International Trade

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I. Introduction

The year 2002 saw important activity in the international trade policy field. Negotiations for the World Trade Organization's (WTO) Doha Agenda began in earnest, as did various bilateral and multilateral free trade agreements between the United States and other countries. Dispute settlement at the WTO was the source of various significant developments, highlighted by several cases brought and decided against the United States, the accompanying and recurring complaints from U.S. executive and legislative branch officials that the WTO is overstepping its authority in the settlement of these disputes, and the observation by many that implementation of dispute settlement rulings is too slow.

On the domestic front, U.S. trade remedy laws remain among the most frequently used across the globe. The United States applied safeguard (Section 201) measures against a vast array of steel products that met with threats of retaliation, copycat cases, and WTO dispute settlement complaints from non-NAFTA and non-developing countries. Meanwhile, the antidumping and countervailing duties on softwood lumber from Canada placed strains on the U.S.-Canada trade relationship.

Legislative activity in the trade field received a lift, as Congress finally provided the President with trade promotion (fast-track) authority along with adjustments to the Trade Adjustment Assistance program and a renewal of the GSP program. Congress also passed the Homeland Security Act, which moved the Customs Service away from the U.S. Treasury for the first time in U.S. history. Although several other pieces of trade or trade-related legislation were not passed, they appear ready for action in 2003.

II. Negotiating Developments

In early 2002, countries around the world continued bilateral and regional trade talks. Many of the negotiations in which the United States played a role were hampered or at

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least delayed by the absence of Presidential fast-track authority. Congressional passage and
Presidential signature of the Trade Act of 2002 in early August1 freed the United States
Trade Representative (USTR) to wrap up ongoing trade negotiations and begin work on a
flurry of new negotiations, including initiation of bilateral and regional negotiations with
Morocco, Australia, and the nations of Southern Africa. Intense negotiation at the year's
end produced completed trade pacts with Chile and Singapore. On the multilateral front,
the Doha Round trade talks emerged from their first full year of negotiations with wide
differences among WTO members on negotiating modalities and other overarching issues.
The year ended on a negative note as talks aimed at reaching an intellectual property
agreement to ensure adequate supply of AIDS drugs and other medicines to developing
countries failed in late December. The United States' regional efforts in the Western Hemi-
sphere also proceeded with urgency in 2002 as the USTR focused on launching negotiations
with five Central American nations and reinvigorating talks regarding the Free Trade Area
of the Americas.

A. WORLD TRADE ORGANIZATION DEVELOPMENTS

1. Doha Round Negotiations

Doha Round negotiations began in earnest in 2002. Negotiating work at this stage was
primarily focused on negotiating modalities and other over-arching and horizontal issues.
In many important negotiating areas, such as agriculture, market access for industrial goods,
and services, initial proposals revealed wide differences among members that will be difficult
to resolve before the Cancun ministerial in September 2003.

• Agriculture: Doha Round Agriculture negotiations in 2002 focused on modalities for
market access, export subsidies, and domestic support negotiations. At year's end, there
were still substantial differences among members' negotiating positions. With respect
to market access, the United States has proposed a so-called "Swiss Formula" negoti-
ating modality focused on eliminating peak tariffs, capping tariffs at 25 percent,
and proposing applied tariffs rather than bound rates as a starting point for
negotiations.2 The Cairns Group3 has issued a proposal that also endorses a Swiss Formula approach
but rejects the U.S. focus on applied rates as detrimental to countries that have lowered
tariffs unilaterally.

The European Union, in contrast, favors a "Uruguay Round" approach to tariff cuts
that would cut all tariffs by 36 percent.4 The EU proposal also includes provisions
sought by developing countries, such as immediate duty-free access to developed coun-
try markets for least developed countries and differential treatment for developing
countries.5

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6, 2002).
2. World Trade Organization, Agricultural Negotiations: The Issues, and Where We Are Now (Oct. 21, 2002),
3. Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Ma-
laysia, New Zealand, Paraguay, Philippines, South Africa, Thailand, and Uruguay. Canada did not join the
September 27, 2002 proposal.
index_en.htm (last visited May 20, 2003).
5. Id.
Similar differences emerged in discussions on export subsidies and domestic support programs. The United States and the Cairns Group offered proposals calling for reduction of trade distorting domestic support programs to a *de minimis* level, while Japan and Switzerland called for more flexibility on domestic support programs and the ability to use tariffs and support programs to ensure food security. Even the United States and the Cairns Group were far from agreement, however, with Cairns favoring elimination of support programs on a disaggregated basis, while the United States proposes an aggregated reduction strategy that allows a country to continue high levels of support for particular goods if greater reductions are taken on other goods.

By year-end there were still wide differences in negotiating positions on agriculture. In addition to the above, environmental issues, food safety, and other non-trade concerns continue to be sticking points. In an overview paper presented on December 18, 2002, the chairman of the Agricultural Committee summarized negotiations and recommended that countries return to the table with increased flexibility and “think creatively about avenues for convergence.”

- **Market Access for Non-Agricultural Products:** As with agriculture, the biggest issue in market access negotiations was modalities for negotiating tariff reductions. At the outset, negotiators could not even agree on a deadline for an agreement on modalities. Finally, to bring about agreement on a timetable close to that anticipated for the agricultural modalities, the negotiators agreed to reach a common understanding on an outline for an agreement by March 31, 2003. A final agreement on modalities is slated for May 31, 2003.

Again, the United States is proposing a Swiss Formula reduction scheme with two stages of tariff cuts. The first stage envisions by 2010: (1) elimination of all tariffs currently below 5 percent and (2) application of a Swiss Formula with coefficient of eight to all other tariffs. The second stage would include a linear reduction of all tariffs on consumer and industrial goods to zero by 2015. European Union and Japanese officials reacted negatively to the proposal, calling it unrealistic. Many developing countries had similar reactions and, in particular, criticized the proposal for ignoring the Doha mandate to give special treatment to developing countries. Among other issues, developing countries also complained that tariff revenue is an important source of government funds in many developing countries.

- **Services:** Doha Round services negotiations were intended to reach the stage of specific requests by mid-2002, however; many members had not submitted requests by year’s end. Like the agriculture and market access negotiations, services discussions in 2002 focused on broad issues of approach to negotiations and treatment of developing countries. Two “horizontal” issues emerged as sticking points in the negotiations. First, the Committee on Trade in Services is to evaluate the impact of negotiations on developing

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7. *Id.* at 3.
8. *Id.*
9. *Id.* at 2; *Agricultural Negotiations*, supra note 2.
10. *Id.* at 3.
country participation in services trade. Developing countries argue that services liberalization has been one-sided and focused on liberalizing sectors in which liberalized countries have a comparative advantage while not opening areas, such as movement of natural persons, in which developing countries have an advantage.

How and whether to give credit for autonomous liberalization also emerged as an area of contention. Developing countries have argued that credit for autonomous liberalization should be allowed only for developing countries. China and other members, which made extensive commitments in their accession agreements, have also argued that they should not be required to make further commitments in the current round of services negotiations. The deadline for submission of initial offers is March 31, 2003. It appears that progress in the services negotiations may depend on progress in other negotiations that are of more interest to developing country members, such as agriculture.

• Trade Related Intellectual Property Rights: In a separate declaration, the Doha Ministerial declared that the Agreement on Trade Related Intellectual Property Rights (TRIPS) “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.” The Doha Ministers specifically identified the difficulties faced by developing countries with little or no pharmaceutical manufacturing capability in using compulsory licensing under TRIPS. The Doha Ministers instructed the Council for TRIPS to find a solution to that problem by the close of 2002. Negotiators apparently agreed to allow countries manufacturing drugs under the compulsory licensing provision to export to poorer countries without adequate manufacturing capacity when those drugs were destined to deal with epidemics and public health emergencies. However, reports from the WTO and USTR reveal that the talks broke down when the United States refused to accept a broad definition of diseases that would qualify for the exception. Later, the United States unilaterally announced that it would not challenge any WTO member that exports drugs produced under compulsory license for treatment of HIV/AIDS, malaria, tuberculosis, and “other infectious epidemics of comparable gravity and scale.”

In addition to the pharmaceutical access issue, the Doha Ministers also agreed to complete work on implementation of the Additional Protection for Geographic Indications


14. Id.


for Wine and Spirits called for in TRIPS Article 23.4. The Ministers agreed to launch negotiations for the creation of a multilateral system of notification and registration of geographical indications for wines and spirits by the Cancun Ministerial in September 2003. Negotiations on the registry have moved slowly. The United States is seeking a registry that would serve as a database of geographic names that countries would be expected to consult when making their own determinations as to which geographic names should be reserved for products actually originating in a particular geographic region. The European Union in contrast argues for a presumption that other WTO members would protect geographic names listed in the registry. In a related matter, some European nations are pushing for geographic indication protection for other products, such as cheese, and have linked flexibility in agricultural talks to the outcome of talks on geographic indicator protection.

- **WTO Rules:** The Doha Ministerial Declaration called for negotiations to clarify and improve the disciplines of the AD Agreement and the SCM Agreement. In the Trade Act of 2002, the U.S. Congress made clear its view that U.S. trade remedy laws should not be weakened or changed in future trade negotiations. The United States has maintained the position that current WTO rules on antidumping and countervailing duties need not be changed and tabled a concept paper in mid-October addressing the value of remedial measures in promoting trade liberalization.

- **Dispute Settlement Understanding:** While the rest of the Doha negotiations were to be part of a single undertaking, completed and approved as one package by the WTO members, negotiations to improve and clarify the Dispute Settlement Understanding were to be completed as stand alone negotiations by a proposed May 2003 deadline. At the end of 2002, successful conclusion by that date appeared increasingly unlikely as members disagreed on the only proposal offered so far. The United States and Chile tabled a joint proposal in mid-December calling for procedural reform of the dispute settlement process. The proposal focused on increasing WTO member control over the dispute settlement process, calling for opportunities for review of Panel and Appellate Body decisions, eliminating unnecessary findings in reports, allowing partial DSB adoption of reports, and creating opportunities to suspend the dispute settlement process while parties work out a resolution to the dispute. The proposal met with considerable opposition from other WTO members. The European Union, Brazil, South Korea, Norway, and Switzerland criticized the proposal as a return to the less judicial system used prior to formation of the WTO. Malaysia, Australia, and Colombia, however, expressed general support for the proposal.

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24. *Id.*
eraly oppose injecting greater transparency into the dispute settlement process. An EU proposal to create a permanent roster of professional Panelists as a solution to the increasing workload of disputes and delays associated with Panel selection was likewise met with criticism from the United States.

- **Investment:** In 2002, a growing division emerged between countries seeking a new WTO investment agreement and those opposed to any new commitments on investment. Canada, Japan, Korea, and the European Union are the leading proponents of new investment negotiations, while developing countries are reluctant to take on any new obligations. At year’s end few developments were apparent in the investment arena.

2. **Accession to the WTO**

a. **LDC Accession Rules**

WTO Members approved guidelines to streamline the accession process for least developed countries (LDC). The guidelines call on developed nations to refrain from seeking excessive concessions or commitments that are incompatible with the development, financial, and trade needs of the LDCs. The guidelines also call for transition periods for new LDC members, assistance from the Office of the Director General, WTO Secretariat support in information exchange and accession procedures, and the provision of technical assistance by WTO members.25

b. **New Accessions**

Chinese Taipei became a WTO member on January 1, 2002. On October 15, 2002 the General Council approved the accession package for Macedonia, which is still awaiting approval from its legislature.26 Armenia’s accession package was approved on December 10, 2002, clearing the way for Armenia to become the 146th member of the WTO.27 No new requests for accession were made in 2002.28

c. **Ongoing Accession Negotiations**

At year’s end, Russia and Cambodia appeared poised to complete accession negotiations in 2003. However, a number of important issues remained outstanding in Russia’s WTO accession negotiations. Among the biggest issues was agriculture, energy pricing, and Russian membership in the civil aviation agreement.29 Energy pricing remains a critical sticking point for U.S. and EU negotiators who insist that Russia’s low energy prices subsidize steel, aluminum, and fertilizer, thereby leading to dumping on the world market.30 Russia’s domestic support programs and export subsidies for agriculture are being targeted for deep cuts by U.S. and Cairns negotiators. Russian officials, however, suggested that such reductions would be difficult given Russian agriculture’s dependence on government intervention.31 The United States insisted that Russia must join the plurilateral Agreement on Trade

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28. Id.


30. Id.

31. Id.

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in Civil Aircraft, which would require it to eliminate import duties on civilian aircraft. Russia has resisted joining the agreement, citing the current difficulties experienced by its civil aircraft industry.\textsuperscript{32} Negotiations are expected to continue through the first quarter of 2003 with the goal of completing an accession package by 2003 for presentation at the Cancun ministerial in September.\textsuperscript{33}

The third meeting of the working party on Cambodia's accession took place on November 14, 2002. At that meeting Members began focusing on drafting the Working Party Report and defining the terms of Cambodia's entry into the WTO.\textsuperscript{34} At this point, Cambodia is working toward approval of its accession agreement at the Cancun ministerial, along with Russia (although Russia and Cambodia were the only accessions on track for Cancun approval). At the end of 2002, twenty-six nations were in the process of negotiating accession agreements,\textsuperscript{35} with varying target dates for final accession.\textsuperscript{36}

3. Steel Negotiations

Negotiators from major steel producing nations announced on December 19, 2002 that they would begin talks aimed at reducing overcapacity and reducing or eliminating subsidies. Many issues remain to be resolved, including a timetable for talks and whether the negotiations would take place within the WTO or the Organization for Economic Cooperation and Development (OECD). Negotiators indicated that talks might be completed in time for presentation of an agreement at the September 2003 WTO Ministerial in Cancun.\textsuperscript{37} Although the talks are aimed at subsidies and global capacity reduction, negotiators expect that other issues, such as trade remedy laws, may be broached. North American steel producers urged specific actions to address overcapacity and encouraged expansion of the zero-for-zero tariff reduction initiative in the WTO.\textsuperscript{38}

B. U.S. Bilateral and Multilateral Negotiations

1. U.S.-Chile Free Trade Agreement

After years of talks and tense last-minute negotiations on investment, agriculture, dispute settlement, and intellectual property rights, the United States and Chile concluded negotiation of a bilateral free trade agreement on December 11, 2002.\textsuperscript{39} Hurdles included Chile's insistence on maintaining its ability to use capital controls to protect itself from a sudden exodus of capital. Another sticking point was the United States' demand for stronger protection of intellectual property rights, which Chilean negotiators feared might weaken the

\begin{itemize}
\item \textsuperscript{32} Id.
\item \textsuperscript{35} World Trade Organization, List of Applicants to Become WTO Members, available at http://www.wto.org/english/thewto_e/acc_e/workingpart_e.htm.
\item \textsuperscript{36} World Trade Organizations, List of Applicants to Become WTO Members, available at http://www.wto.org/english/thewto_e/acc_e/workingpart_e.htm (last modified Dec. 2002).
\item \textsuperscript{37} Steel Producers Agree to Negotiations, WASH. TRADE DAILY, Dec. 20, 2002, at 1.
\item \textsuperscript{38} Id.
\end{itemize}
competitiveness of Chilean industry. Agricultural provisions and sanctions for derogation of trade or environmental laws also proved contentious.

The final agreement will eliminate all tariffs and quotas, including those on agricultural goods, over twelve years. The services provisions cover major sectors and contain regulatory transparency provisions that have been praised by U.S. business groups. Although the entire agreement was not released by the end of the year, information provided by USTR reveals several other groundbreaking provisions in the U.S.-Chile FTA. The controversial issue of capital controls was resolved by a provision for restitution if such controls are used. In a concession to Chile, however, the agreement requires a one-year waiting period for complaints against controls on short-term capital flows and a six-month waiting period for complaints against controls on long-term capital flows. Another notable provision is a competition chapter that requires Chile to maintain laws prohibiting anti-competitive business practices. Environmental provisions in the agreement provide for stronger cooperation, including a program to develop alternatives to the controversial pesticide methyl bromide. Also of note, the agreement will establish a new U.S. visa for up to 1,400 Chilean professionals per year who have a letter of support from a U.S. company. Chilean officials noted that the agreement maintained protection for Chile's cultural industry, including the ability to subsidize the arts, maintain domestic content quotas for television programming, and require Chilean citizenship for top officials of Chilean media companies.

2. U.S.-Singapore Agreement

As with the Chile FTA, the Singapore pact negotiations appeared to stall at the last minute over Singapore's insistence on the right to impose restrictions on capital movements in times of crisis. Although the countries' negotiators were still discussing the capital movement issue at the end of 2002, completion of the agreement was announced on November 19, 2002. The agreement requires Singapore to reduce its tariffs immediately to zero and contains broad market access provisions sought by the U.S. banking industry. Like Chile, Singapore committed to enacting competition laws and ensuring that government enterprises will not engage in anti-competitive behavior.

3. Free Trade Area of the Americas

The negotiations for a Free Trade Area of the Americas (FTAA), launched by thirty-four nations in the Western Hemisphere in June 1995, hit some roadblocks in 2002. At the Ministerial meeting in Quito in November, there remained open disagreement on the U.S. proposal to negotiate differentiated access to the U.S. market depending on a country's level of development. Brazil has voiced opposition to a differentiated approach. The pre-

41. Id.
43. Id.
44. Id.
45. Id.
46. Id.
47. Steel Producers Agree to Negotiations, supra note 37, at 5.
carious political situation in Venezuela and the election of populist Luiz Inacio Lula da Silva to the Brazilian presidency raised fears that the already drawn-out FTAA talks would be further delayed. Following his election, Mr. Lula vowed to assert Brazil's role as a regional leader and declared that relations within the Mercosur trading bloc would be his top foreign relations priority.

4. New Negotiations

In 2002, the Bush administration announced its intention to begin FTA negotiations with five Central American countries, Morocco, Australia, and the Southern African Customs Union. A number of other countries, including New Zealand, Indonesia, and Peru have requested FTAs with the United States.

- **Central America.** In early October, the USTR notified Congress of the Administration's intent to enter trade negotiations with the five Central American countries of Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. Panama and Belize are not included in the talks. Actual negotiations are set to begin in January 2003.

- **Morocco.** The USTR notified Congress of the Administration's intent to negotiate a free trade agreement with Morocco on October 1, 2002. USTR Robert Zoellick asserted that the agreement would help that country "accelerate [its] embrace of the modern world economy."

- **Southern African Customs Union.** On November 4, 2002, USTR notified Congress of the Administration's intent to begin trade negotiations with the nations of the Southern African Customs Union: Botswana, Lesotho, Namibia, South Africa, and Swaziland. South African business groups have highlighted subsidies and trade barriers on agriculture, along with U.S. trade remedy laws as particular areas of concern.

- **Australia.** Initially, negotiations with Australia were delayed due to the importance of agriculture in any deal with Australia. Nevertheless, the Administration announced its intent to pursue an agreement with Australia on November 13, 2002 and issued

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51. See News Archives, American Council for Trade in Services (Nov. 22, 2002), available at http://www.acstalks.com/archives.htm. "USTR Robert Zoellick proposed negotiating a bilateral trade agreement with Indonesia after he visited the site of the recent bomb blast in Bali. Mr. Zoellick said that improved security, humanitarian help, and increased trade will be vital for the country's economy to recover." See also Joint Press Conference, Indonesian Minister for Industry and Trade Rini Soewandi and U.S. Trade Representative Robert B. Zoellick, Nov. 21, 2002, in Bali, Indonesia, available at http://www.usembassyjakarta.org/press_rel/zoellick_rini.html. "Minister Rini Soewandi: 'There was also a meeting recently in the Philippines between ASEAN and USTR, wherein the U.S.-ASEAN Trade Investment Framework was discussed, which Indonesia actually signed in 1997 with the U.S. Indonesia supports this initiative and even emphasizes the need to move forward on this cooperation, probably conduct a study and seek funding, to explore the possibility of a free trade agreement between Indonesia and the U.S.'"

52. See WASH. TRADE DAILY, Dec. 4, 2002 (quoting Peruvian President Alejandro Toledo as promising to do "everything we can" to make a bilateral trade deal with the United States).


54. Id.


reassurances to farm groups that the FTA would improve access to the Australian market. The deal is scheduled for completion in 18 months. Opposition leaders in Australia’s Senate pushed through a vote calling for a special inquiry into the impact of the proposed trade agreement on Australia. Nevertheless, Australian officials expressed confidence that the negotiations would be completed on time.

5. Other U.S. Negotiations

In mid-December, the United States and Brunei signed a trade and investment framework agreement. The agreement called for the creation of a Joint Council on Trade and Investment to promote cooperation between the two countries on issues such as biotechnology, tourism, protection of investment, facilitation of trade, and information technologies. The agreement is seen as moving the United States closer to a trade pact with the Association of South East Asian Nations (ASEAN). At the October Asia-Pacific Economic Cooperation (APEC) summit in Mexico, President Bush announced that the United States would seek bilateral trade pacts with ASEAN member countries after completing trade and investment framework agreements with those countries.

III. WTO Dispute Settlement Activity

The total number of Dispute Settlement Understanding (DSU) complaints filed this year rose to thirty-seven, 60 percent more than the number filed last year. The number of complaints brought against the United States increased dramatically this year to nineteen, up sharply from six complaints last year, though this is partly the result of multiple complaints concerning a single measure (the steel safeguard measures). The concentration of countries filing complaints was much more dispersed than in previous years. For example, Brazil filed five, and Canada, the European Community (EC), and the United States each filed four complaints. The Safeguards Agreement was the subject of eleven complaints (eight involving the U.S. steel safeguard measures), while the Antidumping Agreement (AD Agreement), the Subsidies and Countervailing Duty Agreement (SCM Agreement), and the Agriculture Agreement were each the subject of seven complaints.

One of the most interesting developments in the WTO dispute settlement arena during the course of 2002 was the heightened level of criticism of Panel and Appellate Body

57. See Letter from USTR to Dennis Hastert, supra note 53; USTR Reassures Farm Groups as it launches Australian FTA, INSIDE U.S. TRADE, Nov. 15, 2002, at 1.
59. Steel Producers Agree to Negotiations, supra note 37, at 4.
60. Id. at 7.
decision-making, specifically the U.S.-driven allegation that the DSB is adopting reports that step beyond the appropriate standard of review and, in effect, creating law where the Agreements were otherwise silent. The United States became particularly vocal about this in the context of the *U.S.-Line Pipe* decision and has continued to complain about the issue in subsequent reports. Meanwhile, the United States has been slow to implement various WTO rulings, particularly those requiring legislative action.

A. Dispute Settlement Reports

1. Reports Addressing the Agreement on Safeguards

The only ruling issued this year involving the Agreement on Safeguards was the Appellate Body’s decision in *United States—Definitive Safeguard Measures On Imports Of Circular Welded Carbon Quality Line Pipe From Korea*. The Appellate Body agreed with some but not all of the Panel’s rulings. It first found that the United States did not give Korea “sufficient time” to allow for a “meaningful exchange” in the consultations, thereby violating Article 12.3 of the Agreement. Additionally, the Appellate Body concluded that because the United States’ “expectations” regarding future import volumes were insufficient the application of the measure to imports from developing countries violated Article 9.1 of the Agreement, at least for countries whose shipments met the *de minimis* levels set forth in that provision.

The Appellate Body also ruled on the issue of whether there is an obligation to make a discrete determination *either* of serious injury *or* of threat of serious injury. The Appellate Body concluded that the phrase “cause or threaten to cause” in Article 2.1 could mean *either* “one or the other” or “both in combination.” On this basis, the Appellate Body reversed the Panel’s decision, finding that a domestic authority may find that there is “serious injury,” “threat of serious injury,” or, as the ITC found here, “serious injury or threat of serious injury.”

The Appellate Body also disagreed with the Panel on the issue of “parallelism” and therefore overruled the Panel’s finding that Korea had not made a *prima facie* case of a violation of this requirement. Specifically, the Appellate Body found that the United States did not provide a reasoned and adequate explanation that established explicitly that imports from non-NAFTA sources *by themselves* satisfied the conditions for the application of a safeguard measure. Because the ITC had included Canada and Mexico in the analysis of whether increased imports caused or threatened to cause serious injury, while excluding Canada and Mexico from the application of the safeguard measure, the Appellate Body found the United States in violation of Articles 2 and 4.

The Appellate Body upheld the Panel’s decision regarding non-attribution, finding that the ITC did not adequately explain how it ensured that injury caused to the domestic

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70. Id.
industry by factors other than increased imports was not attributed to increased imports, in contravention of Article 4.2(b) of the Agreement on Safeguards.\textsuperscript{71} This represented the third safeguards case in which the Appellate Body rejected this aspect of the ITC's causation analysis.\textsuperscript{72}

Finally, the Appellate Body made two important rulings concerning Article 5.1 of the Agreement. First, it clarified that Article 5.1 "must be read as requiring that safeguard measures be applied only to the extent that they address serious injury attributed to increased imports." Such measures may not remedy, in other words, the effects of other causes. The Appellate Body went on to conclude, in a reversal of the Panel's ruling, that by establishing that the United States violated the non-attribution requirements of Article 4.2(b), Korea made a \textit{prima facie} case that the U.S. safeguard measure went beyond the extent permissible under Article 5.1. That is, because the United States had not separated and distinguished the effects of imports versus other causes, it could not ensure that it had applied the line pipe safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment."

2. Reports Addressing the AD and SCM Agreements

Members' implementation of the AD and SCM Agreements continued to be the subject of the majority of the WTO disputes. We review some of the more important reports addressing these agreements below.

a. AD and CVD Trade Remedy Cases

(i) \textit{United States—Anti-Dumping and Countervailing Measures on Steel Plate From India.}\textsuperscript{73}

India claimed in this case that the U.S. Department of Commerce (USDOC) acted inconsistently with Article 6.8 and Annex II of the AD Agreement with its application of "facts available." The United States argued that the information was either incomplete or was never submitted in a usable format. The Panel found that the USDOC must explain the problems with the "usability" of this data and was not entitled to reject all the data. Therefore, the USDOC's application of facts available in this case was inconsistent with Article 6.8 and Annex II, paragraph 3 of the AD Agreement.

India had also argued that Sections 776(a), 782(d) and 782(e) of the Tariff Act of 1930 (Tariff Act) were inconsistent with the AD Agreement because those provisions require the USDOC to apply facts available in a determination even when valid information was submitted. The Panel disagreed finding that those provisions are discretionary and that they may be applied by USDOC in a manner consistent with Article 6.8. The Panel also con-


cluded that India’s effort to challenge the U.S. “practice” of applying facts available was not a “measure” that could be challenged under the DSU. There was no request for an appeal, and the Panel report was adopted.74

(ii) United States—Preliminary Determinations With Respect to Certain Softwood Lumber From Canada.75 The Panel in this case agreed with Canada that the USDOC erred in its countervailing duty investigation when it compared Canadian stumpage prices with those charged in the United States, rather than with prices observed in Canada (which is the only in-country source for “prevailing market conditions”), thus violating Article 14(d) of the SCM Agreement. Canada also claimed that the USDOC inappropriately assumed that the stumpage rights constituted a financial benefit by the Canadian Government and that they conferred a benefit on the downstream producers of softwood lumber. The Panel found that stumpage rights indeed constituted a benefit but agreed with Canada that the USDOC failed to examine the actual benefit conferred on the allegedly subsidized product, contrary to SCM Agreement Article 1.1(b). The Panel also agreed with Canada’s claim that the United States’ retroactive application of provisional measures in this case violated Article 20.6 of the SCM Agreement. The Panel stated that, although duties may be assessed retroactively in accordance with Article 20.6, “the general rule of non-retroactivity applies to provisional measures, without exception.” The Panel also found that provisional measures were applied too early and lasted for too long, in violation of Article 17.

(iii) United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany.76 This dispute challenged for the first time U.S. sunset review procedures. In the disputed case, because the USDOC and the ITC found both a likelihood of future subsidization and injury, the United States did not revoke the CVD order on carbon steel from Germany. The European Union challenged the USDOC’s automatic self-initiation of sunset reviews, claiming that such initiation must be accompanied by a showing of sufficient evidence to justify the review, as required by Articles 10, 21.1 and 21.3 of the SCM Agreement. The Panel and the Appellate Body disagreed finding no such explicit evidentiary requirement. However, in a reversal of the Panel, the Appellate Body found that there is no explicit requirement to apply “any de minimis” standard in sunset reviews.

Importantly, the United States did not appeal the Panel’s finding that the USDOC’s likelihood determination in this case was insufficiently rigorous. Although U.S. law itself was found to be consistent with the SCM Agreement, its application in this case was not. The United States attempted to reverse this aspect of the panel’s decision with a procedural claim before the Appellate Body, but the procedural claim was rejected. The panel’s decision was therefore adopted.

(iv) United States—Countervailing Measures Concerning Certain Products From The European

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In this dispute, the Appellate Body reversed the Panel’s finding that privatizations at arm’s-length and for fair market value must lead to the conclusion that the purchaser did not receive a benefit or advantage from a prior financial contribution bestowed upon the state-owned producer. The Appellate Body found that there is no “per se rule requiring” the investigating authorities to determine that a “benefit,” derived from pre-privatization financial contributions, expires following privatization at arm’s length and for fair market value.\footnote{WTO Appellate Body, United States—Countervailing Measures Concerning Certain Products From The European Communities, WT/DS212/AB/R (Dec. 9, 2002), available at http://www.wto.org (last visited Mar. 6, 2002).}

The Appellate Body upheld the Panel’s finding, however, that the USDOC imposed countervailing duties without assessing the existence of countervailable subsidization after a privatization or change in ownership. The Appellate Body also upheld the Panel’s finding that the “same person” methodology applied by USDOC is inconsistent with the SCM Agreement “as it prohibits the examination of the conditions of the privatization-transaction when the privatized producer is not a distinct legal person based on criteria relating mainly to the industrial activities of the producers concerned.”\footnote{Id. ¶ 121.}

(v) United States—Section 129(c)(1) of The Uruguay Round Agreements Act.\footnote{WTO Panel, United States—Section 129(c)(1) of The Uruguay Round Agreements Act, WT/DS221/R (July 15, 2002), available at http://www.wto.org (last visited Mar. 6, 2003).} This case addressed the provision of U.S. trade remedy law that limits the retroactive application of determinations implementing adverse WTO dispute settlement decisions. Canada and the United States agreed in this case on the general principle of prospective implementation of DSB rulings but disagreed on whether the principle permits a Member to take WTO-inconsistent actions after the date of implementation. Canada claimed that Section 129(c)(1) of the URAA violates Articles VI:2, VI:3, and VI:6(a) of the GATT 1994, Articles 1, 9.3, 11.1, and 18.1 of the AD agreement and Articles 10, 19.4, 21.1, and 32.1 of the SCM Agreement. Canada argued that by applying WTO rulings only to entries made “on and after” USTR directs implementation, Section 129(c)(1) effectively requires WTO-inconsistent actions with respect to “prior unliquidated entries.” Canada argued that imports that entered the United States prior to that date would remain subject to future administrative review determinations and definitive duty assessments using WTO-inconsistent rules.\footnote{Canada claims that the following specific provisions were violated: Article VI:2, VI:3, and VI:6(a) of the GATT 1994; Articles 1, 9.3, 11.1, and 18.1 of the AD Agreement and Articles 10, 19.4, 21.1, and 32.1 of the SCM Agreement. Id.} The Panel agreed with the United States that there is nothing established in the AD Agreement, the SCM Agreement or GATT 1994 that provides any requirements related to timing of implementation of adverse WTO reports. Canada did not appeal this decision and the Panel report was adopted.

b. Subsidy Cases

(i) Canada—Export Credits and Loan Guarantees Regional Aircraft.\footnote{WTO Panel, Canada—Export Credits and Loan Guarantees Regional Aircraft, WT/DS222/R (Feb. 19, 2002), available at http://www.wto.org (last visited Mar. 6, 2002) [hereinafter Canada-Aircraft II].} Brazil alleged in this case that Canada continues to provide export subsidies through equity infusions by its Export Development Corporation (EDC). This case is closely tied to a previous dispute Canada-Aircraft I, where the Panel found that Canada was providing illegal export subsidies...
to its regional aircraft industry. Article 21.5 compliance proceedings associated with the
first case found that part of the revised measures continued to provide export subsidies, but
the new Panel ruled that certain of Brazil’s claims were properly considered outside the
context of the previous dispute because they technically represented new claims of incon-
sistency with the SCM Agreement.

Brazil argued that Canada still provides loan guarantees, financial services, interest rate
support and debt financing despite the Panel’s recommendation to remove all subsidies in
the previous case. Because the alleged subsidy programs did not mandate the conferral of
a benefit, they were not a prima facie violation of the SCM Agreement. However, the
Canada Account financing on the sale to Air Wisconsin conferred a “benefit” under Article
1.1(b) of the SCM Agreement as it was offered on terms more favorable than those available
in the market, reconfirming the previous Panel’s conclusion that the Canada Account fi-
nancing constituted a prohibited export subsidy under SCM Agreement Article 3.1(1).

The Panel also considered whether the financing fell under the “safe haven” provision
of the Illustrative List of Export Subsidies under the SCM Agreement, which refers to the
1979 OECD Arrangement. Because the matching of a derogation by the Canada Account
financing on the Air Wisconsin transaction was not in conformity with the interest rate
provisions of the OECD Arrangement, the Panel concluded that it did not fall within the
scope of the safe haven provision of item (R) of the Illustrative List of Export Subsidies.
Therefore, the Canada Account financing of the Air Wisconsin transaction was a prohibited
export subsidy. The Panel also found EDC’s Corporate Account Financing since 1996 and
IQ Loan Guarantees (provided by the province of Quebec) were prohibited export subsi-
dies. Regarding the IQ equity guarantee, the Panel found no subsidization to exist because
it was neither de jure or de facto contingent upon export performance. However, the Panel
made a different finding for the IQ equity guarantee for which “no fee was charged,”
holding that this constitutes a subsidy.

(ii) United States—Continued Dumping and Subsidy Offset Act of 2002. This case,
brought before the Panel by Australia, Brazil, Chile, the European Union, India, Indonesia,
Japan, Korea, Thailand, Canada, and Mexico, addressed the U.S. Continued Dumping and
Subsidy Offset Act of 2000 (Offset Act), also known as the “Byrd Amendment.” This law
established that antidumping or countervailing duties would be distributed to the affected
domestic producers to compensate them for qualifying expenditures. The complaining
parties asserted that there are only three permissible measures available to WTO members
under the AD and SCM Agreements, and that the Offset Act did not fall under any of those
three options. The Panel agreed, finding that the law was contrary to Article 18.1 of the
AD Agreement, Article 32.1 of the SCM Agreement, and Articles VI:2 and VI:3 of the
GATT. The Appellate Body agreed with this finding in a ruling issued in early 2003.

82. WTO Panel, Canada—Measures Affecting the Export of Civilian Aircraft, WT/D70/AB/R (Aug. 20,
83. WTO Panel, Canada—Export Credits and Loan Guarantees Regional Aircraft, WT/D722/7 (May 24,
84. If a member is a party to an international undertaking such as the OECD, an export credit practice that is
in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement. Id.
86. United States Tariff Act of 1930 § 754(a).
87. WTO Appellate Body, United States—Continued Dumping and Subsidy Offset Act of 2000, WT/D217/

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The Panel had also found that the Act provided a financial incentive for producers to initiate and support petitions for antidumping and countervailing duty investigations. The Panel considered the support for the petition as a prerequisite for receiving offset payments inconsistent with the principle of good faith protected by AD Agreement Article 5.4 and SCM Agreement Article 11.4. The Appellate Body, however, ultimately rejected this finding.

The Panel rejected the complainants' argument that AD Agreement Article 8.3 and SCM Agreement Article 18.3 require the examination of the appropriateness of accepting a price undertaking and rejecting an undertaking offered for a specific reason. The Panel, agreeing with the United States, held the Offset Act did not introduce any changes in the U.S. statutory provisions relating to price undertakings. The Panel also rejected the complaining parties' argument that the Offset Act violates GATT Article X:3(a) because the Act is substantive in nature and therefore falls outside the scope of GATT Article X:3(a).

3. Other Disputes

a. Chile—Price Band System and Safeguard Measures Relating To Certain Agricultural Products

This case, brought by Argentina, concerns Chile's price band system (PBS), which allowed for tariff rates to surpass the maximum allowable rate as established in the WTO Schedule. The PBS established the methodology for the calculation of the upper and lower thresholds of the price band. The Appellate Body explained that the PBS is at least similar to two of the prohibited measures listed in Article 4.2 of the Agriculture Agreement, namely "variable import levies" and "minimum import price." The variable import levies were similar to the PBS, as both incorporate a scheme or formula that ensures duties will change automatically and continuously in a manner that lacks transparency and predictability. The term "minimum import price" was defined by the Appellate Body as "generally the lowest price at which imports of a certain product may enter a Member's domestic market." The Appellate Body reconfirmed the Panel's conclusion that, if the weekly reference price in Chile's PBS is below the lower threshold of the band, the customs authorities will levy the standard applied duty and add an additional duty. Therefore, instead of merely amending the PBS to set a maximum threshold of a 31.5 percent duty, to comply with the bound rate in Chile's WTO schedule, Chile's PBS should have been converted into an ordinary customs duty as directed by Article 4.2 of the Agriculture Agreement.

b. United States—Section 211 Omnibus Appropriations Act of 1998

This dispute concerns Section 211 of the United States Omnibus Appropriations Act of 1998, which effectively prohibits Cuba, Cuban nationals, or other nationals who have an interest in trademarks or trade names related to certain confiscated goods, from renewing the trademarks or trade names without the consent of the original owner, as they are not permitted to pay the requisite fees. The European Union challenged various aspects of the Act under the TRIPS Agreement. The Panel largely rejected the EU claims, and the Appellate Body largely agreed based on the view that the Agreement simply did not cover.

many of the issues raised by the Act. However, the Appellate Body disagreed with the Panel’s finding that the Agreement did not cover trade names (in addition to trademarks). The Appellate Body also found, contrary to the Panel, that Article 211(a)(2) of the Act violated the principle of national treatment. Finally, the Appellate Body ruled that, because an “original owner” who is Cuban is subject to the measures at issue while a non-Cuban original owner is not, Sections 211(a)(2) and 211(b) also violate the most favored nation obligations under the TRIPS Agreement.

B. Implementation

1. Completed implementation

Consultations have proven an effective way to end disputes as at least two disputes were settled amicably between parties this year, before Panel requests were filed. The United States and Argentina came to a resolution in *Argentina—Patent Protection for Pharmaceuticals and Test Data Protection for Agricultural Chemicals.* The United States was concerned that Argentina did not have laws that provided for the adequate protection of pharmaceutical patents, nor did it have an avenue for ensuring exclusive marketing rights for such products. Argentina agreed to either submit a bill to its Congress, to comply with TRIPS, or to apply its current laws in a TRIPS-consistent manner in the following areas: compulsory licenses, exclusive marketing rights, import restrictions, product by process patent protection, shifting of the burden of proof in process patent infringement cases, preliminary injunctions to prevent patent infringement, patentability of micro-organisms and other subject matter, transitional patents, and the protection of test data against unfair commercial use. In another dispute, *Peru—Tax Treatment on Certain Imported Products,* the Peruvian government agreed to withdraw a law that applied an 18 percent tax on imports of fresh fruits, vegetables, fish, milk, tea, and other natural products.

Korea and the United States came to a compromise agreement in *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea.* Both parties extended the deadline until September 1, 2002, for establishing a reasonable period of time for the United States to comply with the Appellate Body’s Report. On July 31, 2002, the parties agreed that if the United States had not terminated the measure by September 1, 2003, the in-quota volume of imports from Korea would be increased. Though this measure was referred to as temporary, it effectively became the only relief from which Korea would benefit, because the safeguard measures were already scheduled to end on March 1, 2003.

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Pending Implementation

The U.S. Congress continues to drag its heels in implementing the ruling in United States—Anti-Dumping Act of 1916. The original deadline to repeal the Act was set as December 31, 2001. Though two bills have been introduced before the U.S. Congress to repeal this Act, neither was even brought to a vote before the committees. Key members of Congress have opposed the necessary legislation, and the Administration has not actively sought the law’s repeal. Rather than face the issue, the European Union and Japan have continued with the suspension of the arbitration proceedings under Article 22.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

In another case, the United States made some effort to implement the DSB ruling but failed to address all of the adverse findings adopted by the DSB. In United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, the United States had until November 23, 2002 to implement the DSB ruling. On the day before that deadline, the United States issued a status report to the DSB explaining that the USDOC had issued an amended final determination that: (1) uses information supplied by two companies that was originally rejected as “untimely”, (2) removes the adverse facts applied to another respondent with respect to certain unreported U.S. sales and bases the margin entirely on reported U.S. sales information, (3) applies an even-handed arm’s length test to select home market sales as a basis for normal value, and (4) calculates an “all others” rate that is below the Anti-Dumping Agreement “ceiling.” It also implemented its new arm’s length test to be applied in all future cases. The United States did not, however, make the required statutory change to the all others rate provision and reported that it would consult with Congress to resolve the remaining issues.

The United States apparently believes that no action is necessary to implement the Appellate Body’s rulings concerning errors in the ITC methodology for finding injury. The
Appellate Body stated that the ITC must separate and distinguish the injurious effect of factors other than imports, commonly known as non-attribution. The United States has taken the position that the Appellate Body “merely found fault with the Panel’s reasoning and was not reviewing the underlying facts of the case.” Whether Japan will challenge this position is unclear. For the time being, Japan has agreed to allow the United States until December 31, 2003, to comply with the Appellate Body ruling.103

3. Article 21.5 Challenges

Several parties challenged, under article 21.5, the nature of implementation taken by countries previously found to violate WTO Agreements. We review some of the more important article 21.5 rulings below.

a. United States—Tax Treatment for Foreign Sales Corporations104

On March 20, 2000, the DSB adopted the Panel and Appellate Body reports in this case and recommended that the United States withdraw the FSC subsidies. After an extension of time, the United States passed the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (ETI Act) on November 15, 2000. Unsatisfied with these measures, the EC appealed the implementation under article 21.5 of the DSU. On January 29, 2002, both the Panel and the Appellate Body reports were adopted, and they agreed with the European Union that the ETI Act violated the SCM Agreement, the Agreement on Agriculture, and article III:4 of GATT. The European Union had already requested authorization from the DSB to suspend concessions in the amount of four billion dollars per year. The United States objected to this request and requested that this matter be referred to an arbitrator. Because there was already a compliance Panel established, the parties agreed to suspend the arbitration proceeding until the adoption of the compliance reports.

The United States argued that the maximum amount of suspended concessions should total only $1.1 billion, equaling the European Union's share of the total subsidy for 2000 of $4.1 billion. The European Union countered that article 4.10 allows it to seek the full value of the subsidy to induce compliance by the United States. The arbitrator ruled in favor of the European Union, finding that there is nothing in the text of the SCM Agreement that limits the award to only the percentage of the total incurred by the EU. For the countermeasures to act as an inducement for the United States to remedy its non-WTO consistent law, they would have to equal the benefit incurred by the subsidy. The arbitrator granted the EC's request of countermeasures totaling four billion dollars per year.

b. Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products105

On October 27, 1999, the DSB adopted the Panel and Appellate Body reports in the original Canada—Milk/Dairy dispute.106 Both New Zealand and the United States believed

103. Status Report by the United States, supra note 100.
that Canada's implementation measures failed to comply with the DSB's recommendations. Therefore, the complainants requested that the matter be referred to the original Panel under DSU article 21.5. The article 21.5 Panel found that by providing export subsidies through its commercial export milk (CEM) class, as defined in Agriculture Agreement article 9.1(c), in excess of its commitment levels Canada violated several provisions of the Agriculture Agreement. This second issue concerned whether the CEM program involved "payments" and whether such payments were "financed by virtue of governmental action." The CEM program allowed for pre-commitment contracts, and the milk under these contracts was not subject to pricing or volume regulations. However, if that milk were sold on the domestic market, there would be financial penalties applied.

On appeal, the Appellate Body, due to a lack of factual findings, was unable to uphold the Panel's assessment of whether a "payment" existed. Therefore, the Appellate Body could not determine whether these measures violated the Agriculture Agreement. Because of the Appellate Body's decision, the complainants requested that a second article 21.5 Panel be established, as they argued that there continued to be a disagreement as to whether Canada's measures complied with the DSB's ruling. The second compliance Panel found again that the CEM program was in violation of the Agreement on Agriculture.

Upon review the Appellate Body overturned the burden of proof set by the Panel for Agriculture Agreement article 10.3. The correct burden was for the complainants to demonstrate that if Canada had exported dairy products in quantities exceeding its commitment levels, then Canada would have to prove that those exports did not benefit from export subsidies. Additionally, the Appellate Body upheld the Panel decision that sales under this program were "payments" because they were below the total average cost of production. Additionally, these payments were "financed by virtue of governmental action" because the higher in-quota prices allowed producers to cover their fixed costs and enabled them to make CEM sales below cost.

IV. U.S. Trade Remedy Decisions

In 2002, countries around the world continued their active use of trade remedy laws. According to the WTO, 305 new antidumping (AD) cases were initiated between July 1, 2001 and June 30, 2002 and definitive duties were imposed in 184 cases during the same period. With respect to countervailing duties (CVD), a total of eighteen new cases were initiated between July 1, 2001 and June 30, 2002, and definitive duties were assessed in

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108. Id.


111. WTO Appellate Body, supra note 105.

seventeen cases during the same period.\textsuperscript{113} The United States led the world with eleven CVD initiations,\textsuperscript{114} and had a total of fifty-eight AD initiations, second-place behind India’s seventy-six, but ahead of the European Union with twenty-three.\textsuperscript{115} The People’s Republic of China continued to be the most frequent target of antidumping actions,\textsuperscript{116} and steel continued to be the industry most often investigated.\textsuperscript{117} In the United States, the steel safeguard proceeding and the AD/CVD investigations of Softwood Lumber from Canada dominated trade remedy litigation. Also notable were the USDOC’s market economy determinations affecting Russia, Kazakhstan, and Vietnam.

A. Administrative Decisions

1. Steel Safeguard Proceedings

In 2002, the United States completed the largest and most complex safeguard proceeding in its history following the ITC’s affirmative injury findings for carbon and alloy “flat-rolled” products (including slab, plate, hot-rolled, cold-rolled, and corrosion-resistant steels), tin mill products, hot bar, cold bar, rebar, flanges and welded tubular products other than oil country tubular goods (OCTG), and stainless steel bar and rod.\textsuperscript{118} After a series of USTR hearings and a period of intense lobbying by all parties, President Bush proclaimed a steel remedy on March 5, 2002, imposing tariffs of 30 percent on flat products (except slab), tin mill products, and hot and cold-finished bar.\textsuperscript{119} In all, the remedies imposed by the President were generally stronger than those recommended by the Commission majority but less than those recommended by Commissioners Bragg and Devaney. Tariffs of 15 percent were imposed on rebar, certain tubular products, and stainless steel rod,\textsuperscript{120} while fittings, flanges, and stainless steel wire received slightly lower tariffs.\textsuperscript{121} A tariff-rate quota of 5.4 million short tons—less than the seven million recommended by the Commission majority\textsuperscript{122}—was imposed on slab with a 30 percent out-of-quota tariff.\textsuperscript{123} President Bush decided to impose these safeguard measures for a period of three years, rather than the four years recommended by the ITC. Significantly, the proclamation exempted most developing countries from its coverage and directed the USDOC and USTR to evaluate all pending product exclusion requests and to entertain future exclusion requests.

The President’s proclamation was widely condemned by the United States’ trading partners and sparked an intense political and media debate, with many viewing the President’s

\textsuperscript{114} See id.
\textsuperscript{120} See id.
\textsuperscript{121} See id.
\textsuperscript{122} See Steel Determination, supra note 118, at Annex C.
\textsuperscript{123} See id.
decision as a political one calculated to secure Republican votes in the steel-producing states of West Virginia, Pennsylvania, and Ohio. The European Union's initial response was to threaten $380 million in trade retaliation against U.S. goods and convene a WTO dispute settlement panel. Ultimately, however, the European Union decided to delay its retaliation, concluding, "the EU interest is best served by maintaining maximum pressure on the U.S. to deliver a meaningful rebalancing package of exclusions." Between March and August of 2002, the Administration announced a total of 727 product exclusions—including certain plate, hot-rolled, cold-rolled, corrosion resistant, tin mill, and stainless steel products—the majority of which benefited European Union or Japanese steel producers. Although these exclusions prevented immediate retaliatory action by the European Union or Japan, the steel safeguard measures remain under attack in pending dispute settlement proceedings, leaving open the possibility of retaliatory action by the European Union, Japan, and other nations once the Panel and/or Appellate Body rule.

2. Antidumping and Countervailing Duty Cases

a. Negative ITC Steel Determinations

In May 2002, the Commission reached a negative preliminary injury determination for OCTG from thirteen countries and in the following month, it issued a final negative injury determination concerning certain structural steel beams from China, Germany, Luxembourg, Russia, South Africa, Spain, and Taiwan. In August 2002, the ITC determined, by a vote of 4-1, that the U.S. steel industry was not materially injured or threatened with material injury by certain cold-rolled carbon steel products from Australia, India, Japan, Sweden, and Thailand, stating that "the Section 201 investigation and the President's remedy fundamentally altered the U.S. market for many steel products, including cold-rolled steel," and that "Section 201 relief was the overwhelming factor in the sharp decline in subject imports during the most recent period examined." Two months later, the Commission issued a final negative determination—based on the same analysis—in its investigation of cold-rolled carbon steel products from the remaining fifteen countries subject to the investigation. These negative cold-rolled determinations represented a setback to the


127. See U.S. Announced Final List of Steel Exclusions for This Year; EU, Japan Main Beneficiaries, Int'l Trade Rep. (BNA), at 1489 (Sept. 5, 2002).


129. Certain Structural Steel Beams from China, Germany, Luxembourg, Russia, South Africa, Spain and Taiwan, Inv. Nos. 731-TA-935-936 and 938-942, USITC Pub. No. 3522 (June 2002) (Final).


131. See id. at 28.

132. See Certain Cold-Rolled Steel Products from Argentina, Belgium, Brazil, China, France, Germany, Korea, The Netherlands, New Zealand, Russia, South Africa, Spain, Taiwan, Turkey, and Venezuela, Inv. Nos. 701-TA-423-25 and 731-TA-964, 966-970, 973-978, 980, and 982-983, USITC Pub. 3551 (Nov. 2002) (Final).
U.S. steel industry and suggest that, at least for the time being, the Commission majority is skeptical of injury claims by steel producers receiving Section 201 protection.

b. Softwood Lumber from Canada

In 2002, the USDOC continued its AD and CVD investigations of Softwood Lumber from Canada. Following a final affirmative threat determination from the ITC, the USDOC imposed a countrywide CVD rate of 18.79 percent and an average AD cash deposit rate of 8.43 percent. As a result, Canadian producers are now subject to annual cash deposits of roughly $1.5 billion, qualifying this trade dispute as one of the largest in history. Several aspects of the case are of general interest:

- In the AD case, the USDOC decided to allocate joint production costs according to the net realizable value (NRV) of the products sold in the U.S. market, that is, based on period of investigation (POI) home market net sale prices adjusted for freight and selling expenses. Significantly, the USDOC's value-based cost allocation considered price differences based on log species and lumber grade, but not dimension (length/width/thickness). Furthermore, when comparing U.S. sales to similar products in the home market, Commerce made no difference in merchandise (DIFMER) adjustment based on differences in dimension because there was no cost difference between these products under its cost allocation methodology. These two issues—the USDOC's decision not to extend its NRV-based cost allocation through dimension and its decision not to compute a (non-zero) DIFMER adjustment when comparing similar products with different dimensions—are at the heart of an appeal now pending before a NAFTA Chapter 19 Panel.

- In the CVD case, the USDOC determined that the “stumpage” programs under which Canadian provinces provide rights to harvest standing timber on provincial forestlands conferred countervailable subsidies to softwood lumber producers during the period of investigation. The USDOC held that these programs were countervailable subsidies because (1) they provided a “financial contribution” of “goods” by a government, specifically “timber harvesting rights,” (2) they provided a “benefit,” that is, the goods were provided at “less than adequate remuneration,” and (3) the programs were “specific” because they were limited to lumber producers, pulp and paper manufacturers, and re-manufacturers. Among the myriad issues in dispute was the USDOC's benefit calculation, that is, its determination that stumpage rights were provided at “less than adequate remuneration.” The U.S. statute provides that “adequacy of remuneration


shall be determined in relation to prevailing market conditions for the good or service being provided . . . in the country which is subject to investigation or review." The USDOC rejected the use of an in-Canada benchmark—for example, Canadian private timber market data—because it found that such prices were fundamentally distorted by the existence of Canadian provincial stumpage programs. Accordingly, the USDOC resorted to a "cross-border" comparison, using adjusted timber prices in the United States as the benchmark for measuring adequacy of remuneration. In the USDOC proceeding, the Canadian parties had argued without success that this cross-border methodology was unlawful. But a subsequent WTO Panel considering the issue in the context of the USDOC's preliminary determination ruled that the WTO Subsidies Code requires use of an in-Canada benchmark. The same issue is now being litigated before a NAFTA Chapter 19 Panel.

Notwithstanding the U.S. industry's success before the USDOC, the 27 percent border measure resulting from the May 2002 AD/CVD orders failed to slow imports or raise prices for U.S. lumber during the second half of 2002. Canadian shipments of lumber into the U.S. market remained steady and, despite strong housing starts, lumber prices fell by 20 percent. At year's end, both the United States and Canadian parties continued to aggressively litigate the lumber cases in both the NAFTA and WTO fora, each side confidently expecting to prevail.

c. PET Film from India

In the companion AD/CVD investigations of *PET Film from India*, the USDOC calculated a net export subsidy rate of 20.12 percent and a dumping margin of 10.34 percent for respondent Polyplex. In an unprecedented move, the USDOC did not simply reduce the respondent's AD cash deposit rate to zero to account for its receipt of export subsidies during the POI, but it went further to exclude Polyplex from the AD order because its adjusted cash deposit rate—not its dumping margin—was zero. Petitioners have appealed from the AD order, arguing that, notwithstanding 19 U.S.C. § 1677a(c)(1)(C), the USDOC lacks the statutory authority to exclude a respondent from an AD order when it calculates a dumping margin above *de minimis* during the POI.

3. Market Economy Determinations—Russia, Kazakhstan, and Vietnam

In 2002, the USDOC considered the "market economy" status of Russia, Kazakhstan, Ukraine, Vietnam, Lithuania, Romania, and Estonia. Significantly, the USDOC decided to

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140. See CVD Issues and Decision Memorandum, supra note 138, at 33–53.
141. See id.
143. See Notice of Final Affirmative Countervailing Duty Determination: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from India, 67 Fed. Reg. 34,905, 34,906 (May 16, 2002).
144. See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) from India, 67 Fed. Reg. 34,899, 34,901 (May 16, 2002).
145. See id. n.2.
146. See 19 U.S.C. § 1677a(c)(1)(C) (requiring Commerce to increase a producer's price by the "amount of any countervailing duty imposed on the subject merchandise . . . to offset an export subsidy") (emphasis added).
147. See Memorandum of Law in Support of Plaintiffs' Motion for Judgment Upon the Agency Record, Consol. Ct. No. 02-00-463, at 3 (Nov. 5, 2002).
grant market economy status to Russia (effective April 1, 2002) and Kazakhstan (effective October 1, 2001), while deciding to treat Vietnam as a non-market economy in the first case ever brought against that country. The USDOC decided to postpone its determination regarding Ukraine, however, and at year’s end, it was still considering the status of Lithuania, Romania, and Estonia.

The market economy determinations for Russia and Kazakhstan have two important consequences. First, the USDOC will be required to use respondents’ actual prices and costs to calculate normal value in future antidumping cases rather than relying on surrogate country price and cost data (which generally disfavor respondents). Second, petitioners will now be able to bring cases against Russia and Kazakhstan under the U.S. countervailing duty law. Because neither Russia nor Kazakhstan is “Subsidies Agreement Countries” at the present time, CVD cases may be brought against them without the need for an injury determination by the ITC.

4. Sunset Reviews

The USDOC and the ITC faced a comparatively light schedule of five-year sunset reviews in 2002. Of the ten five-year sunset reviews initiated by the USDOC in 2002, five resulted in pro forma revocations due to a lack of interest by the domestic industry, one was mooted because there was no longer a suspended investigation for which to perform a review,
two were continued, \textsuperscript{157} and two were still pending before the ITC following affirmative findings by USDOC. \textsuperscript{158}

\textbf{B. Court of International Trade (CIT) and Federal Circuit Decisions}

1. \textit{FAG Italia—Duty Absorption Inquiries for Transition Orders}

In \textit{FAG Italia}, \textsuperscript{159} the Federal Circuit affirmed the CIT's finding that the USDOC lacked the statutory authority to conduct a duty absorption inquiry pursuant to 19 U.S.C. § 1675(a)(4) for "transition orders," that is, antidumping orders predating the implementation of the Uruguay Round Agreements Act (URAA) on January 1, 1995. The USDOC had maintained that, because the statute authorized such inquiries during reviews initiated two and four years after a post-URAA antidumping order\textsuperscript{160} and because transition orders were deemed to be issued on January 1, 1995 for sunset review purposes,\textsuperscript{161} it had the authority to conduct such an absorption inquiry in a review taking place in the second year after January 1, 1995. The court scolded the USDOC for "seriously misunderstanding[ing] its role under \textit{Chevron},"\textsuperscript{162} noting that "statutory silence as to Commerce's power to initiate duty absorption inquiries for transition orders does not give Commerce authority to conduct such inquiries."\textsuperscript{163}

2. \textit{Nippon Steel III—Devaney Recess Appointment}

This case represented the final CIT ruling concerning the circumstances under which Commissioner Devaney was appointed to the ITC. Following discovery proceedings to collect information on the timing of Commissioner Devaney's recess appointment, the CIT ruled on plaintiffs' challenge to the validity of the ITC's 3-3 sunset review vote in the \textit{Grain-Oriented Silicon Electrical Steel (GOES) case}.\textsuperscript{164} Plaintiffs had argued, \textit{inter alia}, that Devaney's participation in the ITC vote was constitutionally infirm because (1) the President did not sign the commission appointing Devaney until after the Senate had returned from its recess, and (2) there was not a "vacancy" to which Devaney could be appointed. The court, however, concluded that Devaney's appointment was a valid recess appointment and that there was indeed a vacancy since Commissioner Askey's term had already expired. According to the court, the President's personal approval of the appointment and his preparation of the recess appointment order constituted the "open and unequivocal act" necessary for an appointment. In other words, the formal commission (which occurred after the Senate returned from its recess) was not necessary to complete a recess appointment.


\textsuperscript{158} See Crawfish Tail Meat from China, 67 Fed. Reg. 69,557 (Nov. 18, 2002); Steel Concrete Reinforcing Bar from Turkey, 67 Fed. Reg. 57,628 (Sept. 11, 2002).

\textsuperscript{159} FAG Italia S.P.A. v. United States, 291 F.3d 806 (Fed. Cir. 2002).

\textsuperscript{160} See 19 U.S.C. § 1675(a)(4).

\textsuperscript{161} See id. § 1675(c)(6)(D).

\textsuperscript{162} FAG Italia, 291 F.3d at 815.

\textsuperscript{163} Id. at 817.

The court also found that there was a vacancy to which Commissioner Devaney could be appointed because the holdover statute provided for the termination of Commissioner Askey’s service when a new commissioner takes office. Thus, when the President appointed Commissioner Devaney during a Senate recess, he created a vacancy that was simultaneously filled through the completion of the recess appointment process.  

3. GTS Industries, Ilva Lamiere, and Acciali I & II—“Same Person” Test

In a series of cases in 2002, the CIT evaluated the USDOC’s methodology for determining whether non-recurring subsidies continue to be countervailable after a subsidized business entity is privatized. Specifically, the courts considered the USDOC’s two-step test developed after the Federal Circuit’s decision in Delverde III. Under the test, the USDOC first examines whether the post-privatization entity is the “same person” that received the original subsidies before privatization. If so, then the subsidies are deemed to pass-through and are countervailable. If not, then the second step of the test looks at the facts and circumstances of the sale to determine whether the post-sale firm received a financial contribution and benefit. Although the Acciali II court affirmed the USDOC’s approach, the GTS Industries, Ilva Lamiere, and Acciali I courts held that the USDOC’s “same person” test was inconsistent with the legal requirements of Delverde III. Specifically, the courts found that, under Delverde III, the USDOC was required to “examine[e] the particular facts and circumstances of the sale and determin[e] whether [the purchaser] directly or indirectly received both a financial contribution and benefit,” and that the per se rule embodied in the USDOC’s step-one “same person” test failed to meet that standard. This analysis was also reflected in the WTO Appellate Body decision in United States—Countervailing Measures Concerning Certain Products from the European Communities issued in December 2002.

4. SKF—Calculation of CV Profit

In 2001, the Federal Circuit had vacated a CIT ruling that the USDOC’s longstanding CV Profit methodology was consistent with U.S. law. Specifically, it directed the CIT to remand the case for “a reasonable explanation of why the USDOC uses different definitions of ‘foreign like product’ for price purposes and . . . constructed value.” In March 2002, the USDOC released its re-determination in the SKF case, explaining that continuation of its pre-URAA CV Profit methodology comports with the post-URAA statute and that, contrary to SKF’s contention, the statute does not require it to locate “identical” or “like”

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165. The court’s analysis of this issue was also incorporated by reference into the Corus decision. See Corus Group PLC v. Bush, 2002 WL 31008986 (Ct. Int’l Trade Sept. 5, 2002) (holding that Commissioner Devaney’s vote was valid).
166. See Delverde SRL v. United States, 202 F.3d 1360 (Fed. Cir. 2000) [hereinafter Delverde III].
168. See id.
169. See id.
171. Delverde III, 202 F.3d at 1364.
173. See SKF USA Inc. v. United States, 263 F.3d 1369 (Fed. Cir. 2001).
merchandise before using aggregated data for the CV Profit calculation. Specifically, the USDOC explained that

[where the Department must use CV to represent normal value, the Department has either found no sales of identical or similar products for price comparisons or found such sales to be outside the ordinary course of trade . . . To now rely solely upon those disregarded sales to determine profit and SG&A components of CV would be equivalent to constructing the same value as reflected in the price of those disregarded sales. Adopting such a methodology would defeat the purpose of the contemporaneity requirement contained in the statute.]

Without any analysis, the CIT affirmed the USDOC’s re-determination. At year’s end, SKF’s appeal on the CV Profit issue was again pending before the Federal Circuit.

5. Usinor and Nippon Steel II—Quality of ITC Determinations

The CIT issued two opinions taking the ITC to task for failing to adequately explain its analysis and findings. In Usinor, the court criticized “the Commission’s total failure to analyze or rebut evidence submitted by the Plaintiffs” and stated that

[to withstand judicial scrutiny, the Commission must sufficiently articulate the basis of its conclusions. . . . The Commission must discuss the key issues in its determination and is not free to simply leave the parties or the court to guess whether these issues were properly factored into the Commission’s analysis. . . . Its failure to do so here has resulted in a Review Determination that is unsupported by substantial evidence.]

Similarly, in Nippon II, the court issued a harsh reprimand of the Commission, noting that the Commission “failed to follow the court’s instructions” on a variety of issues. Some of the court’s strongest criticisms came with respect to the Commission’s failure to identify some of the conditions of competition in the industry, particularly with respect to purchaser perceptions and expectations, which, in the court’s view, should have influenced the Commission’s determination with respect to price issues. The court reiterated the Nippon Steel I court’s criticism of the Commission’s opinion, emphasizing, “simply noting the importance of other factors does not constitute analysis sufficient to support its conclusion.” And rather than remanding the case for the second time, the court ordered the Commission to enter a negative determination because, in its view, “[r]emand[ing] for reconsideration or recalculation is not necessary in this case, as not only are the Commission’s conclusions unsupported by substantial evidence, it has also demonstrated an unwillingness or inability to address substantial claims made by respondents or the concerns expressed by the court in Nippon I.”

V. Legislative Activity

The year 2002 was notable for Congressional action on trade legislation. In particular, Congress approved an omnibus trade package with renewal of presidential trade promotion
authority (TPA) as its cornerstone, thus ending eight years of partisan stalemate on the issue. The omnibus package also included much delayed efforts to revamp the Trade Adjustment Assistance (TAA) program, to renew and enhance the Andean Trade Preferences Act (ATPA), to renew the Generalized System of Preferences (GSP) program, to reauthorize the Customs Service, and to establish a $50 million fund for WTO dispute settlements.

In the face of these new trade liberalization initiatives and of new national security threats as a result of the September 11, 2001 terrorist attacks, the U.S. Congress also acted in 2002 to bolster U.S. borders, with the enactment in the fall of the Homeland Security Act and Maritime Transportation Security Act. It failed, however, to reach agreement on the direction of U.S. export controls via reauthorization of the Export Administration Act (EAA), an issue that will pit industry against national security advocates in a similarly difficult battle in the 108th Congress.

A. Trade Act of 2002

On August 6, President Bush signed the Trade Act of 2002 (P.L. 107-210, formerly H.R. 3009). The legislation was approved handily in the Senate by a vote of 64 to 34, but it cleared the House by a very close three-vote margin of 215 to 212. Only a score of House Democrats supported the measure, making the Trade Act vote one of the most contentious in the House.

1. Trade Promotion Authority

The Trade Act of 2002 extends until 2007 presidential trade promotion authority, formerly known as fast-track procedures. TPA allows the President to enter into bilateral, regional, and multilateral negotiations with trading partners and to bring the agreements to the U.S. Congress for quick approval without concern that they will ultimately be amended. The new negotiating authority is subject to strict congressional consultation and reporting requirements, and the Act establishes a new Congressional Oversight Group to serve as official Congressional advisors for any U.S. trade negotiations.

As in previous fast-track bills, the Congress included extensive principal negotiating objectives as part of the new TPA authority. They cover the following broad range of negotiating topics: (1) trade barriers and distortions, (2) services, (3) foreign investment, (4) intellectual property, (5) transparency (6) anti-corruption, (7) improvement of WTO and multilateral trade agreements, (8) regulatory practices, (9) electronic commerce, (10) agriculture, (11) labor and the environment, (12) dispute settlement and enforcement, (13) WTO extended negotiations regarding trade in civil aircraft and rules of origin, (14) trade remedy laws, (15) border taxes, (16) textile negotiations, and (17) the worst forms of child labor.

2. Trade Adjustment Assistance

To ensure the necessary amount of Democratic support for the Trade Act of 2002, the Republican Leadership agreed to include language that revamps and enhances the current Trade Adjustment Assistance (TAA) program through September 30, 2007. The new TAA

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will combine the NAFTA TAA program and the previous TAA program into one worker dislocation program that includes farmers and ranchers. It also will provide assistance to new categories of dislocated workers, including secondary workers that supply component parts directly to an affected firm, downstream workers affected by trade with Mexico or Canada, and certain workers who were fired because their company relocated to a country with which the United States has an FTA or preferential trading arrangement.

A controversial component of the new TAA legislation is a two-year wage insurance pilot program aimed at older workers who have been dislocated because of trade. The program provides workers fifty years of age and older up to 50 percent of the difference between their new salary and the salary earned at the time of termination of employment. Wage insurance for eligible workers would be capped at $5,000 for each year of the two-year period. The law also establishes a new refundable tax credit to cover up to 65 percent of a TAA recipient's health insurance if he or she is enrolled in a qualified health program. Qualified programs include but are not limited to: COBRA continuation, certain state based coverage, and other coverage not associated with a group health plan.184

3. Generalized System of Preferences

The Trade Act of 2002 includes a retroactive extension of the current Generalized System of Preferences program through December 31, 2006. The GSP law was first established on January 1, 1976, pursuant to Title V of the Trade Act of 1974. The program provides duty-free treatment to over 4,650 products from some 140 beneficiary developing countries.185

The Trade Act leaves the previous GSP program virtually intact but enhances the definition of internationally recognized worker rights as part of the eligibility criteria for beneficiary nations. Under the new language, the President must take into account, as a “factor of ineligibility,” whether a country has not taken steps to “afford international worker rights” to its workers, including a prohibition of the worst forms of child labor.

4. Andean Trade Promotion and Drug Eradication Act

The Trade Act of 2002 includes the Andean Trade Promotion and Drug Eradication Act (ATPDEA), which enhances the original ATPA statute and retroactively renews it through December 31, 2006. Duty-free access to imports originating in Andean countries is now accorded watches and watch parts, petroleum products, certain tuna in flexible containers, handbags, luggage, flat goods, work gloves, and most footwear. A few footwear products were excluded from benefits, as a result of a determination by the President that they were “import-sensitive in the context of overall imports from [ATPDEA] beneficiary countries.” The ATPDEA also authorizes certain Andean apparel made from U.S. inputs to enter the United States duty free without limitation and allows certain Andean apparel made with regional inputs to enter the U.S. duty-free subject to an annual cap.

However, as part of the ATPDEA, the beneficiary nations will be subject to a new annual review of compliance with extensive eligibility criteria, including (1) protection of intellectual property consistent with or greater than the TRIPS Agreement; (2) provision of in-

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ternationally recognized labor rights; (3) meeting U.S. counter-narcotics certification criteria; (4) steps taken to become a party and implement the Inter-American Convention Against Corruption; (5) conformity with the WTO Agreement on Government Procurement; and (6) support for U.S. antiterrorism efforts.166

5. Customs Reauthorization

Title III of the Trade Act of 2002 reauthorizes and provides additional funding to the U.S. Customs Service. It also authorizes additional funding to the Office of the U.S. Trade Representative and the U.S. International Trade Commission, as well as counter-terrorism activities deemed essential in the post-September 11th security atmosphere. Among the anti-terrorism provisions, the law mandates advanced electronic cargo manifest information, such as point of origin, consignor and consignee, and provides legal immunity from civil litigation for Customs officials acting in good faith when they conduct searches on suspicious persons. The law also increases monitoring of illegal textile transshipment activities, requiring a General Accounting Office (GAO) audit of Customs’ textile transshipment initiatives and authorizing funds for textile transshipment enforcement.167


The Trade Act of 2002 also enhances trade benefits under the existing Caribbean Basin Trade Partnership Act (CBTPA) and the African Growth and Opportunity Act (AGOA). Perhaps most important, the law significantly expands the annual tariff rate quota (or caps) for duty-free treatment of certain apparel made with regional inputs. For example, whereas the original cap for knit apparel made in the Caribbean beneficiary countries from regional fabric and U.S. yarns rose gradually to a level not to exceed 250 million square meter equivalents (SME), the new law raises the cap to 970 million SMEs beginning October 1, 2004, through the duration of the Act.

B. Farm Bill

President Bush signed into law on May 13, 2002, the Farm Security and Rural Investment Act of 2002 (Pub. L. No. 107-171). The law authorizes unprecedented high levels of domestic commodity supports and contains language that encourages the U.S. Secretary of Agriculture to use more vigorously the Export Enhancement Program; an export subsidy intended to counteract subsidies and other supports given U.S. competitors overseas. For the former, however, the law contains a provision that requires the Secretary of Agriculture to maintain the farm supports within the bounds of U.S. WTO commitments, acting as a so-called “circuit breaker” for unauthorized payments. U.S. trading partners have criticized both provisions in the Farm Act as obstacles to achieving meaningful agricultural reforms as part of the Doha Development Agenda and FTAA trade negotiations.168

C. Port Security

After months of debate, the Congress finally completed work on the Maritime Transportation Security Act of 2002 (Pub. L No. 107-295) during the lame duck session, which

187. Id.

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followed the mid-term congressional elections. The Act is heavily focused on anti-terrorism activities at the nation's ports of entry, deemed to be especially vulnerable to terrorist attack. For instance, the law "directs the Secretary of Transportation to assess port vulnerability, including each facility in a port, wherever the Secretary believes there is a high risk of a catastrophic emergency." The law also mandates the development and maintenance of "anti-terrorism cargo identification and screening system, including performance standards for seals and locks of shipping containers."

D. Homeland Security

President Bush signed into law on November 25, 2002, legislation establishing a Department of Homeland Security (DHS). The DHS consolidates federal agencies with domestic security functions into one agency. The new DHS will have an impact on the trade community because the Customs Service will be subsumed within the new department. Customs officials have assured anxious business community representatives that the move will not diminish the facilitation of trade; rather, they say, it will enable the service to enhance national security while facilitating the flow of goods.

The DHS will have primary responsibility for four broad security categories: border transportation and security; emergency preparedness and response; chemical, biological, radiological and nuclear countermeasures; and information analysis and infrastructure protection.

E. Export-Import Bank Reauthorization

Legislation reauthorizing the Export-Import Bank (Pub. L. No. 107-189), renewing its operating charter, was signed into law on June 14, 2002. The law extends the Bank's authority through fiscal year 2006. Section VIII of the law "directs the Bank to implement: (1) certain technology improvements designed to improve small business outreach and (2) an electronic system designed to trade all pending Bank transactions." The law also requires annual reports to Congress on its progress in implementing the technological requirements as well as on annual competitiveness and descriptions of Bank outreach activities to socially and economically disadvantaged small businesses.

F. Extraterritorial Income Tax

The WTO ruled in 2001 that the U.S. extraterritorial income (ETI) tax regime—the successor to the Foreign Sales Corporation (FSC) tax regime—is illegal under international trading rules and the United States must comply with the ruling or face up to $4 billion in

190. Id.
194. Id.
195. Id.
EU retaliatory tariffs. House Ways and Means Committee Chairman Thomas released in
the summer of 2002 a bill (H.R. 5095) that would repeal the ETI law and increase taxes
on direct exporters and on subsidiaries of foreign companies invested in the United States,
while allowing companies to defer paying taxes on foreign-source income, among other
things.

The proposal drew considerable opposition from U.S. exporters, particularly Boeing and
Caterpillar, who complain that the Thomas "fix" rewards companies who have moved
operations overseas. Speaker Hastert, representing Boeing and Caterpillar interests in Il-
linois, opposed the legislation in the 107th Congress. As a result, the legislation failed in the 107th Congress.

Thomas, with Administration backing, intends to reintroduce a perhaps slightly modified
ETI repeal proposal early in the 108th Congress.

G. EXPORT ADMINISTRATION ACT REAUTHORIZATION

Once TPA was enacted, the Administration expressed a desire to push for reauthorization
of the Export Administration Act, a regime governing control of U.S. exports that lapsed
in 1994. The Administration favored the Senate version of the bill (S. 149), which increased
penalties for violations of export controls but allowed for mass-market availability excep-
tions. This version contrasted with a House bill marked up after the September 11, 2001
terrorist attacks that contained stringent national security-oriented amendments and an
increased role for the Department of Defense in the export control process.

Administration tactics to move a more industry-favorable EAA reauthorization bill alien-
ated some key members of the House and U.S. industry who would have been instrumental
in the bill's passage. As a result, efforts to reach a compromise were stalled, leaving this
issue for the 108th Congress.

H. RUSSIA PERMANENT NORMAL TRADE RELATIONS

Although negotiations to bring Russia into the WTO hit some stumbling blocks, it has
been a goal of the Administration to try to advance permanent normal trade relations
(PNTR) for Russia ahead of its WTO accession as a reward for its cooperation in the war
on terrorism. House Ways and Means Committee Chairman William Thomas and Senator
Richard Lugar (R-IN) led congressional efforts to promote the Administration's objectives
in 2002 by authoring Russia PNTR bills (H.R. 3553 and S. 1861 respectively). Russia
PNTR was blocked, however, by opponents such as Finance Chairman Max Baucus
(D-MT) and Ways and Means Trade Subcommittee Ranking Member Sander Levin
(D-MI), who were concerned about losing leverage on issues of key importance to the
United States, such as the terms of Russia's WTO accession and commitments on steel.
Many U.S. industries concurred. In addition, the success of Russia PNTR may hinge on
obtaining more commitments from Russia with respect to protections for religious and
ethnic minorities.