categories set out in Part II of the TRIPS Agreement.
arbitration, which determined that the level of nullification suffered by the United States to be $116.8 million and that suffered by Canada to be Cdn.$11.3 million. The DSB authorized the suspension of concessions to the EC on July 26, 1999. No further notice has been given to the WTO regarding the progress of the implementation of this case.

The implementation period for United States—Import Prohibition of Certain Shrimp and Shrimp Products ended on December 6, 1999. On January 14, 2000, the United States noted that it had revised guidelines for implementing its shrimp/turtle law. Malaysia was not satisfied with this proposal because the United States did not lift the import prohibition and did not take measures to allow the importation of certain shrimp and shrimp products in an unrestrictive manner. Malaysia requested the matter be referred to the original panel and the DSB did so on October 12, 2000. No further action has been taken.

Implementation of Australia—Measures Affecting the Importation of Salmon remains unresolved. On July 28, 1999, after the period of implementation had expired, Canada requested authorization to suspend concessions to Australia and also requested that the original panel review whether Australia’s measures were sufficient to comply with the adopted panel report. On February 18, 2000, the panel found that due to delays in the entry into force of several measures, there were no measures that “existed” during the period of implementation, which would bring Australia’s law into conformity with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The DSB adopted the panel report on March 20, 2000. Canada requested approval to institute Cdn.$45 million in tariff concessions as well as a surtax of 100 percent above existing customs duties on a list of products. The DSB sent the request to arbitration pursuant to Australia’s request and no further action has taken place.

Japan has made effective efforts to comply with the ruling in Japan—Measures Affecting Agricultural Products. On December 31, 1999, Japan removed the varietal testing requirement as well as the “Experimental Guide.” Also, on February 24, 2000, Japan announced

113. See United States Original Complaint, Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WT/DS26/ARB (July 12, 1999), at http://www.wto.org. See also Canada Original Complaint, Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WT/DS48/ARB (July 12, 1999), at http://www.wto.org.
114. See id.
120. See Multilateral Agreements on Trade in Goods, supra note 82, Agreement on the Application of Sanitary and Phytosanitary Measures [hereinafter SPS Agreement].

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its expectation to reach an agreement with the United States with respect to new quarantine technology. Korea, likewise, has complied with the decision in Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products by lifting its safeguard measure on May 20, 2000. Similarly, Guatemala abided by the decision in Guatemala—Definitive Anti-Dumping Measure Regarding Grey Portland Cement from Mexico and has removed its antidumping measure.

On September 26, 2000, Mexico claimed to have implemented the ruling in Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, but the United States asked that the matter be referred to the original panel to determine whether Mexico’s implementation conformed to the panel’s recommendation. As of this writing, the panel’s consideration of the issue was delayed pending U.S.-Mexico consultations over a mutually agreeable solution under Articles 21 and 22 of the DSU.

Similarly, due to dissatisfaction with the United States’ measures to comply with the ruling in United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, Korea requested on March 9, 2000, that a panel review the U.S. measures. Before the panel could issue its opinion, however, the United States revoked the antidumping order in question due to an agreement reached between the United States and Korean industries during the course of a five-year “sunset” review conducted by the U.S. Department of Commerce. (See infra Part IV.)

Another mutual decision was reached in Australia—Subsidies Provided to Producers and Exporters of Automotive Leather. The original panel, reconvened pursuant to a request by the United States, found on January 21, 2000, that Australia had failed to withdraw the prohibited subsidies within ninety days and therefore did not take sufficient measures to comply with the DSB recommendation. After the DSB had adopted the report on Feb-

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137. See WTO Panel Report on Australia—Subsidies Provided to Producers and Exporters of Automotive Leather, WT/DS126/RW (Jan. 21, 2000), at http://www.wto.org. The panel stated that payment of interest was not required—thus permitting a WTO-prohibited interest-free loan contingent on exports.
uary 11, 2000, Australia and the United States notified the DSB that they had reached a mutually satisfactory solution on July 24, 2000. Specifically, Australia agreed to a payment of A$7.2 million to the Australian Government by Howe Leather, the company found to have been receiving assistance provided in a manner inconsistent with Australia's WTO obligations; the removal of automotive leather from eligibility for support under certain Australian industry assistance programs; and a prohibition on other subsidies, either direct or indirect, that are related to or benefit the manufacture, sale or distribution of automotive leather for a period of twelve years. Also, there would be a suspension of certain custom duties on a most-favored-nation basis, with effect from July 1, 2000, and a binding arbitration would be instituted in the event of a dispute over the implementation or application of the mutually satisfactory solution.

Brazil was found to have violated the Subsidies Agreement in *Brazil—Export Financing Programme for Aircraft*. Brazil requested the original panel to review whether the measures adopted by Brazil following DSB adoption of the panel report were compliant with the panel's findings. A reconvened panel concluded, and the Appellate Body agreed, that Brazil had failed to bring its measures into compliance. The arbitrators granted Canada Cdn.$344.2 million per year in countermeasures, and the DSB authorized suspension of tariff concessions in that amount on December 12, 2000.

In a parallel case, *Canada—Measures Affecting the Export of Civilian Aircraft*, Brazil requested a panel on November 23, 1999, because it believed the Canadian measures did not fully carry out the DSB decision. The panel ruled on May 9, 2000, that Canada did not implement the DSB recommendation to withdraw the Canada Account assistance to the Canadian regional aircraft industry within the period of implementation. Brazil appealed certain aspects of the panel's report on May 22, 2000. The Appellate Body determined on July 21, 2000, that the panel had erred in refusing to hear one of Brazil's arguments. However, this had no substantive effect on the outcome because the Appellate Body further found that Brazil had failed to establish that Canada had not implemented the recommendations of the DSB because it could not establish that the revised Technology Partnership Canada (TPC) program violated the Subsidies Agreement.

Brazilian protest over Canadian subsidization of Brazilian aircraft is continuing. On January 10, 2001, the Brazilian Foreign Ministry stated that Canada has now publicly admitted

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144. See Recourse by Brazil to Article 21.5 of the DSU, WT/DS70/9 (Nov. 23, 1999), at http://www.wto.org.

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to the usage of illegal subsidies on aircraft. On the same day, Canada announced that it would subsidize Bombardier to help it win a bid to build seventy-five regional jets. It remains to be seen if this debate has ended, or if another case will be brought before the WTO.

In an attempt to comply with the DSB's ruling in *United States—Tax Treatment for "Foreign Sales Corporations,"* the U.S. Congress passed and the President signed into law the FSC Repeal and Extraterritorial Income Exclusion Act (FSC Replacement Act), effective November 15, 2000. (See supra Part I.) On November 17, 2000, the EC requested consultation with the United States and DSB approval to initiate countermeasures and suspend concessions, claiming that the FSC Replacement Act provides equally prohibited subsidies to U.S. exporters as did the FSC scheme and introduced further prohibited subsidies to certain foreign corporations. The United States and the EC agreed that the United States will seek arbitration on the EC's request, and that the arbitration will be suspended until the panel has decided on the implementation measures of the United States. The United States requested arbitration on November 27, 2000; on December 7, 2000, the EC requested that the panel reconvene to consider its new complaints.

There has been little progress in the implementation of the panel and Appellate Body reports in *United States—Anti-Dumping Act of 1916.* Although the United States has indicated its intent to comply with the decisions, consultations with Japan and the EC failed to reach a suitable period of time for implementation. As of December 19, 2000, the parties had agreed on an arbitrator and extended the deadline to February 28, 2001, to determine the period of time for implementation.

C. Pending Disputes

In addition to the pending appeals discussed above, as well as the implementation measures being considered by various panels, several other disputes remain pending before
panels as of this writing. Of these, the panel report in United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan promises to contain important decisions regarding U.S. antidumping law and practice. Specifically, Japan's complaint in this dispute addresses: (a) the application of facts available, adverse or otherwise; (b) the calculation of the "all others" rate; (c) the exclusion of sales to affiliated parties through use of the "arm's length" test; (d) the replacement of home market sales to affiliates with affiliates' resales; (e) the early and retroactive application of provisional measures through findings of "critical circumstances"; (f) the existence and use of the captive production provision in the injury analysis; and (g) appropriate standards for determining a causal connection between imports and a domestic industry's alleged injury. Japan's complaint also makes novel arguments under Article X:3 of GATT 1994, claiming that the U.S. antidumping measures on hot-rolled steel were not made in a uniform, impartial, or reasonable manner.

The controversy over the subsidy calculation methodology at issue in United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (U.S.—Lead and Bismuth Steel) continues to linger. The panel and the Appellate Body ruled in that case that the Commerce Department improperly assumed that privatized companies continued to benefit from subsidies granted when the companies were government owned. After a change in ownership, the Appellate Body held that the Department could not make an "irrebuttable" presumption that the benefit of the subsidy flows to the new owners; it must instead prove that a benefit is being granted to the new owners.

Ultimately, the measures at issue in U.S.—Lead and Bismuth Steel were terminated due to a lack of domestic interest, thereby alleviating the need to adopt a new methodology as applied to that case. However, following a CAFC ruling on the same issue, the Commerce Department requested remands on four subsidy cases that had been pending before the CIT. As of the end of the year, the Department had begun to explain its revised methodology for these redeterminations, stating that it would investigate each sale or privatization in an effort to determine whether the post-transaction entity is the same legal "person" and thus continues to benefit from the subsidy. As part of its analysis, the Department said it would analyze such factors as the continuity of general business operations, production facilities, assets and liabilities, and personnel.

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159. The panel report, which was issued in December of 1999, was appealed to the Appellate Body by the United States. The Appellate Body, in turn, upheld the panel's conclusions in all respects. Appellate Body Report on United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R (May 10, 2000), at http://www.wto.org.


Meanwhile, the European Communities requested consultations at the WTO on fourteen countervailing duty cases in which the United States maintained duties on privatized companies using the old methodology. The European Communities were also expected to request WTO consultations with the United States regarding the new methodology. In January 2001, Brazil also requested consultations aimed at challenging both the old and new methodologies used by the Department of Commerce. As of the writing of this article, no further action has been taken on this issue.

Finally, on December 21, 2000 Japan, Australia, Brazil, Chile, India, Indonesia, Korea, Thailand, and the EU requested consultations with the United States to discuss the recently passed “Byrd Amendment” under which antidumping duties are to be paid to the members of the domestic industry that petitioned for the relief. (See supra Part I.) It is expected that the nine challenging Members will request establishment of a panel to resolve the dispute. This will be an important case given the potential ramifications of using antidumping duties as direct payments to domestic industries.

IV. Unfair Trade Remedies

A. Summary

From both a national and international perspective, the year 2000 was marked by active use of trade remedies, and specifically antidumping laws. An October 2000 report by the United Nations Conference on Trade and Development (UNCTAD) noted that antidumping (AD) and countervailing duty (CVD) actions are now the most frequently used global trade remedies. The report also found that developing countries are becoming more frequent targets of AD and CVD actions—and are also increasingly enacting and using AD and CVD laws themselves.

According to the WTO Committee on Antidumping Practices, the European Union initiated the highest number of new antidumping investigations for the year ending June 30, 2000, with forty-nine new investigations. The United States initiated seventeen new investigations during this time. India reported the most provisional antidumping measures and most impositions of definitive duties. The most frequent targets of antidumping duties were Asian countries, most notably China, South Korea, and Taiwan.

B. Developments at U.S. Department of Commerce and the ITC

1. Steel Cases

In terms of U.S. trade measures, the year 2000—like previous years—was dominated by steel proceedings. New antidumping and/or countervailing duty orders were imposed on a

167. However, if each country subject to an investigation is counted, this total increases significantly. For calendar year 2000, the U.S. Department of Commerce received sixty-three antidumping or countervailing duty petitions, and completed thirty-two AD/CVD investigations.
variety of products, including cut-to-length carbon-quality steel plate from six countries; steel sheet from Japan; small diameter pipe from Czech Republic, Mexico, and Romania; structural steel beams from Japan and Korea; and seamless standard, line and pressure pipe from Japan and South Africa. Still more cases were underway at year-end: the International Trade Commission returned a unanimous 6-0 affirmative preliminary determination on a new round of hot-rolled steel cases against eleven countries on December 28, 2000, and the Department of Commerce’s preliminary determinations involving steel concrete reinforcing bar (rebar) from eight countries were nearly completed. Investigations involving stainless steel angle from Japan, Korea, and Spain and steel wire rope from four countries were also moving forward at year-end.

The biggest loss for the domestic steel industry in 2000 was on a series of cold-rolled steel cases involving twelve countries. By a vote of 5-1, the International Trade Commission made negative injury determinations with respect to six of the countries in March, and with respect to the other six in June. An important aspect of the case, and one of which the ITC Office of Economics appeared to take particular note, was a 500-page econometric study submitted jointly by respondents, which in part linked U.S. cold-rolled prices, not to import prices, but to hot-rolled prices. The ITC determination provoked a heated response from the U.S. steel industry. Both the cold-rolled cases and an ITC negative determination involving seamless stainless steel hollow products from Japan were appealed to the Court of International Trade.

2. Sunset Reviews

The Department of Commerce and International Trade Commission continued a heavy schedule of five-year sunset reviews during 2000. The outcomes of these reviews were mixed, but more positive for domestic producers than in previous years. Prior to 2000, nearly every case where the ITC proceeded to a full, non-expedited review, it found in favor of the respondents (i.e., that revocation of the dumping order would not cause a recurrence of injury to the affected U.S. industry). This changed substantially in 2000, in part because the sunset review determinations involved more recent antidumping orders. The results left in place a number of significant AD and CVD orders:

• **Bearings:** In one of the largest and most complex sunset proceedings, the Commission left in place antidumping orders against ball bearings from six countries; tapered roller bearings from China, and spherical plain bearings from France. However, more than half of the existing bearings orders were revoked, including orders against cylindrical roller bearings from six countries and tapered roller bearings from three countries.

• **Steel:** The ITC’s approach on the largest steel sunset reviews mirrored its approach on recent dumping investigations of the same steel products. The ITC maintained orders on carbon steel plate against eleven countries, and on corrosion resistant steel against six countries, but revoked orders against cold-rolled steel from four countries.

• **Other prominent orders** that remained in place included cement and cement clinker from Mexico and Japan; heavy forged hand tools from China; and pure magnesium

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169. For a month-by-month listing of all Department of Commerce antidumping and countervailing duties orders, see http://www.ita.doc.gov/stats/iastats1.html.

from Canada. In the magnesium case, the order was maintained in part because of a new Canadian producer who was about to begin magnesium production—the first time, critics alleged, that a new producer’s entry has played such a central role in an affirmative sunset review determination.

• Korean DRAMs case: The United States and Korea reached a settlement in a U.S. sunset review involving dynamic random access memory (DRAM) semiconductors. The settlement terminated the sunset review and averted a Korean WTO challenge to the Department of Commerce’s sunset review of the order. In exchange, the Korean and U.S. industries announced an agreement to collect price and cost data that could be used to expedite future antidumping cases.  

3. Other Key Determinations

Several Commerce Department determinations were notable in their development or reinforcement of new approaches to various aspects of the antidumping and countervailing duty law. Most significantly, the Department at year-end began to set forth a new “change-in-ownership” methodology for determining whether a newly privatized entity received both a financial contribution and a benefit from subsidies granted to the former owner. (See infra section C.1)

The Department also developed its position with respect to revocation of antidumping orders after three years of zero margins. In Polyvinyl Alcohol from Taiwan and Oil Country Tubular Goods from Mexico, the Department made clear that it will not revoke such orders if the exports in question are not made in commercial quantities.

In Certain Welded Carbon Steel Pipes and Tubes from Thailand, the Department continued to pursue a more flexible approach to the issue of date of sale. Its regulations, enacted following the Uruguay Round, state that it will normally use the date of invoice, as recorded in the producer or exporter's records, as the date of sale. However, in Thai Pipe and Tube, the Department stated that it “believes that it is appropriate to place a stronger emphasis on price when analyzing the date of sale issue.” After analyzing the record, it concluded that the price and quantity of subject merchandise had not changed from those specified in the contracts, and thus found that contract date was the appropriate date of sale.

Finally, in Bulk Aspirin from the People's Republic of China, the Department found that the degree of a foreign producer’s integration of its manufacturing operations is a relevant factor that can affect its overhead expenses. In order to capture the additional overhead

expenses incurred by integrated Chinese aspirin producers, it applied an overhead ratio to each upstream stage of the production as well as to the aspirin processing stage.\textsuperscript{179}

C. COURT DECISIONS

1. Delverde/Change of Ownership Subsidies Methodology

Decisions from the Court of Appeals for the Federal Circuit as well as the World Trade Organization forced the Department of Commerce to review a fundamental aspect of its subsidies methodology in 2000. On February 2, 2000, in \textit{Delverde v. United States},\textsuperscript{180} the Federal Circuit ordered the Department of Commerce to reassess whether an Italian pasta company continued to receive the benefit of a subsidy granted to a previous owner. The court held that Congress did not hold the view that past subsidies necessarily continued to be countervailable after a sale, nor did it intend that an arm's length change of ownership required the continued imposition of duties.

In May, the WTO Appellate Body also struck down the Department's change-in-ownership methodology. After a change in ownership, the Appellate Body held, the Department cannot make an "irrebuttable" presumption that the benefit of the subsidy flows to the new owners; it must instead prove that a benefit accrues to the new owners. (See supra Part III.)

Following the adverse rulings at the Federal Circuit and the WTO, the Commerce Department requested remands on four subsidy cases that had been pending at the Court of International Trade. At year-end, the Department had begun to explain its revised methodology for these redeterminations, stating that it will investigate each sale or privatization in an effort to determine whether the post-transaction entity is the same legal "person" and thus continues to benefit from the subsidy.\textsuperscript{181} As part of its analysis, the Department said it will analyze such factors as the continuity of general business operations, production facilities, assets and liabilities, and personnel. One result of this reconsideration was to raise the subsidy rate above that found in the decisions that were overturned by the CIT and/or WTO.

2. AK Steel v. United States

The Federal Circuit also addressed one of the most fundamental aspects of the U.S. antidumping statute in 2000, by ruling on when U.S. sales are classified as export price (EP) or constructed export price (CEP) transactions. In \textit{AK Steel v. United States},\textsuperscript{182} the court held that the location of the sale determines whether a sale is an EP or a CEP sale. In the process, the Federal Circuit invalidated the so-called "PQ Test," a three-part test that the CIT established in 1987.\textsuperscript{183} Under the PQ Test, the Department of Commerce had classified sales made by U.S. affiliates as EP sales if the following criteria were met: (1) the subject

\textsuperscript{179} See Decision Memorandum, supra note 178, cmt. 4.
\textsuperscript{180} Delverde v. United States, 202 F.3d 1360 (Fed. Cir. 2000).
\textsuperscript{181} See Final Results of Redetermination Pursuant to Court Remand, Acciai Speciali Terni S.p.A. v. United States, available at http://ia.ita.doc.gov/remands/ast_remand.htm; see also Grain-Oriented Electrical Steel from Italy; Final Results of Countervailing Duty Administrative Review, 66 Fed. Reg. 2885 (Jan. 12, 2001) and Issues and Decision Memorandum: Final Results of Countervailing Duty of Administrative Review: Grain Oriented Electrical Steel from Italy (Jan. 12, 2000).
\textsuperscript{182} AK Steel Corp. v. United States, 226 F.3d 1361 (Fed. Cir. 2000).
\textsuperscript{183} See PQ Corp. v. United States, 652 F. Supp. 724 (CIT 1987).
merchandise was shipped directly from the manufacturer to the unrelated buyer, without being introduced into the inventory of the related shipping agent; (2) direct shipment from the manufacturer to the unrelated buyer was the customary channel for sales of this merchandise between the parties involved; and (3) the related selling agent in the United States acted only as a processor of sales-related documentation and a communications link with the unrelated U.S. buyer.\(^4\)

The Federal Circuit concluded that the Uruguay Round Agreements Act invalidated the PQ Test. According to the court, the changes to the statutory definitions of EP and CEP as a result of the URAA made clear that "the critical differences between EP and CEP sales are whether the sale or transaction takes place inside or outside the United States and whether it is made by an affiliate."\(^5\) Because the transactions involved in AK Steel took place between two parties located in the United States, and the contract was executed in the United States, "such a transaction cannot be classified as an EP transaction."\(^6\) The court also clarified that the URAA Statement of Administrative Action, which appeared to endorse the pre-Uruguay Round PQ Test, could not be read to endorse a test developed by the Department of Commerce that was inconsistent with the plain language of the statute.

3. Save Domestic Oil v. United States

A Court of International Trade decision also threatened to revive antidumping and countervailing duty petitions filed against crude oil from four countries.\(^7\) The CIT remanded the Department of Commerce's decision not to initiate these politically charged investigations, and ordered the Department to either initiate or provide further explanation of its reasoning within sixty days. Instead, the Department of Commerce immediately appealed the court's decision to the Federal Circuit, arguing that it should not be forced to await the conclusion of an investigation before appealing the initiation decision. At year-end, the Federal Circuit had not ruled on whether it would accept the appeal of the remand order.

4. U.S. Steel Group v. United States

In another decision affecting a basic aspect of antidumping law, the Federal Circuit in U.S. Steel Group v. United States\(^8\) reversed the Court of International Trade and upheld the Department of Commerce finding that the phrase "total expenses" in 19 U.S.C. § 1677a(f)(2)(C) includes U.S. and home market movement expenses. The lower court previously had ruled that movement expenses should not be included, since "total expenses" is later defined in the statute as including "all expenses . . . with respect to the production and sale of the merchandise."\(^9\)

5. De Cecco v. United States

Finally, the courts continued to assess the concept of "corroboration" of facts available as set forth in the Uruguay Round Agreements Act. In De Cecco,\(^10\) the Federal Circuit

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184. See id. at 733-35.
185. AK Steel, 226 F.3d at 1370.
186. Id.
189. Id. at 1286.
reiterated that corroboration of a petition margin must take place at the outset of an investigation. The court ruled that the Court of International Trade properly declined to reconsider a previously uncorroborated dumping margin after the Commerce Department offered corroborating evidence on remand.

D. Administration Action Involving Unfair Trade Proceedings

1. Steel Debate

The Clinton Administration and the U.S. steel industry waged a political war throughout the year 2000 regarding the threat of steel imports and the danger to domestic jobs and production. The rhetoric only intensified as the presidential election approached, with steel supporters warning of another impending "crisis" and demanding immediate action by the administration, such as self-initiation of a Section 201 investigation.

At the beginning of the year, the administration found itself defending its August 1999 Steel Action Program, which called for vigorous enforcement of the trade laws but offered no major new initiatives. In July, the Department of Commerce issued a 235-page report to the president, titled "Global Steel Trade: Structural Problems and Future Solutions." The comprehensive report was issued after eleven months of investigation, and compiled alleged market-distorting practices and trade barriers throughout the global steel industry. However, the Commerce Department faced critiques from opposing perspectives. The domestic steel industry questioned the usefulness of the report, claiming that it spent too much time analyzing the 1998 crisis as opposed to proposing solutions for an impending 2000 crisis. For instance, the proposed solutions in the report focused primarily on minor changes to existing trade laws, further bilateral negotiation, and monitoring of the domestic and foreign steel industries. Meanwhile, many U.S. trading partners, including Japan, strongly protested the report's allegations and maintained that the U.S. steel industry's problems are due to its own failures and inaction, rather than to trade barriers and anti-competitive practices abroad.191

On October 16, with the presidential election looming and in doubt, the United Steelworkers of America called on the president to initiate a comprehensive steel Section 201 case. White House Chief of Staff John Podesta responded on October 25, pledging "all reasonable steps to prevent a steel crisis from again taking hold," including "an intensive review" of a possible Section 201 case.192 In particular, Podesta pledged a review of market conditions by the White House Council of Economic Advisers and National Economic Council Director Gene Sperling. However, the letter again made no specific commitments on any actions to limit steel imports. The election of President Bush and subsequent transitions at the Department of Commerce and the Office of the U.S. Trade Representative placed further new initiatives on hold.

2. Section 201 cases

In March 2000, the administration imposed safeguard measures to benefit two segments of the steel industry: producers of wire rod and line pipe. The wire rod decision was delayed

for several months past the statutory deadline for a response, following a 3-3 vote at the International Trade Commission. The president imposed a tariff-rate quota of 10 percent, declining to 5 percent in year three, for all imports exceeding 1998 levels. However, relief was tempered by the provision of exclusions for several types of wire rod; by midyear, the U.S. Customs Service had discovered significant misreporting using these exclusion categories. For line-pipe imports, the president proclaimed a tariff surcharge on all but the first 8,165 MT imported annually from any country. At year-end, the EU asked for WTO consultations on both the wire rod and line pipe Section 201 measures, alleging that both conflicted with the Agreement on Safeguards.

3. NAFTA Extraordinary Challenge

In April, the U.S. Government also filed the first extraordinary challenge under the North American Free Trade Agreement, alleging that a panel decision involving U.S. antidumping duties imposed on Mexican cement threatened the integrity of the binational dispute settlement process. According to NAFTA Article 1904.13, an extraordinary challenge may only be filed in cases involving gross misconduct, serious departure from a fundamental rule of procedure, or a panel manifestly exceeding its powers, authority, or jurisdiction. A decision is due in early 2001.