I. Developments in Negotiations

A. Introduction

This year’s major achievements in the negotiation of international trade agreements were the launch of a new round of multilateral trade negotiations and the accession of China to the World Trade Organization (WTO). There was also significant activity in the negotiations of bilateral agreements with Chile and Singapore as well as of the Free Trade Agreement of the Americas. These and other highlights in the negotiations of international trade agreements in 2001 are summarized below.

B. World Trade Organization Developments

1. Doha Development Agenda

In November 2001, the Trade Ministers, representing the 142 members of the WTO, launched new multilateral trade negotiations and developed a new work program at the Fourth WTO Ministerial Conference in Doha, Qatar. The Doha Ministerial Declaration set out an ambitious work program, labeled the “Doha Development Agenda,” which calls for comprehensive three-year negotiations covering a variety of areas affecting international business and commerce. Like negotiations of the Uruguay Round, the Doha Development Agenda negotiations are to be concluded as a single undertaking, meaning that all agree-
ments will be presented for approval in a single package, with the exception of modifications of the Dispute Settlement Understanding. The Doha Ministers set a deadline of January 1, 2005 for conclusion of the negotiations, but early implementation of some agreements is possible.

In Doha, the Ministers also approved a political Declaration regarding patent rules and public health and a *Decision on Implementation-Related Issues and Concerns Raised by Developing Countries*, which addressed developing country concerns, related to their commitments to implement previous WTO Agreements and their need for technical assistance. Both documents were critically important to developing countries and played significant roles in the successful launch of new negotiations.

To oversee the negotiations, the Ministers established a Trade Negotiating Committee (TNC), which convened its first meeting on January 28, 2002. Negotiations will be conducted at the WTO's headquarters in Geneva, Switzerland. The Fifth Ministerial Conference will be held in 2003—the mid-point of the three-year negotiations—in Mexico, to review the progress of the negotiations. The Ministerial Conference, which is the highest-level decision-making body of the WTO, must meet “at least once every two years,” as required by the Marrakesh Agreement Establishing the WTO. The major elements of the Doha Development Agenda are reviewed in the following section.

• *Agriculture*: Negotiations on agricultural issues were initiated in early 2000 under Article 20 of the Uruguay Round *Agreement on Agriculture*, which provided a framework for further agricultural negotiations. Accordingly, negotiating proposals were submitted on behalf of 121 Members. Building on that work, the Doha Ministerial (paragraphs 13 and 14) set a comprehensive negotiating mandate that is intended to result in substantial improvements in market access, reductions—with a view to phasing out—of all forms of export subsidies, and substantial reductions in trade-distortin domestic support. Based on the modalities for further commitments to be established by March 31, 2003, participants must submit their draft schedules of specific commitments by the Fifth Ministerial Conference.

• *Services*: The Doha Declaration (paragraph 15) builds on negotiations already underway on trade in services. Services negotiations were initiated in January 2000 under Article XIX of the *General Agreement on Trade in Services* (GATS), which called for progressive liberalization of services. As with agriculture, Members submitted a number of proposals on a wide range of service sectors and several horizontal issues, as well as on movement of natural persons. The Doha Declaration reaffirmed the *Guidelines and Procedures for the Negotiations*, adopted by the Council for Trade in Services on March 28, 2001 as the basis for continuing the negotiations under the Doha Development Agenda to achieve greater services liberalization.

The Doha Ministerial established a rigorous timetable for the negotiations, directing that initial requests for specific commitments be submitted by June 30, 2002 and setting a deadline of March 31, 2003 for the submission of initial offers. The Declaration sets the stage for the commencement of negotiations on new liberalization commitments, including in the telecommunications, financial services, energy, audio visual and express delivery sectors.

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5. *Id.* para. 15.
• Market Access for Non-Agricultural Products: The Doha Ministerial (paragraph 16) launched tariff negotiations aimed at reducing or eliminating tariffs, including the reduction or elimination of tariff peaks, high tariffs and tariff escalation, as well as non-tariff barriers. The negotiations will particularly focus on products of export interest to developing countries. The negotiations will be comprehensive in terms of product coverage, with no a priori exclusions of products, meaning that no Member may exclude any sector or product at the outset. The negotiations must "take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments." The negotiating mandate to reduce tariff and non-tariff barriers on industrial products, with modalities to be agreed upon, will enable the WTO Members to pursue a variety of tariff liberalization initiatives, potentially, including landmark agreements such as a second Information Technology Agreement.

• Intellectual Property: The Doha Ministerial issued a separate Declaration on the TRIPS (Trade-Related Intellectual Property Rights) Agreement and Public Health. The Declaration highlights provisions in the TRIPS Agreement that provide Members with the flexibility to address public health emergencies, such as epidemics of HIV/AIDS, tuberculosis and malaria. Specifically, it affirms that the TRIPS Agreement "can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all." Through the Declaration, Members expressed strong support for the TRIPS Agreement and affirmed the importance of intellectual property protection for the development of new drugs. To address the concern that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement, the Doha Ministers instructed the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

The Doha Ministerial also agreed to complete the work started in the TRIPS Council on the implementation of TRIPS Article 23.4 (Additional Protection for Geographical Indications for Wines and Spirits) by launching negotiations for the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Ministerial. The Ministers also agreed to extend until January 1, 2016 the time by which least-developed WTO Members must implement TRIPS provisions on protecting patent rights for pharmaceutical products.

• WTO Rules: The Doha Ministerial Declaration (paragraph 28) provides for a two-phase process of negotiations to clarify and improve the disciplines under the Agreement on Implementation of Article VI of the GATT 1994 (Anti-dumping Agreement) and the Agreement on Subsidies and Countervailing Measures and on trade distorting practices that give rise to dumping and countervailing duties. The Declaration provides that the negotiations must preserve the "basic concepts, principles and effectiveness" of those Agreements and their instruments. In the context of these negotiations, WTO Members will also attempt to clarify and improve WTO disciplines on fisheries subsidies, giving consideration to the importance of this sector to developing countries.

The Doha Declaration (paragraph 29) also calls for negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions that apply to re-

7. Doha Ministerial Declaration, supra note 1, para. 16.
8. Id.
10. Id.
11. Doha Ministerial Declaration, supra note 1, para. 28.
12. Id.
The negotiations are to take into account the developmental aspects of such agreements.

**Dispute Settlement Understanding:** The Doha Ministerial Declaration (paragraph 30) calls for negotiations to improve and clarify WTO rules on dispute settlement procedures (Dispute Settlement Understanding (DSU)) "based on the work done thus far as well as any additional proposals by Members." The DSU negotiations, which are the only exception to the single undertaking commitment, are to be concluded by May 2003, with entry into force as soon as possible thereafter. The negotiations will provide an opportunity for the WTO to refine dispute settlement systems based on the experiences of Members over the past six years. Among the issues to be taken up are problems with the compliance phase of the dispute settlement process, which arose, e.g., in the EU Bananas dispute, as well as the need for increased transparency of the dispute settlement procedures.

**Investment:** The Doha Declaration (paragraphs 20–22) sets the objective of establishing the first multilateral framework aimed at securing transparent, stable, and predictable conditions for Foreign Direct Investment worldwide, with a two-stage negotiation. During the first stage, the existing WTO Working Group on the Relationship Between Trade and Investment will clarify issues such as: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a positive list approach (such as that used for the GATS); exceptions; balance-of-payments; safeguards and consultation and the settlement of disputes between members. At the Fifth Ministerial, Members will decide by “explicit consensus” on the timing and specific content of the negotiations. The Declaration also commits the WTO to work with other relevant intergovernmental organizations, including UNCTAD, and through appropriate regional and bilateral channels, to provide assistance by responding to the needs of developing and least-developed countries by way of enhanced support for technical assistance and capacity building.

**Competition:** In Doha, the Ministers agreed (paragraphs 23–25) to a modest two-stage negotiation. In the first stage, the WTO will focus on clarification of “core principles, including transparency, non-discrimination and procedural fairness and provisions on hardcore cartels.” At the Fifth Ministerial, a decision will be made, based on an “explicit consensus,” on the timing and specific content of the negotiations.

**Transparency in Government Procurement:** The Doha Ministers agreed (paragraph 26) to negotiate an agreement providing for enhanced transparency in the government procurement procedures of all WTO Members. The negotiations will be launched after the Fifth Ministerial, following a decision taken at that Ministerial by “explicit consensus” on the modalities of the negotiations. The negotiations will build on the progress made in the Working Group on Transparency in Government Procurement since its establishment in 1996. The negotiations must take into account participants' development priorities, especially those of least-developed country participants. The negotiations will not incorporate market access commitments, which means that Members may maintain preferential procurement programs.

**Trade Facilitation:** The Doha Ministers embarked (paragraph 27) on a focused program leading to negotiations aimed at meeting the needs of a fast-paced global economy. Ministers agreed to work on new WTO rules to make customs procedures at international borders

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13. Doha Ministerial Declaration, supra note 1, para. 29.
15. Doha Ministerial Declaration, supra note 1, paras. 20–22.
16. Doha Ministerial Declaration, supra note 1, paras. 23–25.
17. Id.
19. Doha Ministerial Declaration, supra note 1, para. 27.
more transparent and efficient. Members will decide on modalities of negotiations at the Fifth Ministerial, on the basis of a decision to be taken by "explicit consensus." At that time, negotiations will be launched on WTO rules for expediting the movement and clearance of goods crossing borders, building on relevant GATT Articles (Articles V (transit), VIII (formalities), and X (transparency).

- **Trade and the Environment:** The Ministerial Declaration (paragraphs 31–33) approved a package of environmental elements that demonstrates the WTO's commitment to sustainable development and simultaneously advancing trade, environment, and development interests.\(^{20}\)

  For the first time, WTO Ministers called for negotiations on the relationship between the WTO rules and the specific trade-related obligations of multilateral environmental agreements (MEA). The results of those negotiations will affect only WTO Members who are parties to a particular MEA. The Declaration also calls for negotiations to focus on procedures for information exchanges between the MEA secretariats and the relevant WTO committees. In addition, the Declaration strengthens the role of the Committee on Trade and the Environment. Finally, the Ministers called for the negotiation of the reduction or elimination of tariff and non-tariff barriers to environmental goods and services. As noted above, WTO Members will also undertake negotiations of WTO disciplines on fisheries subsidies.

- **Electronic Commerce:** The Doha Ministerial took note (paragraph 34) of the work done in the WTO General Council and other relevant bodies since 1998 on electronic commerce and agreed to continue the Work Program on Electronic Commerce.\(^{21}\) It also instructed the General Council to consider the most appropriate institutional arrangements for handling the Work Program, and to report on further progress at the Fifth Ministerial. The Doha Declaration also maintains the current practice of not imposing customs duties on electronic transmissions until the Fifth Ministerial.

- **Governance/Capacity Building:** The Doha Declaration (paragraphs 38–41) set an agenda aimed at strengthening the operations of the WTO, its cooperation with other international institutions, capacity building/development, and promoting greater transparency in WTO negotiations.\(^{22}\) The declaration recognizes the special needs and interests of developing countries, and provides for technical assistance for capacity building during negotiations and subsequent implementation of agreements.

  In December 2001, the WTO General Council adopted a budget package that will substantially increase funding for technical cooperation for developing countries. The package includes the creation of a new trust fund for technical cooperation activities with a target for funding in 2002 of SFR 15 million, a doubling of the WTO's trade policy training program for developing countries. The WTO will also provide additional resources to assist the thirty-six developing countries that cannot afford permanent representation in Geneva.

- **Trade, Debt, and Finance:** The Declaration (paragraph 36) provides for the establishment of a Working Group under the auspices of the WTO General Council to examine and to provide a progress report at the Fifth Ministerial on the relationship between trade, debt, and finance.\(^{23}\) The Ministerial Declaration recognizes the individual mandates of the WTO, the World Bank and the IMF, but also recognizes the need for greater coherence among them in their common aims to promote growth, development, and prosperity.

- **Implementation Issues:** Even as the WTO Members undertook the new Doha Development Agenda, concerns were expressed regarding implementation of existing WTO agreements. The Ministers in Doha addressed a wide range of developing country concerns regarding implementation of previous WTO agreements in both the main Declaration and a separate

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\(^{20}\) *Doha Ministerial Declaration, supra* note 1, paras. 31–33.

\(^{21}\) *Doha Ministerial Declaration, supra* note 1, para. 34.

\(^{22}\) *Doha Ministerial Declaration, supra* note 1, paras. 38–41.

\(^{23}\) *Doha Ministerial Declaration, supra* note 1, para. 36.
Decision on Implementation-Related Issues and Concerns:24 The Ministers provided for clarifying existing provisions and seeking further work in various WTO Committees (e.g., Antidumping, Subsidies). Issues that remain outstanding will become part of the WTO Work Program or will be addressed in negotiations where they have been specifically mandated.

2. China's Accession to the WTO

After fifteen years of negotiations, WTO Members formally approved the accession package for the People's Republic of China (China) on November 10, 2001 at the Fourth Ministerial Conference.25 A month later, on December 11, 2001, China became the 143rd Member of the WTO. China also indicated that it would join the WTO Information Technology Agreement.

On November 9, 2001, President George W. Bush certified that China's accession to the WTO would satisfy requirements set by Congress in 2000 for permanent normal trade relations (PNTR) with China.26 The President certified that the final terms of entry for China into the WTO are at least equivalent to those agreed to bilaterally between the United States and China in 1999. The President's certification was required under a law the Congress passed in 2000 authorizing the grant of PNTR status to China.27

3. Chinese Taipei's Accession to the WTO

The Fourth Ministerial Conference approved Chinese Taipei's accession to the WTO on November 11, 2001, the day after it approved China's accession.28 On January 1, 2002, Taiwan became the WTO's 144th Member. With the addition of China and Chinese Taipei as WTO Members, WTO disciplines now cover approximately 97 percent of global trade.

4. Other Accessions to the WTO

In addition to the accessions of China and Chinese Taipei, the WTO also added two other Members during 2001: Lithuania on May 8 and Moldova on July 26.29 On October 29, 2001, the Working Party on the Accession of Vanuatu concluded negotiations on that country's accession package.30 Other countries took steps to begin the accession process. In January 2001, the Federal Republic of Yugoslavia submitted a formal request for accession and a Working Party was established in February 2001.31 Formal requests for accession were also submitted by the Bahamas and Tajikistan in May 2001, and Working Parties were established for them in July 2001.32 In October 2001, the Syrian Arab Republic made a formal request for accession.33 Currently, the applications of twenty-seven countries

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26. Statement of the Press Secretary, President of the United States, President Certifies Terms of China's Accession to WTO (Nov. 9, 2001), available at http://www.whitehouse.gov (last visited July 24, 2002).
27. Id.
31. See id.
32. See id.
33. See id.
for WTO accession are in various stages of the access process negotiations. In terms of trade volume, Russia and Saudi Arabia are among the most significant countries seeking accession.34

C. DEVELOPMENTS IN THE NEGOTIATION OF AGREEMENTS OUTSIDE THE WTO—BILATERAL AND MULTILATERAL AGREEMENTS INVOLVING THE UNITED STATES

1. U.S.-Jordan Free Trade Agreement

The U.S.-Jordan Free Trade Agreement (FTA), which was signed on October 24, 2001, will eliminate duties and commercial barriers to bilateral trade in goods and services originating in the United States and Jordan.35 President Bush signed the implementing legislation on September 28, 2001, and the Agreement came into effect on December 17, 2001. The FTA includes, for the first time in the text of a trade agreement, provisions addressing trade and environment, trade and labor, and electronic commerce. Other provisions address intellectual property rights protection, balance of payments, rules of origin, safeguards and procedural matters such as consultations and dispute settlement. Because the United States already has a Bilateral Investment Treaty with Jordan, the FTA does not include an investment chapter.

2. U.S.-Vietnam Bilateral Trade Agreement to Normalize Trade Relations

In July 2000, the United States and Vietnam signed a bilateral trade agreement, which was ratified by the United States in October and by Vietnam in December of 2001.36 This historic agreement normalizes trade relations between the two countries and represents an important milestone in the decade-long normalization process that began in the 1990s. The negotiations were conducted over a five-year period, beginning in 1996. With the entry into force of the Agreement on December 10, 2001, Vietnam completed the conditions for normal trade relations (NTR). Vietnam’s status is subject to annual review under the “Jackson-Vanik” provisions.

Under the Agreement, Vietnam has committed to opening its market to U.S. goods, services and investment and to moving toward adoption of WTO and other international trade and investment norms. The Agreement covers six major areas: market access for industrial and agricultural goods; protection of intellectual property; market access for services; investment protection; business facilitation; and transparency. The Agreement also cuts tariffs on Vietnam’s exports to the United States from 40 percent to about 4 percent. In addition, it gives monopolies in the telecommunications and energy sectors several years to improve efficiency as the Agreement gradually opens up Vietnam to U.S. service providers in a wide range of fields. If properly implemented, the pact could ease Vietnam’s eventual accession to the WTO.

3. **U.S.-Chile Free Trade Agreement**

Chile and the United States began negotiations of a bilateral free trade agreement (FTA) in December 2000. The U.S.-Chile FTA would be the first free trade pact between the United States and a country in South America. In the negotiations, the two countries seek to create a comprehensive state-of-the-art agreement that reflects their shared commitment to free trade and economic integration. Bilateral trade between the United States and Chile has more than doubled in the past decade to nearly $6 billion annually. The negotiations cover a broad array of areas that include market access for goods and services, standards, intellectual property, investment, sanitary and phytosanitary standards, safeguards, customs, rules of origin, agriculture, anti-dumping, government procurement, competition policy, e-commerce and dispute settlement. It is also anticipated that the FTA will include labor and environment provisions.

The two countries held their ninth round of negotiations in Miami in December. At that time, U.S. and Chilean negotiators announced that a final deal was within reach, but further negotiations would be needed in 2002 to finalize the Agreement. The issues of labor and environment have yet to be fully addressed. It is anticipated that the FTA would be concluded in 2002.

4. **U.S.-Singapore Free Trade Agreement**

Negotiations of a U.S.-Singapore FTA, which began in December 2000, continued throughout 2001 on a wide range of issues. The issues include trade in goods, customs and rules of origin, textiles, trade in services, investment, intellectual property rights and government procurement. Significant progress was made in 2001 in a number of areas, including services and rules of origin. The two sides agreed to adopt the negative list approach for services and investment and to develop state-of-the-art rules of origin to take into account the globalization of manufacturing in a knowledge-based world economy. Additional progress has also been achieved on enlarging the areas of convergence between the two sides, resulting in a revised document of consolidated texts. Considerable work remains on this undertaking, which is designed to achieve a world-class FTA. The agreement is expected to be completed in 2002.

5. **Free Trade Area of the Americas**

The negotiations of a Free Trade Area of the Americas (FTAA), launched by thirty-four nations in the Western Hemisphere in June 1995, moved forward in 2001. The FTAA work is organized into nine negotiating groups: market access; agriculture; government procurement; investment; intellectual property rights; services; competition policy; dispute settlement; and subsidies, antidumping and countervailing duties. In addition, several non-negotiating groups have been established. The Committee of Government Representatives on Civil Society receives input into the negotiation process from all sectors of civil society. The Consultative Group on Small Economies monitors the negotiations and makes rec-

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ommendations for addressing issues of concern to smaller economies. The Joint Government-Private Sector Committee of Experts on Electronic Commerce, comprised of both government and private sector representatives, makes recommendations in light of the “rapid expansion of Internet usage and electronic commerce in the Hemisphere.”

At the April 2001 FTAA Ministerial, the Trade Ministers reviewed the progress of the negotiations, including the first consolidation of draft texts produced by the Negotiating Groups. In a significant step aimed at keeping the negotiating process transparent, the Ministers directed that the consolidated draft be made available to the public through the FTAA's Web site. The FTAA Trade Negotiations Committee (FTAA TNC), which oversees the negotiations, is to prepare a second version of the draft FTAA Agreement for review at the next Ministerial Meeting, which is to be held by October 2002 in Quito, Ecuador. At the April Summit of the Americas in Quebec City, the leaders of the FTAA countries agreed to conclude the negotiations of the FTAA by January 2005, with entry into force of the new agreement by December 2005.

In 2001, the FTAA Ministers established a new Technical Committee on Institutional Affairs to develop the overall architecture of an FTAA Agreement (general and institutional matters). The Ministers instructed the FTAA TNC to continue its consideration of the treatment of the differences in the levels of development and size of the economies of the Hemisphere, including the smaller economies, and to provide ongoing guidance to the Negotiating Groups in their consideration of proposals submitted by countries or groups of countries in the substantive negotiating areas. Product- and sector-specific market access negotiations will begin by May 15, 2002.

6. Asia-Pacific Economic Cooperation

The Asia-Pacific Economic Cooperation (APEC) was established in 1989 in response to the growing interdependence among Asia-Pacific economies. "Begun as an informal dialogue group, APEC has become the primary regional vehicle for promoting open trade and economic cooperation" within that region. Its [aim] is to advance Asia-Pacific economic dynamism and sense of community." APEC's 21-member economies accounted for 46.7 percent of global trade in 2000. The APEC Chair, which rotates annually among members, is responsible for hosting the annual ministerial meeting of foreign and economic ministers. China held the APEC Chair in 2001 and hosted the APEC Economic Leaders Meeting in October 2001 in Shanghai. As the 2002 Chair, Mexico will host the Fourteenth APEC Ministerial in 2002.

II. Legislative Activity

A. Summary

Trade topics were at the head of the list of important issues debated by Congress this year, however, action on the major bills occurred, if at all, only at the end of 2001. The year saw trade issues moved to the back burner both as a result of the change in control of the Senate and the tragic events of September 11. At year's end, the House of Represen-
tatives approved Trade Promotion Authority (TPA), 2001's most hotly debated trade topic, by a single vote. The year ended, however, with major trade legislation unresolved, including TPA, Trade Adjustment Assistance, and important export control legislation.

B. MAJOR TRADE LEGISLATION

1. Trade Promotion Authority

The decision to grant the President Trade Promotion Authority (TPA), formerly known as "Fast Track," was the most hotly debated trade issue of the year. President Clinton had previously been denied fast track authority, and the ability of the Bush administration to gain approval in the House was seen by many to be a feather in the cap of Ambassador Zoellick, the U.S. Trade Representative.

The Bipartisan Trade Promotion Authority Act of 2001, H.R. 3005, was introduced in the House on October 3, and passed by one vote in December. TPA provides the President with authority to negotiate trade agreements that are brought back to Congress for an up or down vote. The House approved the bill by a vote of 215 to 214, with 194 Republicans and 21 Democrats voting for it. The TPA sets the overall negotiating objectives on trade agreements for the United States, including:

1. to further strengthen the system of international trading disciplines and procedures, including dispute settlement;
2. to foster economic growth, raise living standards, and promote full employment in the United States and to enhance the global economy;
3. to ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment . . . , while optimizing the use of the world's resources; and
4. to promote respect for worker rights and the rights of children.

The TPA sets forth the authority of the President to enter into trade agreements with countries regarding tariff and non-tariff barriers. Resulting trade agreements are required to make progress in meeting the overall and principal trade negotiating objectives and require that the President satisfy certain notification and consultation requirements, including submission of the agreement for assessment by the U.S. International Trade Commission. TPA also requires that the USTR consult closely with Congress during trade negotiations.

Traditionally, concerns over environmental and labor issues have limited Democratic support for TPA. Several GOP representatives from districts with significant textile industries supported the bill only after receiving last-minute promises from the Administration and GOP leaders that their concerns will be addressed (including CBTPA issues).

In the beginning of December the Senate Finance Committee approved a modified version of the House's Fast-Track bill by an 18–3 vote. The Senate's draft legislation includes a provision for the United States to seek improved WTO panel adherence to the appropriate standard of review in dispute resolution. Chairman Baucus and Senator Grassley, the ranking GOP member, developed the bipartisan Senate bill. The bill is similar to H.R. 3005 but includes additional language addressing investor-state disputes, trade laws, labor issues, and congressional consultations. The Baucus-Grassley bill provides for Presidential authority until June 2005, with a possible two-year extension.

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44. Id.
At year-end, the ultimate passage of TPA remained uncertain. Indeed, the likely differences in any final Senate and House versions of the legislation virtually guarantee that TPA will remain the leading focus of Congressional trade debate in 2002.

2. **ILSA Extension Act of 2001**

The ILSA Extension Act of 2001, signed into law by the President on August 3, 2001, effectively extends the Iran and Libya Sanctions Act of 1996 for another five years. The previous act was set to expire in 2001. Some in the Bush administration had initially called for only a two-year extension in order to maintain flexibility in the President's Libya and Iran policies. Additionally, the ILSA Extension legislation lowers the ceiling on petroleum investment in Libya from $40 million to $20 million, in accordance with the limit on such investment in Iran.

On July 16, 2001, the House Ways and Means Committee reported H.R. 1954, the ILSA Extension Act, amended to include a provision that allows the two Houses of Congress to terminate sanctions against Iran and Libya at any time by a joint resolution. The amendment, which eased the burden for lifting sanctions, drew sharp criticism from families of victims of the Pan Am Flight 103 bombing and set the stage for a jurisdictional battle over which committee's version should be adopted by the whole House. Though two versions of the Bill came to the floor of the House on July 17, leaders moved to stall a vote until after President Bush's return from Genoa, where he was attending the G8 summit. Some saw passage of the bill as potentially detrimental to the President's efforts at securing European support for American sanctions policy. Several European allies have been critical of unilateral American sanctions on Iran, and House decision-makers sought to refrain from hindering the President's efforts at reaching consensus.

Eventually, the House approved the International Relations Committee version, which excluded language concerning congressional termination and rather directed the President to report to Congress annually on the effectiveness of the sanctions. The Senate voted on July 25 to pass S. 1218 without amendment by a vote of 96 to 2 (only Senators Hagel and Lugar voted nay). Citing Iran's and Libya's support for terrorism as the primary factor in his decision, the President signed the ILSA Extension Act on August 3, 2001.

3. **Export Administration Act**

The Senate passed S. 149, the revised Export Administration Act (EAA), on September 6, 2001 by a vote of 85 to 14. However, the Act stalled in the House, with consideration of the measure delayed until February 2002. The EAA has not been substantially revised since 1988. However, on November 27, the House approved H.R. 3189 to extend the Export Administration Act of 1979 (EAA), until April 20, 2002.

S. 149 considerably modifies the previous Export Administration Act to ease government restrictions and would allow U.S. companies to increase sales of high technology products. The measure was strongly opposed by a group of powerful Republican Senators due to national security concerns.

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47. See generally INSIDE U.S. TRADE, July 6, 2001.
49. Export Controls: Senate Approves Business-Backed EAA Bill but Early Action by House Seen as Unlikely, 18 INT'L TRADE REP. (BNA), No. 36, at 1422 (Sept. 13, 2001) [hereinafter Export Controls].
vamps export controls on dual-use goods, products that could be used for civilian or military purposes. The EAA is the statutory authority that authorizes the U.S. Department of Commerce to issue Export Administration Regulations (EAR), which provide for the classification and licensing of dual-use exports. S. 149 expands the President's discretion in controlling sensitive dual-use exports and substantially increases the penalties for violation of the U.S. export control regulations.

The EAA was set to expire on August 20 until the House moved to extend consideration until February 2002. Some Senate Republicans expressed concern that dual-use export controls would be eased to include sales of missile technology to China. The Senate bill, which did ease control on a limited scope of high-tech products, received the full support of the White House and of the business lobby. Opponents of the legislation maintain that loosened export controls, especially with respect to terrorist-supporting states, jeopardizes U.S. national security interests.

4. Andean Trade Preference Act

The Andean Trade Promotion and Drug Eradication Act (ATPA), H.R. 3009, extends the Andean Trade Preference Act, which provides trade benefits to Colombia, Bolivia, Ecuador, and Peru. ATPA is similar to the benefits conferred to Caribbean Basin Initiative countries under the Caribbean Basin Economic Recovery Act. H.R. 3009 would expand the products covered, including textiles; however, it still faces strong opposition in the Senate.

ATPA authorizes the President to grant duty-free treatment to certain imports from the designated countries through December 31, 2006. The Act was strongly opposed by the U.S. textile industry due in part to the fact that it amends the Caribbean Basin Economic Recovery Act and the African Growth and Opportunity Act to provide duty-free and quota free treatment to imported apparel articles that are sewn or otherwise assembled, or cut in a U.S.-Caribbean Basin Trade Partnership Act (CBTPA) or sub-Saharan African beneficiary country from components knit-to-shape in the United States. ATPA also increases the allowable amount over an eight-year period for certain apparel made from yarn in Sub-Saharan African countries that can be imported into the United States duty free and quota free.

H.R. 3009 was introduced in the House at the beginning of October, and was passed by the House in November. The House version expands the benefits provided under the original Act and extends it through December 31, 2006. The Senate Finance Committee approved legislation to renew and expand ATPA at the end of November but added fewer new benefits than were included in the House bill. The Senate measure expands benefits through February 28, 2006. The Bush administration has indicated that ATPA renewal was a high priority since it represents an important foreign policy tool as to both international trade and anti-narcotics objectives.

51. See Export Controls, supra note 49.
52. See id.
5. **Trade Adjustment Assistance**

Legislation to reauthorize the trade adjustment assistance program was introduced in October. The House of Representatives approved a bill in December to reauthorize the existing Trade Adjustment Assistance program and extend unemployment benefits for six months. The House overwhelmingly voted for the bill by a vote of 420 to 3. On December 4, the Senate Finance Committee approved S. 1209 to reauthorize and expand TAA benefits. Senator Baucus indicated that passage of TAA would likely be closely linked to Trade Promotion Authority and would be scheduled for a vote in early 2002.

C. **Other Trade Legislation**

1. **Extension of Normal Trade Relations Status to Vietnam**

By joint resolution, the U.S. House of Representatives and the U.S. Senate approved the extension of nondiscriminatory treatment (or Normal Trade Relations (NTR) status) with respect to the products of the Socialist Republic of Vietnam. Along with the U.S.-Vietnam Trade Agreement signed July 13, 2001, H.J. Res. 51—passed by voice vote in the House and by a vote of 88 to 12 in the Senate—this legislation marks the symbolic end of hostilities between the United States and Vietnam.

More substantively, the Resolution opens the door to significant trade opportunities for American importers and exporters. According to the World Bank, Vietnam's exports to the United States could rise to $1.3 billion during the first year of NTR, a 60 percent increase on exports in 2000. And the U.S.-Vietnam Trade Agreement requires that Vietnam extend the same treatment to the United States, expanding the potential boon of Vietnam's 78 million-person market to U.S. exporters.

2. **Jordan Free Trade Agreement**

The President signed legislation implementing the agreement establishing a United States-Jordan free trade area on September 28, 2001. The House passed the bill implementing the free trade agreement at the end of July on a voice vote. The Senate approved the implementing legislation after Senator Phil Gramm (R-TX) dropped his objections concerning some of the more contentious provisions of the Agreement. The Free Trade Agreement, negotiated by the Clinton administration, was extremely controversial due to certain labor and environmental provisions. Specifically, the U.S.-Jordan agreement includes language that provides for the imposition of trade measures if either country derogates from its labor or environmental protection laws in order to gain an advantage in trade. The FTA will eliminate tariffs on almost all goods within ten years, but does contain a safeguard provision. In effect, the implementing legislation provides for a trade remedy...
action should the U.S. International Trade Commission determine that Jordanian goods are being imported into the United States in such increased quantities and under such condition that the imports constitute a substantial cause of serious injury or threat thereof to the domestic industry.

3. Mexican Trucks

The President signed the Department of Transportation and Related Agencies Appropriations Act 2002 into law on December 18, 2001.64 This legislation included a Congressional compromise of safety measures after a NAFTA panel ruled against the United States. Specifically, the panel held that the United States could not impose blanket restrictions on Mexican trucking firms due to safety concerns, but must instead consider applications on a case-by-case basis for Mexican operators.65 In November, negotiators from the House and Senate agreed to a deal on safety measures on Mexican trucking firms, which allows them to operate in the United States.66 However, the legislation did not merely implement the NAFTA panel ruling, instead it imposed several conditions on the President's ability to implement the ruling.

4. Zimbabwe Sanctions

The Zimbabwe Democracy and Economic Recovery Act of 2001 was signed into law on December 21, 2001.67 The House approved S. 494 on December 4 to allow President Bush to sanction Zimbabwe. The Bill passed unanimously in the Senate and with a very large (396-11) margin in the House. The Bill is intended to address the ongoing humanitarian crises in that country. The Bill does this by specifically targeting assets of individuals held outside of the country, limiting travel and imposing economic sanctions on those responsible for the continuing unrest. President Robert Mugabe has ruled the country for more than twenty years.

Additionally, the Act provides for the cancellation or reduction of indebtedness owed to the United States and certain international financial institutions by the Government of Zimbabwe upon the President's certification regarding improvements in certain areas of basic human rights. The Act also authorizes the President to provide foreign assistance funds to Zimbabwe to support the establishment of democratic institutions, free press and independent media, and the rule of law.

5. Export-Import Bank Reauthorization

The charter of the Export-Import Bank (Ex-Im Bank or Bank) was set to expire on September 30, 2001, and accordingly, the House and the Senate took up consideration of the Export-Import Bank Reauthorization Act of 2001, H.R. 2871 and S. 1372 respectively. The Bill would have reauthorized the Bank through FY 2005, and would also have introduced new requirements regarding the amount of export-import financing related to small business. However, neither the Senate nor the House version of the Bill came to a floor vote in 2001. The President signed continuing appropriations legislation on October 12, effectively extending consideration of reauthorization legislation through March 2002.

The Bill was stalled in part by concerns on the part of the Department of Treasury, which has come into conflict with the Export-Import Bank over each entity's role in the operations of the Tied Aid War Chest. The Export-Import Bank has also drawn criticism from some environmental groups, which seek to influence the Bank's energy funding away from fossil fuels and toward renewable energy sources. Reauthorization of the Bank in 2002 will hinge upon the Bank's perceived usefulness and efficiency in achieving U.S. international trade objectives. There was strong support, however, by many Republican Senators and a coalition of business groups in support of the Ex-Im Bank and its programs, which include providing loans, loan guarantees, and export credit insurance to foreign entities that buy U.S. products.

III. WTO Dispute Settlement Activity

In 2001, the WTO Dispute Settlement Body (DSB) received twenty-seven requests for consultations, leading to the establishment of eight panels. Another nine panels were established to review cases initiated in 2000. The DSB adopted eight panel reports, two without modification because the losing parties indicated they would not appeal, and seven Appellate Body reports. As in 2000, the DSB continued to develop its interpretations of the agreements covering antidumping and safeguard measures, and to address the extent to which domestic laws and regulations operated as a trade restraint. The DSB's ongoing willingness to adopt recommendations that required a change to members' laws and regulations was apparent in 2001. This policy forced countries to weigh the need to reconcile their WTO obligations, as interpreted by the Dispute Settlement Mechanism (DSM), with their domestic agendas. As such, implementation remains the most difficult phase of the DSB process.

In 2001, three new members joined the Appellate Body to take the place of outgoing members. Mr. James Bacchus (the United States) assumed the Chair. The WTO Director-General opened an Advisory Centre for WTO Law, which aims to rectify the problems developing countries have faced in accessing the DSB system by providing them with legal aid at all stages of the DSM process.

A. Significant Panel and Appellate Body Reports

1. United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat From New Zealand and Australia

The Appellate Body upheld a panel ruling faulting, on several grounds, a U.S. safeguard measure that imposed a tariff on imports of lamb from Australia and New Zealand. Re-
jecting the U.S. defense, the Appellate Body held that the "unforeseen developments" re-
quired under Article XIX 1(a) of GATT to justify a safeguard measure, must be demonstr-
ated prior to the application of a safeguard measure. Currently, U.S. law does not require 
the USITC, the investigating body, to examine the existence of unforeseen developments. 
In the WTO case, the United States argued that this factor could be inferred from the 
factual record of the investigating authority and then demonstrated during the DSB process. 
The Appellate Body also agreed with the panel that the U.S. definition of U.S. lamb 
meat industry unfairly included growers and feeders of live lamb, in violation of Article 
4.1(c) of the Safeguards Agreement, which requires that the domestic industry be defined 
exclusively by reference to "producers of a like or directly competitive product." The 
Appellate Body upheld the panel's finding that the USITC failed to ensure that injury 
caused by other factors was not attributed to imports, as required by Article 4.2(b) of the 
Safeguards Agreement. This case was satisfactorily resolved when the United States re-
placed the tariff with adjustment assistance to the industry, although the "unforeseen de-
velopments" finding suggested a potentially significant interpretation with respect to all 
safeguards investigations.

2. Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished 
Leather

This case, brought by the European Union (EU) with the United States claiming third-
party rights, addressed the extent to which a country's customs and tax requirements can 
act as a restraint on trade. The panel rejected the EU's claims that the mere participation 
of domestic industry representatives in the customs inspection exercises pressure and thus 
restrains exports. However, the panel agreed with the EU position that the industry rep-
resentatives' access to confidential business information was unreasonable. The panel also 
agreed with the EU that Argentina's practice of requiring tax down payments (or "pre-
payments") on imported goods increased the tax burden, in the form of interest payments, 
on imports and thus discriminated between imported and competing domestic products. 
Neither Argentina nor the EU appealed, and the panel report was adopted without mod-
ification.

3. United States - Antidumping Measures on Certain Hot-rolled Steel Products from Japan

Japan initiated a complaint against the United States alleging that the preliminary and 
final determinations of the U.S. Department of Commerce (DOC) and the U.S. Interna-
tional Trade Commission (USITC) in their antidumping investigations of certain hot-rolled 
steel products from Japan (issued in 1999) were erroneous, based on deficient procedures 
under the U.S. Tariff Act of 1930 and related regulations, and violated the Antidumping 
Agreement. The panel report supported Japan's claims that the United States had erred in: 
(1) refusing to consider additional information provided by three Japanese steel companies

from New Zealand and Australia, WT/DS177/AB/R & WT/DS178/AB/R (May 1, 2001), available at http://
www.wto.org (last visited July 24, 2002).
73. Id.
74. WTO Panel, Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, 
75. WTO Appellate Body, United States - Antidumping Measures on Certain Hot-Rolled Steel Products from 
after the deadline for responses to the DOC’s questionnaires; and (2) applying its “arms-length” test to conclude that home market sales made by exporters to affiliated customers at less than 99.5 percent of the prices charged to unaffiliated customers are not in the “ordinary course of trade” and therefore not eligible for inclusion in the antidumping analysis. On appeal, the Appellate Body affirmed most of the panel’s ruling, several panel findings, including (1) and (2) above. However, the Appellate Body reversed the panel report by finding that the United States had also erred in its injury analysis by not separating and distinguishing the injurious effects of other known causal factors from the injurious effects of the dumped imports. The United States has said that it intends to implement the DSB recommendations.

4. India – Measures Affecting the Automotive Sector

In this case, the United States and the European Union lodged a complaint against India’s regulations that required auto manufacturers to sign memoranda of understanding (MoU) that imposed local content and trade balancing obligations on the signatories. Under the local content provisions, MoU signatories were required to use a percentage of local content parts in their passenger car production in India. Under the trade balancing provisions, MoU signatories were required to offset their imports of auto kits and components into India with exports of cars or car parts of at least equal value to those imports. (An earlier case had deemed India ineligible to continue to use the balance of payment exception.) The panel agreed with the United States that India’s regulations imposed “unnecessary” barriers on foreign investors wanting to invest in India’s auto industry and were therefore inconsistent with the Agreement on Trade-Related Investment Measures (TRIMS). At year-end, India had not indicated whether it plans to appeal.

5. United States – Section 211 Omnibus Appropriations Act of 1998

At the center of this dispute is the battle between Pernod of France and Bacardi over who owns the U.S. rights to use the trademark “Havana Club” (giving the case its popular name). Section 211 of the U.S. Omnibus Appropriations Act prohibits U.S. courts from registering or enforcing trademarks or trade names associated with businesses confiscated without compensation by the Cuban government unless the previous owner has consented. Pernod claims global ownership of the trademark as a result of its agreement with the Cuban government. U.S. courts have applied the legislation to deny Pernod’s ownership to the U.S. rights in the face of the competing claims of Bacardi that it owns the U.S. rights to the “Havana Club” name as a result of its agreement with the family that owned the distillery at the time it was seized by the Cuban government. The panel rejected thirteen of the EU’s fourteen arguments questioning the consistency of Section 211 with the TRIPs Agreement and found that trade names are not covered by TRIPs and that, in most respects, Section 211 is not inconsistent with the obligations of the United States under TRIPs. The panel did, however, fault the United States for failing to provide the means by which a

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claimant can assert ownership of a trademark before a U.S. court. In a reversal, the January 2, 2002 decision of the Appellate Body found that Section 211 does provide procedures for asserting a claim, but that these procedures violate the most-favored-nation principle of the WTO by imposing on non-U.S. nationals an extra legal step to assert protection of their trademark rights. Both parties have claimed victory, and the implementation phase of this case promises to present a challenge to the DSB process.

B. Implementation

The implementation phase of the DSB process can drag on for years as the losing party takes halting or half-hearted measures that lead to one, or more, referrals of the case back to the original panel. Several stand-offs between the United States and the EU are particularly illustrative.

In United States – Tax Treatment for Foreign Sales Corporations,86 a 2000 Appellate Body decision had agreed with a panel that the U.S. Foreign Sales Corporation (FSC) law was an illegal trade subsidy. The FSC law provides a mechanism by which more than 6,000 U.S. companies gain an annual tax break of about $4 billion through the exemption of most of their foreign-earned income from taxation in the United States. In 2000, Congress passed the Foreign Sales Corporation Repeal and Extraterritorial Income Exclusion Act of 2000, which attempted to address WTO objections while preserving the tax breaks. The European Union complained that the new law not only maintained the violations, but also aggravated them. The reconvened panel agreed. The United States appealed this 2002 finding, and the EU cross-appealed.

In perhaps the best illustration of the limitations facing the DSB in a highly charged dispute, the United States and the EU arrived at a political settlement in European Communities – Regime for the Importation, Sale and Distribution of Bananas case. Pursuant to the parties' agreement, the EU replaced its quota system for African, Caribbean, and Pacific countries, which lay at the heart of the dispute, with a new system of licenses, and by 2006 will introduce a tariff-only regime for banana imports. The United States will phase out the increased duties imposed as a retaliatory measure, but may re-impose them should the EU fail to complete implementation of the agreement.

In United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities,87 the United States has said that it will, within a “reasonable period of time,” implement the original DSB 2001 ruling that the quantitative restriction imposed on wheat gluten from the EU as a safeguard measure violates the Safeguards Agreement. The EU responded that the only appropriate remedy is for the United States to immediately withdraw the safeguard measure and that its “rebalancing” measure (i.e., restrictions imposed on imports of corn or maize gluten under provisions of the Safeguards Agreement) will remain in place until the United States withdraws its safeguard restriction on wheat gluten.

In Brazil – Export Financing Programme for Aircraft,88 for the second time since the Appellate Body, in 1999, affirmed a panel report in favor of Canada, a panel has been estab-

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lished to determine whether Brazil's export subsidy program complies with WTO rules and with the DSB recommendations. At the meeting where this issue was discussed, Members also discussed, without resolving, the question of whether the procedures that normally apply for setting up a panel also apply for panels set up (or reconvened) to rule on "compliance." If the procedures do apply, do they therefore require some form of consultation before a request for a panel is tabled, and permit a member to block the first attempt to create a panel?

As a result of U.S. and New Zealand complaints that Canada's new provincial schemes are export subsidies like the national measures they replaced, the DSB has twice referred the case of Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products\(^8\) back to the original panel, where the matter remained at year-end. The two countries have argued that the failure of the Appellate Body to rule on the consistency of Canada's measures with its WTO obligations lies at the heart of the ongoing disagreements. The United States and New Zealand also requested DSB authorization to suspend concessions against Canada—each in the amount of U.S.$35 million. Canada objected to these amounts, and these matters were referred to arbitration. The arbitration process will be suspended until the original panel completes its report.

In European Communities - Antidumping Duties on Imports of Cotton-Type Bed Linen from India,\(^8\) the European Communities (now the EU) has brought into force its Regulation No. 1644/2001 to implement the DSB rulings in this case, which dates back to 1996, when the European Communities initiated an antidumping investigation into certain imports of cotton-type bed linen from India and other countries. Although the antidumping measure was suspended, India has expressed concern that the regulations do not fully implement the rulings.

In United States - Measures Relating to the Import of Shrimp and Shrimp Products,\(^8\) the Appellate Body affirmed that the new U.S. sea turtle protection law is fully WTO consistent and compliant with DSB recommendations. This case began in 1997, when India, Malaysia, Pakistan and Thailand brought a joint complaint against a ban imposed by the United States on the importation of certain shrimp and shrimp products in order to protect sea turtles. An Appellate Body ruling had determined that the U.S. law discriminated against the four Asian complainants in the requirements imposed for their fisherman to transition to the use of turtle-excluder devices.

The Appellate Body has agreed with the panel ruling in Mexico - Antidumping Investigation of High Fructose Corn Syrup from the United States,\(^8\) that Mexico has failed to cure the flaws the original panel found in Mexico's imposition of antidumping duties on U.S. imports of high fructose corn syrup. Mexico had announced that it has complied with the ruling by re-determining that there was a threat of injury to the domestic sugar industry and maintaining the subject antidumping duties, while at the same time determining that the provisional amounts paid would be refunded with interest.

In 2001, the following cases reached some sort of closure, either through a DSB report certifying that implementation is complete or the agreement of the parties that implementation is complete, and/or the remediating party issuing a statement that it considers itself to have met the terms of the DSB recommendations: United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat; United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan; U.S. – Section 110(5) of the US Copyright Act; Japan – Measures Affecting Agricultural Goods; United States – Antidumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea; Chile – Taxes on Alcoholic Beverages; and Canada – Certain Measures Affecting the Automotive Industry.

C. Substantial Cases Pending Before the DSB

At the request of the EU the DSB has established three panels to examine complaints against U.S. measures on steel imports. United States – Countervailing Measures Concerning Certain Products from the EC involves twelve countervailing duty orders by the United States on steel products from various EC Member States, with India and Mexico reserving their third-party rights. United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany concerns the EU’s complaint about the U.S. “sunset review” during which the Department of Commerce declined to revoke the countervailing duty order while finding that subsidization would likely continue at a rate of 0.54 percent. The EU alleges that this action violates the Subsidies Agreement because countervailing duty orders must be revoked where the rate of subsidization found is less than the one percent de minimis standard for initial countervailing duty investigations. Japan has reserved its third party rights in that case. United States – Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Quality Line Pipe concerns two U.S. safeguard measures that the EU maintains are inconsistent with the Safeguards Agreement and GATT 1994. Canada, Japan, and Mexico have reserved third party rights.

In a pending case, United States – Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment), the DSB has established one panel to examine the complaints of eleven
countries (Australia, Brazil, Canada, Chile, EC, India, Indonesia, Japan, Korea, Mexico and Thailand) against the U.S. Continued Dumping and Subsidy Offset Act of 2000 (known as the "Byrd Amendment"). The co-complainants have alleged that the Act, which provides for the redistribution of antidumping and countervailing duties to the "affected domestic producers," provides double protection and not only violates the Agreement on Subsidies and Countervailing Measures, but also the Agreement on Anti-Dumping. In addition, Mexico alleged that the Byrd Amendment payments were subsidies and actionable. Israel, Norway, and Hong Kong, China reserved their third-party rights.

At Canada's request, the DSB has established a panel to review a second anti-dumping/countervailing duty case, United States – Section 129(c)(1) of the Uruguay Round Agreements Act\(^9\) (URAA). Canada alleges that Section 129(c)(1) of the URAA, and the accompanying Statement of Administrative Action (SAA) at page 1026 of the SAA, preclude the United States from complying fully with DSB rulings in cases where the United States is found to have acted inconsistently with its WTO obligations with respect to an antidumping or countervailing duty proceeding. Chile, the EC, India, and Japan have reserved their third-party rights.

Another case pending between the United States and Canada is United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada,\(^9\) in which Canada complains that the U.S. Department of Commerce preliminary countervailing duty determination and preliminary critical circumstances determination concerning certain softwood lumber from Canada, as well as provisions of the Tariff Act of 1930, are inconsistent with the WTO Agreement on Subsidies and Countervailing Measures, and with Article VI of the GATT 1994.

The aircraft dispute between Canada and Brazil continues in Canada – Export Credits and Loans Guarantees for Regional Aircraft\(^9\) with the establishment of a DSB panel in response to Brazil's request to examine the WTO compatibility of Canada's new aircraft financing system. The EU, India, and the United States have reserved their third-party rights. In Belgium – Administration of Measures Establishing Customs Duties for Rice,\(^9\) the United States has requested the establishment of a panel to examine Belgium's customs duties practices on rice imports.

IV. Trade Remedies
A. Summary

In 2001, countries around the world continued their active use of trade remedies. According to the WTO, 322 new antidumping cases were initiated between July 1, 2000 and

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96. WTO Panel, United States – Section 129(c)(1) of the Uruguay Round Agreements Act, WT/DS221/5 (Feb. 9, 2001), available at http://www.wto.org (last visited July 24, 2002).
June 30, 2001, and definitive measures were imposed in 185 cases during the same period.\textsuperscript{100} The United States led the world in initiations with 77, while India and the European Community followed with 37 and 29 initiations respectively.\textsuperscript{101} India imposed 41 definitive measures, more than any other country, followed closely by the EC with 36 and the United States with 20.\textsuperscript{102} The People's Republic of China continued to be the most frequent target of antidumping initiations,\textsuperscript{103} and steel continued to be the industry most often investigated.\textsuperscript{104} In the United States, trade remedy actions in 2001 were dominated by the Steel 201 investigation.

B. Import Administration and International Trade Commission Developments

1. Steel 201

In June 2001, the United States Trade Representative (USTR) asked the ITC to initiate a Section 201 investigation of steel imports covering a broad range of imported steel products. Products covered by the investigation were divided into four broad categories—carbon and alloy flat products, carbon and alloy long products, carbon and alloy tubular products, and stainless and tool steel products\textsuperscript{105}—and further subdivided these products into thirty-three subcategories.\textsuperscript{106} The case was the largest and most complex safeguard investigation ever carried out by the Commission. Indeed, some members of the domestic industry thought the scope was too broad, and opposed imposition of a remedy and/or voiced complaints about the Administration's failure to consult prior to casting such a wide net.\textsuperscript{107}

After a grueling schedule of briefing and hearings, the Commission made affirmative injury determinations with respect to carbon and alloy slab, plate, hot-rolled, cold-rolled, coated, flat products, hot-rolled bar, cold-finished bar, rebar, flanges, welded tubular products other than OCTG, and stainless steel bar and rod.\textsuperscript{108} The Commission made negative determinations with respect to carbon and alloy grain-oriented electrical steel, (GOES), ingots, rails, wire, strand, nails, shapes, fabricated structural units, seamless tubular products other than OCTG, seamless OCTG, and welded OCTG, and stainless slabs/ingots, plate, cloth, rope, seamless tubular products, and welded tubular products.\textsuperscript{109} The Commission

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\textsuperscript{101} Id.

\textsuperscript{102} Id.

\textsuperscript{103} WTO, Anti-Dumping: Statistics, Initiations: by Affected Country from 01/01/95 to 30/06/01, available at http://www.wto.org/english/tratop_e/adp statistab1_e.htm (last visited July 24, 2002).

\textsuperscript{104} WTO, Anti-Dumping: Statistics, Measures: by Affected Country from 01/01/95 to 30/06/01, available at http://www.wto.org/english/tratop_e/adp statistab9_e.htm (last visited July 24, 2002).


\textsuperscript{106} Id.; Carbon & Alloy Flat Products: Slab, plate, hot-rolled, cold-rolled, grain oriented electrical steel (GOES), coated steel, tin mill products; Carbon & Alloy Long Products: Hot bar, cold bar, rebar, rails, wire, strand, nails, heavy shapes, fabricated units; Carbon & Alloy Tubular Products: seamless, seamless oil country tubular goods (OCTG), welded, welded OCTG, flanges; Stainless & Tool Steel Products: bar, rod, tool steel, wire, cloth, rope, seamless tubular, welded tubular, flanges.

\textsuperscript{107} See, e.g., International Trade Commission, Hearing Transcript at 2314 (Sept. 28, 2001) (testimony of Mr. Luberda on behalf of the domestic stainless seamless hollow products industry, opposing relief); id. at 2352 (testimony of Mr. Sharkey of Gerlin, USA, a domestic manufacturer of stainless flanges, opposing relief).

\textsuperscript{108} ITC Injury, supra note 105.

\textsuperscript{109} Id.
was equally divided with respect to carbon and alloy tin mill products; tool steel, stainless wire, and stainless fittings.\textsuperscript{110}

The Commissioners appear to have tried to present a unified position at the injury phase. A unanimous Commission supported all affirmative injury findings.\textsuperscript{111} Negative findings were unanimous or four to two splits with dissents coming from Commissioners Bragg and Devaney in each case.\textsuperscript{112} Bragg and Devaney voted affirmatively on each of the tie votes; they were joined by Commissioner Miller for tin mill products and Chairman Koplan for the remaining tie votes.\textsuperscript{113}

The remedy recommendations broke down along similar lines, with Bragg and Devaney generally recommending higher tariff amounts than their colleagues. For most products with affirmative injury findings Chairman Koplan and Commissioners Miller and Hillman recommended a 20 percent tariff for the first year, phasing down to 17 percent, 14 percent, and 11 percent over the next three years.\textsuperscript{114} With respect to slab and welded tubular products Koplan, Miller and Hillman were joined by Commissioner Okun in recommending tariff-rate quotas.\textsuperscript{115} Commissioners Bragg and Devaney recommended first year tariffs of 40 percent for most flat products, 35 percent for long products, and 30 percent for tubular products. Bragg recommended first-year tariffs of 25 percent for stainless and tool steel products, while Devaney recommended a quota based on 1996–1998 import levels plus a 15% tariff.\textsuperscript{116} Commissioner Okun recommended quotas on all products for which she made a recommendation.\textsuperscript{117}

Shortly after the ITC released its remedy recommendations, EU officials began threatening WTO action on grounds that the ITC's injury findings were contrary to the WTO Safeguards Agreement.\textsuperscript{118} The USTR's request for additional information about the ITC's consideration of unforeseen developments, economic analysis, and NAFTA exclusions\textsuperscript{119} and the ITC's response to that request\textsuperscript{120} appeared tailored to address issues that might be of specific concern in a WTO challenge.\textsuperscript{121}

\textsuperscript{110} Id. If the Commission is equally divided the president may consider the determination of either group of Commissioners to be the determination of the Commission.

\textsuperscript{111} Id.

\textsuperscript{112} Id.

\textsuperscript{113} Id.


\textsuperscript{115} See id.

\textsuperscript{116} See id.

\textsuperscript{117} See id.

\textsuperscript{118} See, e.g., Possible EU Challenge of U.S. Steel Section 201 Would Focus on ITC Finding, INSIDE U.S. TRADE, Dec. 21, 2001.

\textsuperscript{119} See Letter from United States Trade Representative Robert B. Zoellick to International Trade Commission Chairman Stephan Koplan (Jan. 3, 2002).

\textsuperscript{120} See Letter from Stephen Koplan to Robert Zoellick (Jan. 9, 2002) and Response of Commission to Questions 1 and 3 of USTR Request of January 3, 2002 (Feb. 4, 2002).

After a set of hearings conducted by the USTR and a period of intense lobbying by all parties, President Bush proclaimed a steel remedy on March 5, 2002. The President imposed tariffs of 30 percent on flat products (except slab), tin mill products, and hot and cold-finished bar. Tariffs of 15 percent were imposed on rebar, certain tubular products, and stainless steel rod. Fittings, flanges, and stainless steel wire received slightly lower tariffs. For two of the four products that received injury votes the President elected to impose a safeguard remedy. A tariff-rate quota of 5.4 million short tons was imposed on slab with a 30 percent out-of-quota tariff. The slab quota allowed by the President was less than the 7 million ton quota recommended by the Commission majority. In all, the remedies imposed by President Bush were generally more stringent than those recommended by the Commission majority, but less than those recommended by Commissioners Bragg and Devaney. The proclamation was condemned by virtually all of the United States' trading partners and sparked an intense political and media debate, with many viewing the President's decision as a political one calculated to secure Republican votes in West Virginia, Pennsylvania, and Ohio.

2. Antidumping and Countervailing Duty Cases

The year 2001, particularly the early months, was dominated by the steel investigations that arose from the many petitions brought in the wake of the unprecedented steel import surge in 1998. Two broad new orders imposed duties on hot-rolled flat products from nine different exporting countries and concrete reinforcing bars from eight countries. Duties

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122. See id.
123. See id.
124. See id.
125. See id.
126. See id.
127. See Steel Determination, supra note 114.
were also imposed on large diameter line pipe from Japan,\textsuperscript{132} steel angle from Japan, Korea, and Spain,\textsuperscript{133} and butt-weld pipe from Italy, Malaysia, and the Philippines.\textsuperscript{134} An investigation into Steel Wire Rope from China, India, and Malaysia eventually resulted in no order, following a negative dumping finding for Malaysia and no-injury determinations for India and China.\textsuperscript{135} Non-steel products receiving antidumping or countervailing duty orders included, honey, magnesium, and ammonium nitrate.\textsuperscript{136}

Commerce and the ITC continued to interpret (or reinterpret) agency procedure and various aspects of the U.S. trade remedies laws in 2001. Notable Commerce decisions included:

\begin{itemize}
  \item \textbf{Low Enriched Uranium from France}\textsuperscript{137}/\textbf{Definition of Goods under U.S. Trade Remedy Laws}. Commerce clarified the definition of goods under U.S. antidumping laws in its final decision in an antidumping investigation of low enriched uranium (LEU). Respondents argued that enriched uranium shipped to the United States pursuant to processing contracts was not subject to the AD/CVD laws because foreign uranium processors were selling enrichment services rather than LEU—the subject merchandise. The Department rejected this argument, finding that enrichment constituted substantial transformation such that the enriched uranium entering the United States was a product of the country where it was enriched regardless of the commercial arrangement between the exporter and the purchaser in the United States.
  
  \item \textbf{Automotive Replacement Glass from China}/\textbf{Tainted Import and Surrogate Values}. In its final decision in \textit{Automotive Replacement Glass from China},\textsuperscript{138} Commerce reinforced its policy of not using dumped or subsidized import prices in calculating CV or NME surrogate values and clarified the standard of proof required to show that import prices are tainted. The Department refused to use import values to China or to the surrogate country (India) where there was “reason to believe or suspect” that the import prices were distorted by export subsidies. The Department rejected respondents’ argument that it must find that substantial evidence supported the subsidy finding, explaining that it need only base its decision on generally available information. Under this standard, Commerce found evidence of non-specific export subsidies adequate to preclude use of the prices in question despite respondents’ argument that benefits from the subsidies were \textit{de minimis}. The Department refused, however, to disregard import prices on grounds that the product in question was dumped
\end{itemize}

\textsuperscript{132} Antidumping Duty Order: Large Diameter Line Pipe from Japan, 66 Fed. Reg. 63,368-01 (Dec. 6, 2001).

\textsuperscript{133} Antidumping Duty Order: Stainless Steel Angle from Japan, Korea and Spain, 66 Fed. Reg. 27,628-01 (May 18, 2001).

\textsuperscript{134} Antidumping Duty Order: Stainless Steel Butt-Weld Pipe Fittings from Italy, Malaysia and the Philippines, 66 Fed. Reg. 11,257-01 (Feb. 23, 2001).


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into a third country, finding that evidence of dumping into a third country was not evidence that the same product was dumped into the exporting country or a surrogate country.

- Non-Market Economy Status/Russian Federation and Latvia. At Latvia’s request Commerce reviewed and revoked that country’s non-market economy (NME) status. At the request of a steel producer, Commerce initiated review of the NME status of the Russian Federation.

At the ITC, three preliminary determinations provided further insight into the Commission’s criteria for finding no reasonable indication injury at the preliminary stage. In preliminary determinations on Softwood Lumber from Canada and Circular Welded Non-Alloy Steel Pipe from China, Indonesia, Malaysia, Romania and South Africa, the Commission found no material injury but allowed the investigations to proceed with respect to threat of injury.

In the case of lumber, the Commission concluded that there was no injury because the domestic industry was protected by the 1996 Softwood Lumber Agreement until immediately before the petition was filed. Over objections from the respondents, the Commission found that the Agreement did not preclude a finding of threat of injury despite wording in the Agreement stating that its purpose was to ensure no injury or threat of injury.

In welded non-alloy pipes, the Commission found that the absence of price suppression/depression and evidence that the domestic industry was reasonably profitable despite the economic downturn supported a finding that there was no reasonable indication of injury to the domestic industry. With respect to threat of material injury, the Commission elected to cumulate imports from all countries but China. It found no threat from the cumulated countries but found that the rapid increase in import volumes from China and the growing inventories in the country supported a threat finding.

In Spring Table Grapes from Chile and Mexico, the Commission declined to make an affirmative injury or threat of injury finding. The Commission’s decision arose largely from its refusal to accept the domestic industry’s seasonal definition of the U.S. industry. While finding that seasonality could be a factor in like product definition, the Commission refused to allow it to dominate the like product decision.

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145. Id. at 17.
146. Id. at 17–20.
147. International Trade Commission, Spring Table Grapes from Chile and Mexico Investigations Nos. 731-TA-926 and 927 (Preliminary), USITC Pub. 3432 (June 2001).
148. Id. at 6.

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duction from beyond the limited three-month period proposed by the petitioners, the injury indicators largely disappeared.

In 2001, the Commission also issued its first determination under Section 129 of the URAA. That provision allows the USTR to request an advisory report on whether steps could be taken to bring Commission action into conformity with an adverse WTO decision and to request that ITC issue a determination to bring the proceeding into conformity. Following adverse decisions by a WTO dispute panel and the Appellate Body with respect to the 1998 safeguards action on Wheat Gluten, the USTR invoked Section 129. In the Section 129 proceeding, the Commission adopted its original views on injury but supplemented the discussion of its findings in an attempt to satisfy the deficiencies found by the Appellate Body.

3. Sunset Reviews

Commerce and the ITC faced a comparatively light schedule of five-year sunset reviews in 2001. Contrary to past practice, the vast majority of reviews resulted in continuation of the order. The only orders revoked were Manganese metal from China; polyvinyl alcohol from China, Japan, and Taiwan; and line and pressure pipe from Italy. Manganese metal and polyvinyl alcohol were both pro forma revocations without any domestic industry participation. The line pipe order was revoked only after the ITC found no likelihood of continued injury.

Steel orders remained in place for GOES, stainless steel bar, line and pressure pipe from Argentina, Brazil, and Germany, and clad steel plate from Japan. All were expedited reviews at Commerce. The ITC’s three-to-three GOES decision was Commissioner Devaney’s first vote and produced much controversy as his vote allowed the continuation of an order that would otherwise have been revoked. As discussed below, a challenge to that decision is currently before the Court of International Trade (CIT) where the court has ordered discovery on the validity of Devaney’s appointment.

Following expedited reviews at Commerce, orders were also continued on pasta from Italy and Turkey; garlic from China; pasta from Italy and Turkey; garlic from China; and clad steel plate from Japan. All were expedited reviews at Commerce. The ITC’s three-to-three GOES decision was Commissioner Devaney’s first vote and produced much controversy as his vote allowed the continuation of an order that would otherwise have been revoked. As discussed below, a challenge to that decision is currently before the Court of International Trade (CIT) where the court has ordered discovery on the validity of Devaney’s appointment.

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149. Id. at 15–22.
151. Id.
154. Id.
helical spring lock washers from China and Taiwan;\textsuperscript{164} silicon manganese from Brazil, China, and Ukraine;\textsuperscript{165} and silicon metal from Brazil and China.\textsuperscript{166}

C. COURT DECISIONS

1. Micron Technology/CEP Selling Expenses

In 2001, the Federal Circuit returned to the difficult issue of defining constructed export price (CEP). In \textit{Micron Technology Inc. v. United States},\textsuperscript{167} the court upheld Commerce's decision not to deduct indirect selling expenses from the sales price in calculating CEP unless those expenses were associated with sales in the United States. The statutory clause at issue, 19 U.S.C. § 1677a(d)(1)(D), requires that the price used to establish CEP be reduced by "any selling expenses not deducted under subparagraph (A), (B), or (C)."\textsuperscript{168} Commerce determined that paragraph (D) did not require the deduction of indirect selling expenses from the price used to establish CEP unless those expenses were associated with sales in the United States. Petitioner Micron Technologies appealed to the CIT and then to the Federal Circuit. Micron argued that prior to the enactment of the URAA, Commerce and the CIT had interpreted the corresponding subparagraph in the previous statute to include all indirect selling expenses. Congress, Micron argued, must be presumed to be aware of the prior interpretation and to have intended that the provision continue to be interpreted in the same manner. The Court rejected Micron's argument, holding instead that Congress merely adopted the same ambiguous language contained in the old statute. The Court gave deference to Commerce's interpretation of the statute as requiring deduction of only those selling expenses of a kind similar to those articulated in subparagraphs (A), (B), and (C), that is, expenses associated with sales in the United States. In the same decision, the Federal Circuit found that the statute unambiguously requires that Commerce deduct the selling expenses set forth in Section 1677a(d) from the price used to establish CEP, prior to making a level of trade comparison.\textsuperscript{169}

2. Thai Pineapple/Changing Raw Material Costs in COP Calculations

In \textit{Thai Pineapple Canning Industry Corp. v. United States},\textsuperscript{170} the Federal Circuit required Commerce to change its methodology for matching costs to sales when using constructed value to determine normal value. The court found Commerce's decision to use a single weighted-average cost for the entire review period unreasonable because it distorted the calculation of dumping margins.\textsuperscript{171} Evidence showed that the cost of the raw material (fresh pineapple) increased significantly over the period of investigation and that the merchandise remained

\textsuperscript{164} Continuation of Antidumping Duty Orders on Helical Spring Lock Washer from China and Taiwan, 66 Fed. Reg. 11,255 (Feb. 23, 2001).


\textsuperscript{166} Continuation of Antidumping Duty Orders on Silicon Metal from Brazil and China, 66 Fed. Reg. 10,669 (Feb. 16, 2001).

\textsuperscript{167} Micron Tech. v. U. S., 243 F.3d 1301 (Fed. Cir. 2001).

\textsuperscript{168} 19 U.S.C. § 1677a(d)(A) – (C). Paragraphs (A), (B), and (C) of the subsection include commissions for selling in the United States, expenses directly related to the sale, and selling expense the seller pays on behalf of the purchaser.

\textsuperscript{169} Micron Tech., 243 F.3d at 1316.

\textsuperscript{170} Thai Pineapple Canning Industry Corp. v. United States, 273 F.3d 1077 (Fed. Cir. 2001).

\textsuperscript{171} Id.
in inventory due to a significant delay between production and sale, creating the appearance that sales in the early part of the period were below cost of production and those in the later part of the period had very high profit margins. The case was remanded to Commerce with instructions to match sales of goods to costs based on the period in which those goods were manufactured, taking into account the inventory period.172

3. **Shakeproof/Imported Inputs as Surrogate Value**

   In *Shakeproof Assembly Components v. United States,* the Federal Circuit upheld Commerce's decision to base non-market economy factor of production values on the actual price of inputs imported from a market economy instead of using values in a surrogate country. Petitioners urged Commerce to use Indian prices to estimate the value of steel used in manufacturing the subject merchandise. Commerce elected instead to use the actual value of steel imported from England. In what may be a blow to petitioners who have relied on Commerce's use of relatively high Indian factor prices to estimate Chinese costs of production, the Federal Circuit found that the actual price paid for inputs imported from a market economy in meaningful quantities is the best available information and promotes accuracy in dumping calculations.174

4. **Mitsubishi Heavy Industries/Custom Made “Like Products”**

   Following two remands by the CIT, the Federal Circuit upheld Commerce's determination that large, custom-made printing presses sold in the United States and Japan were like products, despite individual differences between the products. In a 1996 dumping investigation of large newspaper printing presses from Japan, Commerce determined that custom-made presses sold in Japan and the United States were like products for the purposes of a dumping determination and based its constructed value calculation on the profit earned on sales in the Japanese market. The CIT twice remanded the determination to Commerce for a better explanation of the profit calculation and the basis upon which the two products could be reasonably compared. Both courts finally accepted Commerce's explanation that the home-market presses were like products because "both markets share detailed product characteristics" and a common use: "to produce newspapers." Over protests by the respondents that Commerce's questionnaire was drafted to ensure responses showing regularity in Commerce determinations and reiterated that the "substantial evidence" test presents a "high barrier to reversal."177

5. **Nippon Steel/Challenge to Devaney Recess Appointment**

   In a sunset review decided shortly after Commissioner Devaney joined the ITC, the Commission voted three-to-three that revoking the order would likely lead to continuation or recurrence of injury to the domestic industry. Nippon Steel challenged this determination at the CIT. In addition to challenging the determination on the merits, Nippon Steel

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172. *Id.*
174. *Id.*
175. *Mitsubishi Heavy Ind. v. United States,* 275 F.3d 1056 (Fed. Cir. 2001)
176. *Id.* at 1060.
177. *Id.*
178. *Nippon Steel v. United States,* at slip op. 01-153.

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raised a constitutional challenge to Devaney’s participation in the vote, arguing that neither a vacancy nor a recess existed at the time of his appointment by President Clinton. The ITC maintained that the CIT did not have jurisdiction and that Nippon Steel had no standing to challenge the appointment. Styling the case as a challenge to the ITC’s adherence to its own rules rather than a direct challenge to President Clinton’s exercise of the appointment power, the CIT found jurisdiction.\textsuperscript{179} The court found the plaintiffs had suffered injury-in-fact and therefore had standing.\textsuperscript{180} Although discovery is not normally permitted in § 1581(c) cases, the court granted Nippon’s discovery requests seeking information on the timing of the recess appointment.\textsuperscript{181}

6. \textit{Nippon and Altx/Quality of ITC Determinations}

In a pair of cases issued in late 2001, the CIT took the ITC to task for writing conclusory opinions, with little explanation of its analysis and findings. In \textit{Altx v. United States}, the court remanded a four-to-two finding of no-injury to the Commission for reevaluation and reconsideration.\textsuperscript{182} In \textit{Nippon Steel v. United States} the court remanded a four-to-two affirmative determination.\textsuperscript{183} Throughout both cases, the court found that the Commission failed to support its reasoning,\textsuperscript{184} neglected to address contrary data,\textsuperscript{185} and failed to provide adequate support in its written opinion. In both cases, the ITC’s attempt before the court to support its findings with staff report data were dismissed as “post hoc rationales.”\textsuperscript{186} It remains to be seen whether the court’s criticism of the cursory ITC opinions will open the door for more court challenges by dissatisfied parties or will elicit changes in how ITC opinions are drafted.

7. \textit{Save Domestic Oil/Criminal Contempt}

\textit{Save Domestic Oil v. United States}\textsuperscript{187} took several unusual turns during the course of 2001. Petitioners had challenged Commerce’s decision not to initiate controversial dumping and subsidy investigations of crude oil from Venezuela, Saudi Arabia, Iraq, and Mexico. The CIT remanded to Commerce for initiation or further clarification, and denied the Government’s motion for leave to file an interlocutory appeal of the remand.\textsuperscript{188} The Government appealed to the Federal Circuit and moved to stay the CIT order pending appeal. The Federal Circuit dismissed the appeal, holding that a remand to Commerce was not a final, appealable order.\textsuperscript{189} Angered by DOJ’s failure to obtain a stay during the appeal, the CIT judge began criminal contempt proceedings against the Government, jailing a DOJ attorney for a number of hours.\textsuperscript{190} The Federal Circuit then granted a writ of mandamus sought by the Government and found that the criminal contempt proceedings were an

179. \textit{Id.} at 11.
180. \textit{Id.} at 12.
181. \textit{Id.} at 14.
184. See, e.g., id. at 19; see also \textit{Altx}, 167 F. Supp. 2d at 1360, 1362, 1363.
185. See, e.g., \textit{Nippon Steel}, slip op. at 25, 29; \textit{Altx} 167 F. Supp. 2d at 1359, 1363.
189. \textit{Id.}
abuse of judicial discretion and directed the CIT to vacate the orders initiating contempt proceedings. Judge Aquilino saw the CAFC’s action as premature and filed a cert petition at the U.S. Supreme Court to overturn it. However, the Supreme Court denied cert. At year-end, Commerce’s remand determination, which again declined to initiate the AD/CVD investigations, was still pending before the CIT.
