International Trade

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I. Introduction

In 1996, the Clinton administration continued to pursue major international trade initiatives as part of an ongoing effort to increase the competitiveness of U.S. businesses abroad, maximize job creation within the United States, and enhance the standard of living throughout the world. The momentum developed by the establishment of the World Trade Organization, the Uruguay Round agreements, and various regional trade arrangements resulted in several significant developments this past year.

In 1996, the linkages between unilateral, regional, and global trade initiatives became increasingly apparent. The availability and activities of different institutions within the global trading system provided the United States and other countries the opportunity to pursue trade initiatives at several levels in a mutually reinforcing manner. For example, U.S. initiatives in the Asia-Pacific Economic Cooperation forum (a regional trade arrangement) were directly supportive of U.S. objectives in the World Trade Organization (WTO) (a global trade organization). Key structural or institutional developments in the international trade arena are addressed below.

The year of 1996 also saw major developments in the negotiation of trade agreements. The WTO and APEC forums provided a framework to achieve multilateral trade commitments and also reinforced key bilateral negotiations. At the same time, the U.S. Government independently pursued trade commitments, either as part of its ongoing trade agenda or in response to trade relief complaints. While only a few such agreements can be highlighted, this past year's developments suggest an acceleration in the use of negotiated agreements to address bilateral and multilateral trade disputes.

At the same time, the negotiation of regional and multilateral trade agreements that contain dispute resolution procedures and/or rules pertaining to national trade remedy procedures has enhanced the acceptance of dispute resolution procedures to address perceived trade imbalances and unfair trade practices. Indeed, as tariffs continue to fall in the face of trade liberalization agreements, and disciplines are imposed on nontariff barriers, one might expect increasing

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utilization of trade relief procedures based on widely accepted principles. This year was highlighted by several interesting dispute resolution decisions at the multilateral level (*e.g.*, before the WTO), regional level (*e.g.*, under the NAFTA), and the national level (*e.g.*, U.S. import relief proceedings). Only a few cases can be highlighted to illustrate some novel issues within the international trade arena in 1996.

II. Institutional Developments

The year 1996 saw major developments at the regional, global, and bilateral levels. At the regional level, the Asia-Pacific Economic Cooperation forum (APEC) continued to play a major role in the liberalization of trade flows among its member countries and more broadly. On November 22-23, 1996, the trade ministers of APEC's eighteen members[1] met in Manila, Philippines and issued the Manila Action Plan for APEC (MAPA), outlining broad objectives and actions for the next 12 months when the ministers will meet in Vancouver, Canada. The MAPA described various individual and collective voluntary undertakings to achieve reduced tariffs,[2] to lower barriers to foreign investment, and to adopt government policies intended to facilitate business activity and travel across national boundaries. While many of the specific objectives identified in individual member "action plans" were coincident with existing trade commitments, several fresh initiatives were unveiled.[3] In aid of strengthening the APEC, the ministers decided to end a moratorium on new memberships and to develop membership criteria for adoption at the 1997 Vancouver ministerial meeting.[4] It is anticipated that new members will be announced during the 1998 APEC meeting in Kuala Lumpur, with actual admission occurring during the 1999 meeting in Auckland.

The APEC's significance extends beyond the objective of regional trade liberalization, as global trade initiatives also received a boost. For example, the APEC provided a springboard to generate support for the Information Technology Agreement announced during the December WTO ministerial meeting in Singapore. A number of APEC members also announced measures intended to liberalize trade in various service industries, including transportation, telecommunications, energy, finance, and professional services. Their undertakings could provide important momentum for further negotiations on trade in services within the framework of the WTO. As further evidence of APEC's relevance to the global trading system, China and Taiwan undertook in the APEC ministerial to liberalize their respective tariff regimes which, in turn, will be relevant to each country's current efforts to join the WTO.

At the global level, the World Trade Organization wrestled with the implementation of existing Uruguay Round commitments among member countries, as well as questions concerning the expansion of the WTO's competence into other areas critical to future trade liberalization efforts. Throughout 1996, the WTO's attention necessarily focused on the "built-in agenda,"

1. The eighteen existing members of APEC are Australia, Brunei, Canada, Chile, China, Hong Kong, Indonesia, Japan, Malaysia, Mexico, New Zealand, Papua New Guinea, Philippines, Singapore, South Korea, Taiwan, Thailand, and the United States.

2. During the 1994 ministerial meeting in Bogar, Indonesia, the APEC members established the common objective of achieving free trade among all developing country members by 2020, and all developed country members by 2010.

3. Indonesia announced new tariff cuts, South Korea will seek to modify certain import laws, and the Philippines will pursue additional privatization initiatives. APEC members also agreed to facilitate business travel and to create an Internet-accessible customs information data base.

4. Eleven countries have applied to join the APEC: Colombia, Ecuador, India, Macao, Mongolia, Pakistan, Panama, Peru, The Russian Federation, Sri Lanka, and Vietnam.

and the need to ensure that benefits under existing agreements—for example, technical barriers to trade, rules of origin, sanitary and phytosanitary standards, trade-related investment measures, and aspects of intellectual property—were fully realized. However, the Final Singapore Declaration of the WTO Ministerial Conference,[5] held in Singapore between December 9 to 13, 1996, may be more significant for the window it provides on the areas where the WTO may venture in the future.

For the United States, the WTO's first biennial ministerial meeting presented an opportunity to pursue a number of new initiatives critical to the global trading system. The United States sought and obtained a broad agreement on aggressive tariff reductions in the area of information technology, an area that the U.S. Government assigns a high priority for economic expansion and global trade. Likewise, the difficult issue of labor standards and their relationship to fair trade was one which the U.S. Government sought to place within the cognizance of the WTO. The Final Declaration recognized the International Labour Organization as the competent body to deal with core labor standards, but also noted the relationship between labor standards and a liberalized trading system, and acknowledged continued collaboration between the WTO and ILO on this issue. Government procurement, which historically has been resistant to the trade policy process, received a boost with the establishment of a working group to study transparency in government purchasing practices with a view to promoting a more open transboundary procurement system.

The 1996 WTO Ministerial was significant for what it may portend in 1997 and beyond in other substantive trade policy areas. A working group was established to study the interrelationship between trade and competition policy. While the United States believes that this working group should focus on cartel and restrictive practices of nongovernmental entities, other countries, including Canada, may wish to see the group examine the competitive effects of trade relief statutes (such as existing antidumping laws and practices). Given the sensitivity of this issue within the United States, this working group's activities will be of considerable interest in 1997. Progress in trade in services—including professional, financial, telecommunications, and maritime transport—was specifically identified as a priority for the WTO. Environmental aspects of trade will also be an area to watch in 1997, as the Committee on Trade and Environment was encouraged to continue pursuit of its study of trade liberalization, environmental protection, and economic development.

In addition, the WTO Ministerial recognized the need to reinforce and expand upon the existing institutional framework of the global trading system. In this regard, particular attention was given to (1) the role of regional trade agreements as reinforcing global trade liberalization efforts, (2) the need to address the special circumstances facing least-developed countries and to work with other institutions (such as UNCTAD, the International Trade Centre, and multilateral lending organizations) to enhance trade opportunities, and (3) strengthening the WTO by working with applicant countries (with China being among the top priorities) to obtain membership.

The likely expansion of WTO membership in 1997, as well as the possible extension of WTO disciplines into other areas of international trade, will place increasing emphasis on the WTO's own institutional mechanisms for developing and deciding upon substantive trade rules. At the close of the first biennial ministerial meeting, Director General Renato Ruggiero noted the need for improvements to the WTO decision-making process, and developing countries

5. Reprinted in INSIDE U.S. TRADE, Dec. 16, 1996, at S-1 to S-6.

voiced concerns that the trade agenda had been dominated by the interests of the more powerful trading member states. The following year will no doubt include discussion of whether a centralized decision-making mechanism will be needed to ensure effective administration of the WTO agenda. When the next biennial ministerial is convened in 1998, marking the fiftieth anniversary of the General Agreements on Tariffs and Trade, WTO institutional infrastructure may be one of the key issues for discussion.

At the bilateral level, the United States and European Union continued to discuss key trade issues within the structure of their semiannual summit meetings. In both June and December 1996, the United States and the European Union took up key international economic issues, including the use of extraterritorial trade restrictions to achieve national foreign policy objectives (the so-called Helms-Burton Act intended to strengthen the U.S. embargo of Cuba, and the Iran Libya Sanctions Act, which has been characterized as imposing a secondary boycott on non-U.S. companies investing in those countries). European officials indicated strong interest in a repeal of these controversial statutes, and also sought an indication of whether the president would continue to suspend operation of the litigation provisions of the Helms-Burton Act. This issue underscored the interrelationship between bilateral and multilateral trade institutions. For example, the U.S. extraterritorial trade measures contained in the Helms-Burton Act have been challenged by U.S. trading partners within the framework of both the WTO and North American Free Trade Agreement. Important bilateral trade issues were discussed within this institutional framework, such as agricultural trade, mutual recognition of national standards in the pharmaceutical and medical devices industries. However, the summit provided an opportunity for U.S. and European officials to discuss matters of importance beyond the bilateral trade relationship, such as the conditions for China's accession to the WTO and achieving a broad agreement within the WTO on telecommunications trade.

III. International Agreements and Developments

A. Information Technology

At the close of 1996, the United States and over two dozen other countries[6] announced their commitment to an Information Technology Agreement (ITA) intended to liberalize trade in a range of high-technology products. In conjunction with the WTO ministerial meeting in Singapore, twenty-eight countries signed the "Ministerial Declaration on Trade in Information Technology Products,"[7] agreeing to the implementation of an ITA by April 1, 1997, that will eliminate tariffs on covered products by the year 2000. The Declaration conditions ITA implementation on receiving commitments from countries representing ninety percent of world trade in information technology products, and achieving an agreement on the staging of tariff cuts beginning in July 1997. Product coverage is reflected in a list of nearly two hundred products, including such items as capacitors, digital photocopiers, fiber optic cables, computer monitors, computer software, and telecommunications equipment. Work on the details of the timing of specific tariff cuts is to be concluded early in 1997, and each signatory is to provide a list of the Harmonized System product headings to be covered by March 1, 1997. Notably, the ITA will embrace dispute resolution and consultative procedures under the GATT 1994.

6. The countries agreeing to the ITA are the United States, the fifteen member countries of the European Union, Canada, Australia, Switzerland, Norway, Iceland, Turkey, Japan, Taiwan, Hong Kong, Indonesia, South Korea, and Singapore.

7. Reprinted in Inside U.S. Trade, Dec. 16, 1996, at S-8 to S-10.

Given the importance of information technology products to the United States economy, as well as the economies of developed and developing countries alike, the ITA is expected to increase international trade in the covered products by reducing the cost of these products to consumers. Industries and businesses that depend heavily on information technology products will have greater access to a broader spectrum of hardware and software. Conclusion of an ITA will no doubt influence the discussions on new member accession to the WTO, particularly China, which has to date avoided any specific commitment to the tariff reductions contemplated in the ITA. Furthermore, the ITA will provide a backdrop for ongoing negotiations for a telecommunications agreement within the framework of the WTO (*see* discussion below).

B. Insurance

The United States and Japan reached an agreement settling an ongoing dispute regarding access to the Japanese domestic insurance market, and thereby avoiding retaliatory measures previously threatened by the Clinton administration. The agreement, achieved on the eve of a December 15 deadline, commits Japan to four major undertakings in the primary insurance market. Auto insurance companies will be allowed to write policies with variable premiums based on factors that have traditionally been used in the U.S. market.[8] In the area of commercial fire insurance, Japan agreed to reduce the policy value threshold for which competition on price can occur. Beginning in January 1997, the threshold for competition will be lowered from ¥30 billion to ¥20 billion, and in April 1998, it will be lowered again to ¥7 billion. Japan also agreed to reform its system of insurance rating bureaus and to streamline the process for allowing new insurance products into the market.

The U.S.-Japan insurance agreement reinforces an earlier arrangement reached in October 1994, whereby Japan had agreed not to make radical changes in Japanese insurance company access to the so-called third sector of the insurance market (*e.g.*, travel, nursing home, personal accident) until reforms had been achieved in the primary sector. Foreign-based insurance companies have had success in the third-sector market, and Japan's Ministry of Finance had intended as early as January 1997 to permit subsidiaries of Japan's primary insurance sector companies to enter this part of the market. Under the 1996 agreement, Japan will maintain market access protection in the third-sector for two and one-half years after implementation of the primary insurance market reforms.

Foreign insurers are estimated to have between three and five percent of the Japanese insurance market, which comprises about $350 billion in annual premiums. Apart from the potential for greater U.S. participation in the Japanese domestic insurance market, and the possible cost-savings to Japanese insureds from increased competition, the U.S.-Japan insurance agreement was viewed as a test of U.S. resolve to ensure implementation of numerous bilateral trade arrangements with Japan. Furthermore, the agreement averts possible unilateral retaliatory measures that Japan could have been questioned before the WTO (although insurance services are not covered under the GATT 1994).

C. Telecommunications

Members of the WTO are pursuing a broad-based agreement on basic telecommunications services including voice telephone, facsimile, data by wireline, wireless, and satellite transmission

8. These factors include age and sex of the driver, geographical location of the insured, vehicle condition, the insured's driving record, and the use of the vehicle.

under the General Agreement on Trade in Services. A WTO Group on Basic Telecommunications was established by the WTO after negotiations failed to reach an agreement by a previous April 30, 1996, deadline. Member countries are seeking to obtain commitments for greater trade access to national telecommunications markets, agreement on a common set of regulatory principles governing national telecommunications markets, and limitations on the ability of national governments to restrict foreign investment in national telecommunications industries. The deadline for reaching an agreement is February 15, 1997.

The outcome of the WTO telecommunications negotiation will be driven, in large part, by the ability of member countries to resolve or otherwise avoid a number of contentious issues. For example, the United States, which has over the years encouraged significant competition in its domestic telecommunications market, is concerned with the ability of foreign telecommunications monopolies to use their national monopoly position to compete unfairly in the international marketplace. Canada and European country members are concerned with the implications of any agreement on broadcast content, to the extent any such agreement may cover the scope of services provided as well as the means of providing such services. Developing countries will be sensitive to foreign investment and the development of indigenously owned telecommunications companies, as well as the timing of commitments under the agreement. Needless to say, the complexity and scope of the trade, investment, regulatory, and collateral industry issues presented in the telecommunications negotiations suggest that any agreement reached in February 1997 will necessarily not conclude WTO activity in this area, but rather provide a foundation for future discussions and progress.

D. NAFTA Expansion and FTAA

Little progress was made in 1996 on achieving an expansion of NAFTA to include Chile, while some efforts were made toward the establishment of a Free Trade Area of the Americas. These initiatives are largely captive to renewal of the president's fast-track authority, a priority for early resolution in the second Clinton administration. Fast-track authority is viewed as essential to induce substantive negotiations with Chile on NAFTA accession. However, environmental and labor issues have complicated the renewal of the president's fast-track authority given congressional concerns over open trade with countries lacking significant environmental protection or acceptable labor standards.

In a development related to NAFTA expansion, Chile and Canada signed a bilateral trade agreement on November 15, 1996, which will eliminate customs duties on nearly eighty percent of Canadian-Chilean bilateral trade. This agreement could serve as a vehicle to expedite Chile's accession to the NAFTA, if negotiations are started in 1997. However, one aspect of the agreement that could prove troubling is the context of future NAFTA accession negotiations—namely, Chile and Canada agreed to forgo use of national antidumping duties against each country's exports. Canada has been urging the United States, with little success, to consider a similar undertaking within the NAFTA framework, and the Canada-Chile agreement is likely to rekindle this effort.

As for the FTAA, the December 1994 Summit of the Americas called for the completion of negotiations by the year 2005. In support of the FTAA initiative, eleven FTAA working groups have been established with a view to laying a foundation for the next trade ministers meeting, scheduled for May 1997 in Belo Horizonte, Brazil. A key objective of the Brazil meeting will be to establish a timetable and structure for formal negotiations. For example, one issue that will receive early attention is the role regional trading arrangements (notably, NAFTA and MERCOSUR) should play in future FTAA negotiations.

E. Textiles

The United States and China continued to pursue trade negotiations in the hope of reviewing the existing U.S.-China bilateral textile agreement scheduled to expire on December 31, 1996. In connection with renegotiation of the agreement, the United States sought improved market access for U.S. exporters of textile and apparel products, a clearer understanding on the transshipment restrictions already in existence, improved monitoring of Chinese textile facilities to ensure compliance with the agreement, and elimination of certain nontariff barriers to U.S. exports. Related to the effort to renew the bilateral textile agreement were U.S. allegations that China had violated the quota restrictions contained in the agreement. In September 1996, the United States announced a $19 million reduction in quota for Chinese origin textiles, based on evidence of transshipments through Hong Kong, Mongolia, Fiji, and Turkey, in violation of the bilateral agreement. China threatened retaliatory measures, denying its involvement in the transshipment transgressions. A showdown was avoided when the U.S. Government agreed to reexamine the transshipment charges, allowing negotiations to continue into early 1997.

Renewing the U.S.-China textile agreement is a priority for the U.S. Government, given the increasing importance of the U.S. trade relationship with China and growing sensitivity over the U.S. trade deficit with China. In addition, Chinese concessions in the area of textile market access could be a bellweather for broader Chinese acceptance of market access and other trade commitments as part of its accession to the WTO. Furthermore, Chinese compliance with its bilateral textile commitments with the United States will undoubtedly be considered in the decision to renew MFN treatment for China.

IV. International Trade Litigation

A. WTO

If 1995 was the World Trade Organization's "debut," then 1996 was truly the debut for the WTO's much-heralded Dispute Settlement Body (DSB).[9] Two cases concerning U.S. environmental rules for reformulated gasoline[10] and Japan's taxes on alcoholic beverages[11] proceeded through the complete panel and appellate stages, resulting in findings that the U.S. and Japanese measures violated national treatment requirements. Two other panels found U.S.

9. As of December 31, 1996, WTO Members requested 64 consultations on 44 distinct matters. All of the WTO dispute panel reports cited herein are available on WTO's *Overview of the State-of-Play of WTO Disputes* <http://www.wto.org/wto/dispute/bulletin.htm> [hereinafter WTO Disputes Bulletin]. This number is significant, considering that GATT 1947 had only about 200 disputes during its entire forty-seven-year existence. *See* World Trade Organization, Analytical Index—Guide to GATT Law and Practice, 771-78 (6th ed., 1995) [hereinafter GATT Analytical Index]. The fact that GATT 1994 is a more comprehensive multilateral trade agreement than its predecessor no doubt partly accounts for the large number of disputes to date. Several disputes, for example, involve intellectual property issues brought under the TRIPs Agreement, for which GATT 1947 had no counterpart. Nevertheless, the number of requests for consultation made thus far is still quite extraordinary.

10. *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (January 29, 1996), WT/DS2/AB (April 29, 1996) (both adopted May 20, 1996) [hereinafter United States Gasoline]. *See* WTO Disputes Bulletine, *supra* note 9.

11. *Japan—Taxes on Alcoholic Beverages*, WT/DS8, WT/DS10, WT/DS11 (July 11, 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) (both adopted Nov. 1, 1996) [hereinafter Japan—Alcohol Taxes].

restrictions on imports of underwear from Costa Rica[12] and wool shirts from India[13] to be inconsistent with the Agreement on Textiles and Clothing. The final panel held that GATT 1994 was not applicable to a Brazilian countervailing duty imposed on desiccated coconut from the Philippines, but noted that Brazil's actions merited serious concern.[14] Given that GATT 1994 constitutes a more comprehensive rules-based approach to governing international trade than did GATT 1947, the reports issued in 1996 provide the first indications of the development and direction of WTO jurisprudence.

In *Reformulated Gasoline*, the Appellate Body agreed with the Panel that the United States was not justified in applying an Environmental Protection Agency (EPA) regulation known as the "Gasoline Rule" to gasoline imported from Venezuela and Brazil. The rule applied different standards—called baselines—to imported gasoline than were applied to domestic gasoline to determine whether the Clean Air Act's requirements were met.[15] The Panel found that the use of different baselines for imported and domestic gasoline violated the national treatment provisions of Article III:4 of GATT 1994. The Panel also found that the Gasoline Rule was not justified under, *inter alia*, Article XX(g), which allows Members to adopt conservation measures that affect imports if they are applied together with restrictions on domestic production or consumption. The Panel saw no direct connection between the U.S. decision to treat imported gasoline less favorably than domestic gasoline, and the U.S. objective of improving air quality in the United States.

The Appellate Body found that the Panel erred in its interpretation of Article XX(g) by focusing *only* on that portion of the EPA regulation that dealt with baseline establishment methods, rather than on the regulation in its entirety. The Appellate Body reasoned that eliminating the use of baselines would frustrate the Gasoline Rule's primary objective of preventing further air pollution.[16] Article XX(g) required only "even-handedness" in the imposition of restrictions on imported and domestic products, not identical treatment.

The Panel also had erred by not applying the chapeau of Article XX—which provides that measures may be justified under an exception only if they "do not constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade" to the Gasoline Rule. The Appellate Body, applying the chapeau *de novo*, found that the Gasoline Rule did not satisfy the requirements. No doubt cognizant of the tremendous scrutiny which the first DSB Appellate Body report would receive, the Appellate Body stressed that this decision did not impair the ability of WTO Members to adopt their own environmental regulations. WTO Members retain "a large measure of autonomy" in their environmental policies, but must respect the requirements of GATT 1994 in exercising that autonomy.[17]

12. *United States—Restrictions on Imports of Cotton and Manmade Fibre Underwear*, 1996 WL 738823 (G.A.T.T.), (Nov. 8, 1996) [hereinafter United States—Underwear]. On November 11, 1996, Costa Rica announced that it would appeal certain panel legal interpretations. *See* WTO Disputes Bulletin, *supra* note 9.

13. *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33 (Jan. 6, 1997) [hereinafter United States—Wool Shirts]. The Panel completed its work on the report in December 1996, but the report was not released to the WTO Members until January 6, 1997. *See WTO Panel Rules for India in Dispute with U.S. over Wool Shirt Quotas*, INSIDE U.S. TRADE, Dec. 20, 1996, at 8.

14. *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22 (Oct. 17, 1996) [hereinafter Brazil—Coconut]. On December 16, 1996, the Philippines announced its intention to appeal the decision. *See* WTO Disputes Bulletin, *supra* note 2.

15. United States—Gasoline, *supra* note 10, Panel Report, ¶¶ 2.1-2.13.

16. *Id.*, Appellate Body Report at 19.

17. *Id.* at 30.

In *Taxes on Alcoholic Beverages*, a case brought against Japan by the United States, Canada, and the European Union, the Appellate Body and the Panel both found that Japan's Liquor Tax Law, which imposed different tax rates on *shochu*, a Japanese spirit, than on other alcoholic beverages, such as whiskey and vodka (much of which was imported), was inconsistent with Article III's prohibition against dissimilar taxation between imported and domestic products. Specifically, the Panel found the Liquor Tax Law violated Article III:2, which prohibits (1) applying internal taxes in imports that are in excess of those applied to domestic "like products," and (2) applying different taxes on directly competitive or substitutable imported and domestic products in a manner that protects domestic production.[18]

The Appellate Body affirmed the Panel Report's result, but modified the Panel's legal interpretation of Article III. The Panel had reasoned that because Article III:1 states "general principles" concerning the imposition of internal taxes, and Article III:2 contains specific obligations, the starting point for interpreting Article III:2 was Article III:2 itself, and not Article III:1.[19] The Appellate Body found that the Panel had erred by not taking into account Article III:1 in interpreting Article III:2.

The Appellate Body also found that the Panel had blurred the distinction between the issue of whether directly competitive or substitutable domestic and imported products are not similarly taxed, and the separate issue of whether the tax is applied to protect domestic production. The latter issue required an objective analysis of the tax measure's structure and application to determine whether it is protective. Here, the difference between the tax rates for *shochu* and other alcoholic beverages was sufficient to indicate the tax protected Japanese *shochu* production. In other cases, however, factors other than the difference in tax rates may be more relevant to demonstrate protective taxation. The Appellate Body stressed that panels should give full consideration to all relevant facts and circumstances in their analysis.[20] WTO rules are not "so rigid or so inflexible as not to leave room for reasoned judgments" in addressing the "ever-changing ebb and flow of real facts in real cases. . . . They will serve the multilateral trading system best if they are interpreted with that in mind."[21]

These first two reports issued by the Appellate Body shared several characteristics. Neither showed much deference to the panels' legal interpretations, even though the results in both cases were affirmed. Further, although the Appellate Body's jurisdiction is limited to legal issues raised in appeals from panel reports, as a practical matter, the Appellate Body conducted a *de novo* review of some issues in both cases. Finally, both of these reports reflect pragmatism in the application of the GATT 1994 rules to disputes.

Two panel reports applied the new Agreement on Textiles and Clothing (ATC) to U.S. quotas on imports of underwear from Costa Rica and wool shirts and blouses from India. In each case, the quotas were found to be inconsistent with the ATC's requirements. The quotas had been imposed by the U.S. Committee for Implementation of Textiles Agreements (CITA)

18. Japan—Alcohol Taxes, *supra* note 11, Panel Report, ¶ 7.1.

19. *Id.* ¶¶ 6.11, 6.12.

20. *Id.*, Appellate Body Report at 30-31. This case also presented the question of the legal status of adopted GATT panel reports. In 1987, the GATT had adopted a panel report on a similar Japanese Liquor Tax Law that was found to be inconsistent with GATT Article III: 2. The Panel found that adopted panel reports are an integral part of GATT 1994 and constitute subsequent practice in a specific case, but that subsequent panels were not obligated to follow adopted reports. Panel Report, ¶ 6.10. The Appellate Body disagreed, noting that the Ministerial Conference and the General Council had the "exclusive authority" to adopt interpretations of the Agreement. The Appellate Body also observed that the decision by the Contracting Parties to adopt a panel report did not necessarily mean they agreed with the report's legal reasoning. Appellate Body Report at 13-15.

21. *Id.* at 32.

after finding that imports of underwear from Costa Rica[22] and wool shirts and blouses from India[23] were causing serious damage to U.S. producers of these respective products. Neither the ATC nor the DSB's rules provide a specific standard of review for panels to apply in these cases.[24] Drawing on Article 11 of the Understanding on Dispute Settlement,[25] both Panels adopted a standard of review that is analogous to that applied by U.S. courts reviewing U.S. administrative agency determinations. Specifically, the Panels did not substitute their judgments for that of CITA by conducting a *de novo* review of the facts, but instead stated they would assess objectively CITA's review and the evidence relied upon by CITA.[26] In each case, the Panels found that CITA had not satisfied the ATC's prerequisites for implementing new restraints on textile imports. In the *Underwear* case, for example, the Panel found inconsistencies and gaps in CITA's analysis that raised questions about the reliability of CITA's findings.[27] In *Wool Shirts*, among other shortcomings, CITA had used industry data that was not specific to the wool shirt and blouse industry.[28]

In a transitional case, a Panel examined Brazil's administration of its countervailing duty statute. Brazil had instituted a countervailing duty investigation of imports of Philippine desiccated coconut in June 1994, six months before GATT 1994 came into effect, and imposed a final countervailing duty in August 1995. The Philippines contended that Brazil's actions were inconsistent with, *inter alia*, Article VI of GATT 1994. The Philippines did not invoke the Subsidies and Countervailing Measures (SCM) Agreement, since that Agreement specifically applied only to investigations initiated after the GATT 1994's entry into force.[29] The Panel never reached the merits, however, because it found that Article VI of GATT 1994 was inapplicable since Brazil's investigation predated GATT 1994's entry into force. The Panel rejected the Philippines' contention that provisions of GATT 1994 could be invoked separately from the SCM Agreement.[30] The Panel noted, however, that parties in transitional cases such as this were not necessarily without a remedy. The Philippines could have pursued dispute settlement before the Tokyo Round SCM Committee, which remained in operation for two years after GATT 1994 came into effect, although the Panel acknowledged that this remedy was not a complete substitute for WTO dispute settlement.[31]

22. United States—Underwear, *supra* note 12, Panel Report, ¶¶ 2.8-2.14.

23. United States—Wool Shirts, *supra* note 13, Panel Report, ¶¶ 2.1-2.7.

24. United States—Underwear, *supra* note 12, Panel Report, ¶ 7.8; United States—Wool Shirts, *supra* note 13, Panel Report, ¶ 7.16.

25. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization *reprinted in* 33 I.L.M. 81 (1994). Article 11 reads in pertinent part: "[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements. . . ."

26. *See* United States—Underwear, *supra* note 12, Panel Report, ¶ 7.12 ("We do not . . . see our review as a substitute for the proceedings conducted by national investigating authorities. . . . Rather, . . ., the Panel's function should be to assess objectively the review conducted by the national investigating authority, in this case the CITA"); United States—Wool Shirts, *supra* note 13, Panel Report, ¶ 7.16. *Cf.* Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 488 (1951) (reviewing court may not displace the agency's choice "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.").

27. United States—Underwear, *supra* note 12, Panel Report, ¶¶ 7.31, 7.37, 7.38.

28. United States—Wool Shirts, *supra* note 13, Panel Report, ¶¶ 7.39, 7.42.

29. Brazil—Coconut, *supra* note 14, Panel Report, ¶¶ 43-44.

30. *Id.* at ¶¶ 232-257.

31. *Id.* at ¶¶ 271-273, 277.

In conclusion, the WTO Dispute Settlement Body had a very active docket in 1996. The first group of decisions covered such traditional GATT issues as national treatment, as well as new issues arising under the Agreement on Textiles and Clothing, and a transitional case. It should be noted that in both *Reformulated Gasoline* and *Taxes on Alcohol*, the losing parties—the United States and Japan—have indicated they will change their respective measures in accordance with the results in those cases.[32] The fact that two of the world's largest trading countries and most important WTO Members have indicated their intentions to comply with these decisions is a positive omen for the future of the new DSB as a credible and effective mechanism for resolving trade disputes.

B. NAFTA

Two panel decisions under NAFTA Chapter 19 involving Canadian exports to the United States were issued in 1996. In *Color Picture Tubes from Canada*,[33] a panel rejected a challenge to the U.S. Commerce Department's failure to revoke an antidumping duty order. In the underlying administrative proceedings, the Commerce Department had failed to comply with its regulations requiring revocation if, by the last day of the fifth anniversary month after publication of the order, no party had requested an administrative review. The Commerce Department had also failed to comply with its regulation requiring it to publish timely notice of its intent to revoke the order and serve such notice on interested parties. When the Commerce Department subsequently published a notice of intent to revoke two years late, several unions objected causing the department to maintain the existing antidumping order. Mitsubishi Electronics Industries, Inc., challenged the Commerce Department's decision, arguing that the order had expired pursuant to law and the department's failure to follow its own procedures (*i.e.*, providing timely notice to interested parties of its intent to revoke the order) could not be a basis to resuscitate the order.

The Panel affirmed the Commerce Department, relying heavily on U.S. law as applied in a similar situation in *Kemira Fibres Oy v. United States*.[34] The Panel found that the regulations at issue presented two conflicting imperatives: (1) that an antidumping order expires if five years pass without a request for administrative review, and (2) that the Commerce Department publish a timely notice of intent to revoke an order to allow interested parties to object. In *Kemira Fibres*, the department had been tardy in publishing its notice by ninety days, while in the case at hand the Department had delayed almost two years. Despite its concern with the much longer delay, the Panel still found that the failure to publish a timely notice of revocation was not prejudicial since an earlier, timely publication, according to the Panel, would have led to an objection to revocation by domestic interested parties. The Panel did, however, express concern that the Commerce Department's failure to meet the publication deadline could have implications for its commitment to meeting its obligation under the 1994 Uruguay Round agreements to "sunset" antidumping orders after five years.[35]

32. *See U.S. Will Comply with WTO Gas Panel, But Does Not Say How*, INSIDE U.S. TRADE, June 21, 1996, at 3; *Japan Set to Comply with WTO Ruling, Will Revise Domestic Liquor Taxes*, J. OF COM., Dec. 18, 1996, at 4A.

33. Color Picture Tubes from Canada, Panel No. USA-95-1904-03, 1996 FTAPD LEXIS 1 (May 6, 1996).

34. 61 F.3d 867 (Fed. Cir. 1995).

35. *Id.* at 12 and n.26, citing Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 11, § 11.3.

The second NAFTA panel decision involved a challenge to an antidumping determination by Revenue Canada involving refined sugar exports from the United States.[36] The challenge posed three issues. First, Revenue Canada had decided that in calculating the normal value of the refined sugar, the U.S. operating company and its wholly owned production subsidiary should be analyzed as a single entity. Second, Revenue Canada had rejected the U.S. exporter's accounting methodology for calculating its cost of production, and required that the "actual costs" associated with production be calculated. Third, Revenue Canada found that a particular contract did not establish the date of sale for later transactions under the contract, because the contact did not fix the price, quantity, or quality of the goods. The Panel affirmed each of Revenue Canada's rulings as reasonable, except that it remanded for additional analysis of several technical issues related to the "actual costs" associated with the exporter's production.

A critical issue for the Panel in reaching its decision was which standard of review to apply to Revenue Canada's determinations, the more rigorous "correctness" standard or the more tolerant "reasonableness" standards. Noting that Revenue Canada is the agency responsible for administering the antidumping law, the Panel concluded that the latter standard was applicable. Given that the Canadian antidumping law did not define key terms such as "exception," "cost of production," and "date of sale," the Panel also found that Revenue Canada's interpretation and application of those key terms were reasonable.

In two 1996 decisions under NAFTA Chapter 20, a binational dispute resolution panel upheld Canada's right to protect domestic dairy, poultry, egg, margarine, and barley products with tariffs.[37] After the WTO banned quotas last year, Canada replaced its import quotas with equivalent tariffs. The United States challenged Canada's action as violating a NAFTA requirement to eliminate all tariffs on U.S. products by 1998. Canada claimed that its actions were consistent with a grandfather clause in NAFTA. The binational panel issued an interim decision in July that Canada had acted consistent with its WTO and NAFTA obligations, and reaffirmed this decision in November.

V. U.S. Trade Litigation

In March 1996, the Court of Appeals for the Federal Circuit issued a significant decision on the issue of whether the privatization of a state-owned company affects the countervailability of past subsidies received by the company.[38] The Commerce Department had determined that Saarstahl Vollingen GmbH (Saarstahl SVK) received a subsidy from government debt forgiveness in connection with the 1989 sale of most of its stock, and that the benefit of this subsidy passed through to the new owner of Saarstahl SVK's assets, Dillinger Hutte Saarstahl AG (DHS). The department found, however, that a portion of the subsidy was repaid in the privatization. The Court of International Trade (CIT) vacated the Department of Commerce's decision, holding that the arm's-length sale of Saarstahl SVK extinguished any remaining "competitive benefit" from the past subsidies, because the price presumably included the market value of any continuing benefit.

36. In the matter of: Final Determination of Dumping Regarding Certain Refined Sugar, Refined from Sugar Cane or Sugar Beets, in Granulated, Liquid and Powdered Form, Originating in or Exported from the United States of America, Panel No. CDA-95-1904-04, 1996 FTAPD LEXIS 5 (Oct. 9, 1996).

37. Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products, Panel No. CDA-95-2008-01 (Dec. 2, 1996).

38. *See* Saarstahl AG v. United States, 78 F.3d 1539 (Fed. Cir. 1996), *reb'g and reb'g en banc denied*, June 7, 1996.

The Federal Circuit reversed, Judge Plager dissenting. After noting the deference owed to Commerce Department decisions, the court rejected the CIT's premise that subsidies could not be countervailed unless they confer a competitive advantage on the goods exported. The court reasoned that the statute does not require any such showing, nor did the legislative history.[39] The decision applied the countervailing duty statute as in effect before the Uruguay Round Agreements Act (URAA) of 1994. The URAA contains a specific provision on the privatization issue.[40] The court viewed the CIT's decision as improperly requiring the Department to consider the "effect" of a subsidy, a task which Congress has given to the International Trade Commission (ITC), not the Commerce Department. The court viewed as reasonable the Department's decision that a portion of the past subsidies could be repaid in connection with a privatization, but rejected the CIT's holding that as a matter of law no subsidies could pass through after an arm's-length privatization.

This decision may affect other steel cases currently pending before the Federal Circuit. Moreover, while decided under the pre-URAA statute, the Federal Circuit's decision is also likely to influence the Commerce Department's interpretation of the privatization provision contained in the amended statute.

On June 1, 1995, the Commerce Department initiated antidumping and countervailing duty investigations against imports from Italy and Turkey. On July 10, 1995, the ITC preliminarily determined that there was a reasonable indication of material injury by reason of subject imports. Subsequently, on June 14, 1996, the Department issued its final countervailing determination, finding countervailing duty rates ranging from 0 percent to 11.23 percent for Italy and from 3.87 percent to 15.82 percent for the Turkish respondents. These countervailing duty investigations were significant because they were the first in which the Department examined whether certain subsidies to disadvantaged regions were noncountervailable under the "green light" provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (Act).

On June 14, 1996, the Department also issued its final antidumping determination, finding antidumping rates ranging from 0 percent to 46.67 percent for Italian respondents and 56.87 percent and 63.29 percent for the two Turkish respondents. The Department's pasta antidumping investigations were significant because they were the first to implement many of the new provisions of the Act, such as level of trade and targeted dumping. In addition, the ITC's finding that the U.S. pasta industry was materially injured by reason of Italian and Turkish dumping is of note because the ITC was confronted with determining how to weigh evidence from consumers who purchase domestic and imported pasta on the basis of perceived quality, authenticity, and brand attributes.

In October 1996, the Commerce Department entered into a suspension agreement with Mexican tomato exporters to settle a pending antidumping complaint initiated by U.S. tomato growers earlier in 1996. The Commerce Department had preliminarily found Mexican tomatoes to be dumped in the U.S. market, and had issued tentative margins of approximately seventeen percent. The suspension agreement, which could be executed once a preliminary determination was issued and after public comment, commits Mexican growers not to sell at a price below an established reference price. The reference price is based on the lowest average Mexican import prices consistent with an absence of price suppression in the U.S. market. The agreement

39. *Id.* at 1542-43.
40. *See* 19 U.S.C. Sec. 1677(5)(F).

also contains measures to permit the Commerce Department to monitor imports and prices, and to ensure that Mexican growers do not circumvent their commitments.

The suspension agreement eliminated the need for further trade litigation proceedings, as it was intended to eliminate the injurious effects of Mexican imports. While U.S. antidumping procedures provide for the termination of trade relief investigations through negotiated agreements, the tomatoes agreement is noteworthy since such suspension agreements are infrequently negotiated. In part, the sensitivity of any type of price undertaking under U.S. antitrust laws can deter U.S. and foreign competitors from considering a settlement of pending trade litigation. Any such suspension agreement therefore requires the active involvement and endorsement of Commerce Department officials from the outset. Whether the tomatoes suspension agreement will spark renewed interest in negotiated settlements for U.S. trade litigation actions will in part depend on the ability of litigants to navigate antitrust concerns of U.S. trade officials to assist in this process.