International Trade

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I. Introduction

With an unprecedented run of economic growth producing an economy of $8.5 trillion, the United States solidified its place as both the world's largest importer and exporter of goods and services. Imports totaled $1.1 trillion, but the foreign financial crises led to a slowing of export growth to $932 billion. International Monetary Fund (IMF) recovery packages gained funding, but with trade conditionalities intended to deter government directed loans to certain sectors. Worldwide, the rate of growth in world trade dropped from ten percent to four percent, trade actions increased in many markets abroad, and steel imports into the United States surged, precipitating unfair trade cases and heightened political pressure for escape clause relief.

The United States continued to advance trade liberalization initiatives in every region of the world and maintained an aggressive effort to secure implementation and expansion of multilateral obligations. Notable success was marked by the entry into force of the World Trade Organization (WTO) agreement on basic telecommunications services on February 5, which was preceded by additional commitments and the U.S. withdrawal of its broad most-favored-nation (MFN) exception. In addition, the implementation of the newly negotiated expansion of the Financial Services Agreement under the Uruguay Round's General Agreement

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on Trade in Services (GATS) began the process of opening access to ninety-five percent of the world's revenue from banking, securities, insurance, and financial data services. The North American Free Trade Agreement (NAFTA) marked its fifth anniversary, and the hemisphere saw the Free Trade Agreement of the Americas (FTAA) negotiations move past its formal launching, but still hampered by the absence of U.S. legislation providing fast-track authority for its future implementation.

While a multilateral convention negotiated within the Organization for Economic Cooperation and Development (OECD) requires member states to criminalize bribery, bringing other industrialized countries to that U.S. standard, the level of foreign prosecutorial zeal may not yet meet that in the United States, especially in those countries whose negotiators blocked the convention from addressing the tax deductability of bribes, bribes to political parties, and other issues. Issues involving sovereignty, labor, and the environment stopped efforts to secure a Multilateral Agreement on Investment (MIA).

The United States remained the leading participant in WTO dispute settlement proceedings, and with an enviable won-loss record. However, in three cases brought by the United States, the new system produced determinations that proved difficult to implement. Two determinations concerned European measures, one on beef hormones and the other on bananas, and the third concerned a Canadian measure on periodicals. The persistence of resistance to bringing those measures into conformity with the WTO may separately, or in combination, challenge the new system's ability to deal satisfactorily with questionable implementation. With built-in negotiations on agriculture and services, a legislated review of the dispute settlement system, and matters such as the broad implementation of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIP Agreement) *all* nearly coinciding with a U.S.-hosted Ministerial and an election year, the accomplishments and problems of 1998 may well provide the basis for the next defining moment of the international trading system.

II. WTO Dispute Settlement Activity

The caseload in the WTO dispute settlement system has become staggering. The actions discussed here have been highlighted because they may have a broader impact on the dispute settlement system and future cases. In addition to the reported decisions of panels and the Appellate Body, the issue of implementation became a much more significant issue during 1998.

A. Panel and Appellate Body Decisions

The panel and Appellate Body decisions can be grouped roughly into five substantive groups. These involve decisions with respect to: (1) tariff schedule related matters; (2) TRIP; (3) sanitary and phytosanitary matters; (4) Article III matters; and (5) Article XX matters. In addition, there were some significant procedural matters decided. As noted above, not all issues in all cases will be discussed and this should not be taken as an indication of lack of significance of any particular issue with respect to such case and the parties involved.

1. *Tariff Schedule Related Matters*

There were three cases in particular that dealt with matters related to tariffs and schedules. These were a panel decision in *Japan—Measures Affecting Consumer Photographic Film and Paper*[1]

1. Japan Measures Affecting Consumer Photographic Film and Paper, Report of the Panel, WT/DS44/R (Mar. 31, 1998) <http://www.wto.org>.

(*Japan Film*), which was not appealed, and two panel/Appellate Body decisions in *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*[2] (*Argentina Footwear*), and *European Communities—Customs Classification of Certain Computer Equipment* (*EC LAN*).[3]

In *Japan Film*, the panel adopted a fairly broad interpretation of what constituted government measures, showing a willingness to go beyond actual laws to include as measures uncodified expressions of government policy. However, the panel found that the United States did not have reasonable expectations that such measures would not be taken because such measures were already in existence or the United States could have reasonably anticipated them at the time of the tariff negotiations. The panel found that because most of the market structures complained about were pre-existing, the measures individually or collectively could not have "upset the competitive relationship" of imported and domestic film and paper.

In *Argentina Footwear*, the panel found that prevailing General Agreement on Tariffs and Trade (GATT) and WTO practice had been that the form of a tariff had to correspond to that agreed to in the bindings. In this case, Argentina had negotiated an ad valorem tariff binding, but had applied a system of specific duties. The Appellate Body overruled the panel's finding and found that there was no established GATT practice in this regard. The Appellate Body found that there was no obligation on Argentina under Article II to apply a particular form of duty as long as the rate did not exceed the negotiated ad valorem rate.

In *EC LAN*, the panel found that the United States had certain "legitimate expectations" in the customs classification of local area networking equipment. The United States argued that such equipment had been treated as computer equipment (automatic data-processing machines), but then had been reclassified after the negotiation as audio visual equipment thereby being subject to a higher duty. The Appellate Body followed its decision in *India Patents* (see below) that the concept of legitimate expectations in GATT violation cases was not valid. The Appellate Body decided that such a standard was a subjective standard and the Appellate Body found that the appropriate standard was an "objective" standard of what both parties intended by a negotiation. Accordingly, the Appellate Body reversed the panel's finding that the European Communities had violated Article II.1.

2. *TRIPS*

In the case of *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*[4] (*India Patents*), the panel found that the United States had certain "legitimate expectations" in the interpretation of the meaning of Articles 70.8 and 70.9 of the TRIP Agreement. Under those provisions, the panel determined that India was obligated to set up a "mailbox" system to preserve the novelty and priority of patents. The panel found India's ad hoc system insufficient for these purposes. The panel also found that India had not provided for exclusive marketing rights as required.

The Appellate Body rejected the panel's basis of "protection of legitimate expectations" for its findings. The Appellate Body considered this an impermissible melding of the concepts of expectations of equal competitive conditions, which applies in violation cases under Article

2. Argentina Measures Affecting Imports of Footwear, Textiles, Apparel, and Other Items, Report of the Panel, WT/DS56/R (Nov. 25, 1997) <http://www.wto.org>.

3. European Communities—Customs Classification of Certain Computer Equipment, Report of the Panel, WT/DS62/R, WT/DS67/R, WT/DS68/R (Feb. 5, 1998) <http://www.wto.org>.

4. India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, Report of the Panel, WT/DS50/R (Sept. 9, 1997) <http:www.wto.org>.

XXIII:1(a) of the GATT, and reasonable expectations of negotiating members, which applies in non-violation cases under Article XXIII:1(b) of the GATT. The Appellate Body noted that the TRIP Agreement specifically does not allow for Article XXIII:1(b) complaints. The Appellate Body agreed with the conclusions of the panel that India had not fulfilled its obligations under Articles 70.8 and 70.9 of the TRIP Agreement based on an interpretation of the object and purpose of the TRIP Agreement itself.

3. *Sanitary and Phytosanitary Matters B*

In 1997 the panel in *European Communities—Measures Concerning Meat and Meat Products (Hormones)*,[5] found that the E.C. ban on the importation of meat and meat products from livestock treated with certain growth hormones was inconsistent with Articles 3.1, 5.1, and 5.5 of the Agreement on Sanitary and Phytosanitary Standards (SPS Agreement). The panel found that the European Communities had not conducted a proper "risk assessment" and therefore had not satisfied the requirements of Article 5.1. The panel also found that the European Communities had not based the restrictions on existing international standards and therefore was not consistent with Article 3.1 and was not within the exception of Article 3.3. The panel also found that the European Communities adopted arbitrary or unjustifiable distinctions in levels of sanitary protection in different situations, which resulted in discrimination or a disguised restriction on international trade and therefore was inconsistent with Article 5.5.

The Appellate Body agreed that the E.C. measures were not "based on" a risk assessment, noting that there had to be a rational or objective relationship between the measure and the risk assessment. The Appellate Body further noted that such risk assessments could take into consideration risks resulting from, for example, implementation problems outside the laboratory. With respect to Article 3.1, the Appellate Body rejected the panel's finding that the language in Article 3.1 that required use of international standards when available "*except* as otherwise provided for in this Agreement, and in particular in paragraph 3," in fact created a "general rule-exception" relationship between the two paragraphs. In the Appellate Body's view, once the European Communities invoked Article 3.3, Article 3.1 essentially became irrelevant.

The Appellate Body also reversed the panel's findings with respect to Article 5.5. In the Appellate Body's view, all but one of the differences in treatment cited by the panel were not, in fact, arbitrary or unjustifiable. With respect to artificial hormones and naturally occurring hormones in other products, including meats and some vegetables such as broccoli, the Appellate Body stated that there was a significant distinction because one was natural and the other artificial. They then continued by noting that to require equal regulation of naturally occurring hormones would be an enormous regulatory burden, although the question at issue appeared to be less one of requiring further regulation of natural hormones than adjusting the regulation of artificial hormones to accord with what is done for the naturally occurring ones.

In the other allegedly discriminatory situation, which involved non-hormonal treatments on piglets, the Appellate Body found that the difference in the level of protection did not result in discrimination or a disguised restriction on international trade. The Appellate Body found that the comparison of the no residue limits for hormones and the unlimited residue standards

5. EC Measures Concerning Meat and Meat Products (Hormones)—Complaint by the United States, Report of the Panel, WT/DS26/R/USA (Aug. 18, 1997) <http://www.wto.org>; EC Measures Concerning Meat and Meat Products (Hormones)—Complaint by Canada, Report of the Panel, WT/DS26/R/CAN (Aug. 18, 1997) <http://www.wto.org>.

for these products was only an indicator of discrimination which it disregarded in light of the policy justifications offered by the European Communities.

In the case of *Australia—Measures Affecting Importation of Salmon*[6] (*Australia Salmon*), the Appellate Body pursued an analysis under Article 5.5 of the SPS Agreement by comparing the treatment of salmon from Canada with Australia's treatment of other fish and fish products such as herring used as bait and live ornamental fish. The Appellate Body found that the differing treatment between such products satisfied all three steps of the analysis under Article 5.5. There was no in-depth discussion of the distinction between this case and the Appellate Body findings in *EC Hormones*.

4. *Article III Matters*

In *Indonesia—Certain Measures Affecting the Automobile Industry*[7] (*Indonesia Cars*), the panel found that exemption and reduction of certain sales taxes under the Indonesian National Car Program violated Article III:2. Also, the panel found that the local content requirements violated the Agreement on Trade-Related Investment Measures (TRIMs Agreement) and that customs duty and sales tax benefits favoring certain imported cars was inconsistent with Article I of the GATT. Significantly, the panel rejected Indonesia's argument that a case involving a subsidy as defined in the Agreement on Subsidies and Countervailing Measures could only be reviewed under that agreement and not under Article III. The panel also reaffirmed that to be exempt from the requirements of Article III under the provisions of Article III:8(b), there must be a direct payment from the government to the domestic producer of the product in question. This decision was not appealed.

In *Korea—Taxes on Alcoholic Beverages*,[8] the panel found that Korea's Liquor Tax Law violated Article III:2, second sentence, by providing dissimilar taxation between directly competitive or substitutable imported and domestic products in a manner so as to afford protection to domestic production. In reaching this conclusion, the panel found, among other things, that Article III:2, second sentence, includes potential competition as well as current competition. It found that this was implicit in the treaty language and inherent in the concept of protecting equal competitive opportunities. The panel also decided that the definition of directly competitive or substitutable products under Article III was not the same as, and generally broader than, the market definitions used in antitrust and competition laws. The Appellate Body, in a report dated January 18, 1999, upheld the panel on all counts in the appeal. Among other things, the Appellate Body specifically reaffirmed the appellate standard of review with respect to factual issues that it announced in the *EC Hormones* case. The Appellate Body found that the panel in the *Korea Alcoholic Beverages* case had not distorted, misrepresented or disregarded evidence nor applied a "doubled standard" of proof in the case.

5. *Article XX Matters*

In the case of *United States—Import Prohibition of Certain Shrimp and Shrimp Products*[9] (*United States Shrimp/Turtle*), the Appellate Body generally redesigned its approach to Article XX cases.

6. Australia—Measures Affecting Importation of Salmon, Report of the Panel, WT/DS18/R (Dec. 6, 1998) <http://www.wto.org>.

7. Indonesia—Certain Measures Affecting the Automobile Industry, Report of the Panel, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998) <http://www.wto.org>.

8. Korea—Taxes on Alcoholic Beverages, Report of the Panel, WT/DS75/R, WT/DS84/R (Sept. 17,1998) <http://www.wto.org>.

9. United States—Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, Report of the Appellate Body, WT/DS58/AB/R (May 15, 1998) <http://www.wto.org>.

While agreeing with the panel's overall conclusion that the U.S. import prohibition on certain shrimp from countries that did not implement appropriate sea turtle conservation policies was inconsistent with Article XI and not justifiable under the exceptions of Article XX, the Appellate Body reversed and modified much of the reasoning used by the panel.

The panel had decided the case based on an analysis of the chapeau of Article XX and, having found that the U.S. unilateral import bans were discriminatory and disguised restrictions on international trade, did not proceed to the individual paragraphs of Article XX. However, the Appellate Body decided that it was necessary to assess the measures in regard to paragraphs (a) through (j) of Article XX before proceeding to an analysis under the chapeau. The Appellate Body also noted that measures complying with the listed paragraphs may have a certain amount of unilateralism inherent in them. The Appellate Body decided that protecting sea turtles was appropriately done within the context of Article XX(g); that is, sea turtles could be considered an exhaustible natural resource and the U.S. measures satisfied the requirements of paragraph (g).

In analyzing the U.S. measures with respect to the requirements of the chapeau, the Appellate Body rejected the panel's finding that such measures were inconsistent because they imposed policy restrictions unilaterally on the domestic policies of other members (i.e., policies not related to the exported products themselves) and that such measures were a "threat to the multilateral system." The panel had reasoned that if several members imposed such measures and the measures were inconsistent, then international trade could effectively be shut down because the exporter could not simultaneously comply with all the measures. The Appellate Body determined that this standard applied by the panel was not adequately based on the text of Article XX and rejected the panel's reference to the preamble of the GATT for interpretive guidance. (However, the Appellate Body did find it relevant in its analysis of paragraph (g) to refer to the preamble of the WTO Agreement. No further guidance was provided on the distinction.)

The Appellate Body found that the U.S. measure was an unjustifiable discrimination because of the requirement that members adopt essentially the same program as implemented by the United States rather than merely a comparable one. Furthermore, the U.S. measures prohibited imports of shrimp caught by uncertified countries even though their methods for catching the actual imported shrimp might be identical to methods used for imports from certified countries. The Appellate Body also cited the failure of the United States to engage the appellees in serious across-the-board negotiations on sea turtle preservation. Finally, the Appellate Body noted that the United States had negotiated agreements with other members than the appellees. The Appellate Body stated that the "resulting unilateralism" of the U.S. actions supported their conclusions. The Appellate Body did not provide further explanation of the link between this conclusion and their earlier statement that there is some degree of unilateralism inherent in measures falling within the subparagraphs of Article XX.

6. *Procedural Matters*

There were several important procedural matters dealt with by panels and the Appellate Body in 1998. In *India Patents*, the Appellate Body determined that the panel had erred in considering the claims raised by the United States under Article 63 of the TRIP Agreement. The United States did not mention Article 63 in its request for a panel. The United States referred to the TRIP Agreement as a whole and stated that its claims included but were not limited to several other specified provisions. The Appellate Body found this reference too vague. The Appellate Body also did not accept the panel's statement that it intended to rule on all legal claims identified by the end of the first substantive meeting and that neither party objected.

According to the Appellate Body, it was beyond the competence of the panel to consider anything outside the terms of reference regardless of the positions of the parties. The Appellate Body rejected the U.S. argument that it was forced into making the claim when it did because India had not informed the United States during the course of the consultations of the "administrative instructions," which constituted the reason for the Article 63 claim. The Appellate Body stated that based on a strict reading of the treaty text, there is simply no basis for altering or adding to the terms of reference regardless of the circumstances.

In the case of *United States Shrimp/Turtle*, the panel had rejected several papers submitted by non-governmental organizations. Instead, the panel provided an opportunity for the parties to append any such papers to their own submissions and provided additional time for the other parties to comment. The Appellate Body reversed the panel on the basis that the panel's interpretation of the treaty text was too formal and technical in nature. In the Appellate Body's view, the term "seek" in Article 13 of the Dispute Settlement Understanding (DSU) gave panels the authority to receive unrequested submissions from individuals or persons other than member governments party to the dispute.

In *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*[10] (*Guatemala Cement*) the Appellate Body reversed the panel's finding in favor of the complainant on the grounds that there was no proper jurisdiction to hear the dispute. First, the Appellate Body overruled the panel's decision that Article 17 of the Antidumping Agreement provides for a coherent set of rules for dispute settlement specific to anti-dumping cases that replaces the more general approach of the DSU. Second, the Appellate Body found that Mexico had not initiated the case on one of the three listed bases identified in Article 17.4 of the Anti-Dumping Agreement; that is, the Mexican complaint was not with respect to a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure. Thus, there was no authority for the panel to proceed with the case.

B. Implementation

The last half of the year was dominated by a dispute between the United States and its co-complainants against the European Communities (supported by the banana producers covered by the Lome Convention waiver) over the implementation by the European Communities of the decision in *European Communities—Regime for the Importation, Sale and Distribution of Bananas.*[11] An increasingly bitter disagreement arose as to the proper interpretation of Articles 21 and 22 of the DSU. In the view of the European Communities, Article 21.5 was the exclusive remedy if there were disagreements on the consistency of implementing measures with the member's obligations. Only if such an inconsistency were found could another party proceed to Article 22 for compensation or the suspension of concessions. Furthermore, the reference in Article 21.5 to "these dispute settlement procedures," in the E.C.'s view, means that all of the procedures including consultations, panel requests, establishment of the panel by the Dispute Settlement Body (DSB), and resort to the panel and Appellate Body were included.

The United States argued that this was an overly expansive reading of the ambiguous terms of Article 21.5. Such a reading, according to the United States, could lead to an endless loop

10. Guatemala—Anti-Dumping Investigation Regarding Portland Cement From Mexico, AB-1998-6, Report of the Appellate Body, WT/DS60/AB/R (Nov. 2, 1998) <http://www.wto.org>. *See* discussion *infra* Part III.F.

11. European Communities—Regime for the Importation, Sale, and Distribution of Bananas, Complaint by the United States, Report of the Panel, WT/DS27/R/USA (May 22, 1997) <http://www.wto.org>.

of litigation over conformity of measures, leaving complainants as frustrated as under the previous GATT system. Furthermore, nothing in Article 22 required recourse to Article 21.5 as a prerequisite. Finally, in the U.S. view, the E.C. interpretation would preclude ever resorting to Article 22 because of that provision's required time limits.

In a DSB meeting concluded on January 29, 1999, the United States requested authority to suspend concessions under Article 22.2. After considerable disagreement over procedural issues, the DSB proceeded to consider the matter under reverse consensus procedures. However, authorization to suspend concessions was not granted because the European Communities requested that the issue be referred to arbitration in accordance with Article 22.6.

In another case, *Canada—Measures Concerning Periodicals*,[12] there was a potential for the beginning of a somewhat different version of the implementation issue. In this case, Canada eliminated the offending measures within the "reasonable period of time" but indicated that new measures affecting advertising in periodicals would be implemented. The potential question is whether any such measures would be properly considered under Article 21.5 and Article 22 or should be considered as wholly new measures requiring review under the DSU *ab initio*.

III. Unfair Trade Laws at the International Trade Administration

A. The Steel Wars

Administrative litigation of unfair trade cases more than doubled in 1998 over 1997, with forty-seven antidumping and countervailing duty investigations initiated by the Department of Commerce (DOC) in 1998, compared with only twenty-one investigations initiated in 1997. Of these forty-seven cases, roughly two-thirds involved steel products. All in all, 1998 saw unfair trade actions being brought against four categories of steel products: stainless steel round wire; stainless steel plate in coils; stainless steel sheet and strip-in coils; and hot-rolled, flat-rolled carbon-quality steel.

The 1998 onslaught of steel investigations has raised a number of interesting issues for the DOC to resolve. For example, in the steel antidumping investigations involving Korea, the DOC must address the issue of currency conversion in light of the drop in the value of the won.[13] In the countervailing duty cases involving Korea, the DOC is again examining the Korean banking system. In the 1993 Steel Products from Korea final determination, the DOC found that the Korean government directed low cost loans to the steel industry over the years 1983 through 1991.[14] In the 1998 investigations, petitioners alleged that the Korean government continued to control the practices of lending institutions in Korea from 1992 onward and that the steel sector received a disproportionate share of low-cost, long-term credit, thereby providing the steel sector with a countervailable benefit.[15]

12. Canada—Measures Concerning Periodicals, Report of the Panel, WT/DS31/R (Mar. 14, 1997) <http://www.wto.org>.

13. Notice of Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From South Korea, 64 Fed. Reg. 137 (1999); Notice of Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils (SSPC) From the Republic of Korea, 63 Fed. Reg. 59,535 (1998).

14. Final Affirmative Countervailing Duty Determinations and Final Negative Critical Circumstances Determinations: Certain Steel Products From Korea, 58 Fed. Reg. 37,38 (1993).

15. Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination: Stainless Steel Sheet and Strip in Coils from the Republic of Korea, 63 Fed. Reg. 63,884 (1998); Preliminary Negative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination: Stainless Steel Plate in Coils From the Republic of Korea, 63 Fed. Reg. 47,253 (1998).

The hot-rolled steel cases, which were initiated in mid-October, were brought amidst much concern by the U.S. steel producers that a sharp increase in imports from Japan and Russia, among others, were causing them significant injury. Following initiation of the investigations of Japan, Russia, and Brazil, the DOC announced that it would expedite its preliminary investigations, issuing preliminary determinations several weeks earlier than the unextended deadline provided for in the statute. In addition, on November 23, 1998, the DOC issued a preliminary finding of critical circumstances with respect to Russia and Japan.[16] This finding made it clear, well ahead of the preliminary determinations, that if the preliminary determinations were affirmative, importers could be liable retroactively for antidumping duties on entries made up to ninety days prior to the DOC's preliminary determination.

When it came to the hot-rolled steel cases, the novel issues expanded beyond the DOC's antidumping investigations. In October 1998, Wheeling Pittsburgh Steel Corporation commenced a civil action in the Belmont County Court of Common Pleas against producers and trading companies of Russian and Japanese steel. The suit alleged state law claims of unfair competition and tortious interference based on sales by the Russian and Japanese producers and trading companies at prices below the cost of production and delivery, and Wheeling-Pittsburgh sought a temporary restraining order and injunctive relief. The suit was removed to federal court in the Southern District of Ohio, and the state law claims were dismissed based on the court's finding that the matters raised were within the exclusive domain of federal law.[17] Wheeling-Pittsburgh subsequently refiled its complaint alleging federal claims under the Antidumping Act of 1916. As of this writing, the case remains pending.

B. The Trade and Competition Issue

The controversial trade and competition debate continued in 1998. On one side are countries that want to focus on removing anticompetitive practices that block market access for foreign goods; on the other side are those that want to use competition policy as a vehicle for attacking trade remedies, such as the antidumping laws. This debate took place in various fora, including the WTO, the OECD, the Asia Pacific Economic Cooperation (APEC) forum, and FTAA discussions. The center of the debate was in the WTO Working Group on the Interaction Between Trade and Competition Policy (Working Group).

The WTO Working Group studied a variety of market access issues in 1998, including the impact of anticompetitive practices of enterprises and associations on international trade, the impact of state monopolies, exclusive rights and regulatory policies on competition and international trade, the relationship between the trade-related aspects of intellectual property rights and competition policy, and the relationship between investment and competition policy. At one meeting, the Working Group also addressed the "impact of trade policy on competition," a topic which allowed WTO members to discuss trade remedies. The members principally raising challenges to trade remedies, with a definite focus on the "anti-competitive" nature of the antidumping rules, were Japan, Korea, Mexico, and Hong Kong. The United States, meanwhile, mounted a spirited defense of the antidumping rules. In some detail, the United States explained that the fundamental flaw with competition policy's arguments against the antidumping rules is the underlying premise that the antidumping rules have (or should have) the same objectives

16. Preliminary Determinations of Critical Circumstances: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan and the Russian Federation, 63 Fed. Reg. 65,750 (1998).

17. Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co., No. C2-98-1122, 1998 U.S. Dist. LEXIS 18235 (S.D. Ohio Nov. 16, 1998).

as the antitrust laws. According to the United States, the antidumping rules and the antitrust laws have different objectives and are founded on different principles, and they seek to remedy different problems. If the antidumping rules were eliminated in favor of the antitrust laws or modified to be consistent with antitrust principles, the United States pointed out, the problems that the antidumping rules seek to remedy would go unaddressed.[18]

The WTO Working Group tentatively had been scheduled to expire at the end of 1998, but its work was extended for the first six months of 1999. The 1999 agenda includes the relevance of fundamental WTO principles of national treatment, transparency, and MFN treatment to competition policy, approaches to promoting cooperation and communication among WTO members, including in the field of technical cooperation, and the contribution of competition policy to achieving the objectives of the WTO; it does not include the antidumping topic.

C. New Countervailing Duty Regulations and the Privatization Issue in Court

Capped by two decisions from the Court of Appeals for the Federal Circuit, the courts decisively confirmed that the methodology used by the DOC since 1993 to determine whether merchandise produced by companies that have been sold by their government continues to benefit from subsidies received prior to the sale is consistent with congressional intent. Even as the court was approving its present methodology, the DOC concluded a four-year dialogue with representatives of domestic and foreign companies and governments by issuing final countervailing duty regulations that were silent on the privatization issue.[19]

The DOC continued in 1998 to confront issues regarding whether the privatization (or change in ownership) of a company affects the countervailability of previously bestowed subsidies. In September, the U.S. Court of Appeals for the Federal Circuit affirmed the DOC's privatization methodology in a case involving lead and bismuth steel products from the United Kingdom.[20] *Inland Steel Bar Co. v. United States* involved the sale by British Steel Corporation of a productive unit to which DOC had allocated a portion of the subsidies previously received by British Steel. The U.S. Court of International Trade (CIT) held that unless the productive unit were a legal entity, which the DOC determined it was not, it was not capable of receiving a subsidy, and thus past subsidies did not travel with it when it was sold.[21] On appeal, the Federal Circuit reversed the CIT and affirmed the DOC's determination that a privatized productive unit was capable of receiving subsidies that continued to be countervailable. In its opinion, the Federal Circuit reiterated its 1996 holding that " 'commerce's [privatization] approach was reasonable and should not have been disturbed.' "[22] And, in the flat-rolled steel cases on remand from the Federal Circuit, the CIT affirmed that the DOC had properly applied its privatization methodology for allocating subsidies between the buyer and seller when a state-owned company is privatized.[23]

During the steel investigations, the DOC only confronted situations involving the sale of state-owned companies to private entities. However, in the 1996 countervailing duty investiga-

18. *See* Working Group on the Interaction Between Trade and Competition Policy, Communication From the United States,WT/WGTCP/W/88 (Aug. 28,1998) <http://www.wto.org>.

19. Countervailing Duties, 19 C.F.R. § 351 (1998).

20. Inland Steel Bar Co. v. United States, 155 F.3d 1370 (Fed. Cir. 1998).

21. Inland Steel Bar Co. v. United States, 960 F. Supp. 307 (Ct. Int'l Trade 1997).

22. Inland Steel Bar, 155 F.3d at 1375 (*quoting* Saarstahl AG v. United States, 78 F.3d 1539, 1544 (Fed. Cir. 1996)).

23. British Steel PLC v. United States, 27 F. Supp. 2d 209 (Ct. Int'l Trade 1998).

tion of pasta from Italy, the DOC addressed for the first time a situation concerning the sale of a privately-owned company to a private buyer. In addition, because this investigation was subject to the Uruguay Round Agreements Act (URAA), the DOC was required to apply the new "change in ownership" provision of the URAA.[24] In so doing, the DOC used the same privatization methodology it had used in the 1993 steel cases to allocate subsidies in the pasta case between the private buyer and the private seller. While the CIT was initially skeptical of using this approach in a private-to-private sale, it subsequently affirmed on remand DOC's methodology after the DOC provided a further explanation of why the privatization methodology it had used for public sales was applicable under the URAA to a private-to-private change in ownership.[25]

Acceptance by the Court of Appeals of the DOC privatization methodology came even as the agency was considering a range of ways to modify that approach, including circumstances under which prior subsidies would no longer be attributed to merchandise produced by the company. In the end, the DOC kept open its options, thus ensuring that any change to the privatization methodology would be made in the context of actual cases, and that the present approach, in which the purchase price is taken to reduce unamortized previous subsidies in part, would be applied until that time. It explained that while it had developed some expertise on this issue during the past five years, more time was needed to assess the appropriateness of its current methodology as new privatization scenarios were encountered and to determine whether an alternative analytical framework could be developed to address these situations.[26]

The new regulations, the first substantive regulatory guidance in the subsidies area from the agency,[27] make significant changes to the DOC practice in other areas. For example, the DOC decided that equity infusions by governments into unhealthy[28] companies would be treated as a grant in the full amount of the equity infusion,[29] thereby abandoning attempts in the proposed regulations to construct a hypothetical price that would have been paid for the shares by a reasonable private investor or to adjust the subsidy amount for a particular period by the amount of actual returns to investors.[30]

Another important provision posits a normative definition of "benefit," one of three prerequisites to the finding of a subsidy (along with two factors already defined in the Subsidies Agreement and the law—a "financial contribution" from the government that is "specific" to an industry or firm). Under the new definition, a "benefit" exists where the company pays less for its inputs (e.g., moneys, a good, or a service) than it otherwise would pay in the absence of the government program, or receives more revenues than it otherwise would earn.[31] Although the agency was careful to advise that this general rule would not overtake the more specific descriptions of a benefit contained in the rules governing particular subsidies, such as loans or equity

24. 19 U.S.C. § 1677(5)(F).

25. Delverde, SrL v. United States, 24 F. Supp. 2d 314 (Ct. Int'l Trade 1998).

26. 63 Fed. Reg. 65,348,355 (1998).

27. The department proposed substantive regulations a decade ago in Notice of Proposed Rulemaking and Request for Public Comments (Countervailing Duties), 54 Fed. Reg. 23,366 (1989), but they were not made final because of Uruguay Round negotiations that resulted in revision of the Agreement on Subsidies and Countervailing Measures.

28. The technical term invented by the department is "unequityworthy," defined in 19 C.F.R. § 351.507(a)(4) as a firm unable to generate a reasonable rate of return within a reasonable period of time. 63 Fed. Reg. 65,410 (1998).

29. 19 C.F.R. § 351.507(a)(6), 63 Fed. Reg. 65,411 (1998).

30. *See* 63 Fed. Reg. 65,374 (1998).

31. 19 C.F.R. § 351.503(b), 63 Fed. Reg. 65,408 (1998).

infusions, and also cautioned that a benefit still might be found even if the definition were not met if the program was similar to illustrative subsidies set out in the statute, this new attempt to provide a reasoned framework to guide practitioners of subsidy law will no doubt create controversy in close cases.

When a firm receives a government loan, the DOC normally calculates whether a subsidy has been provided by comparing what the firm pays for the government loan with the amount it would pay for a comparable commercial loan the company actually could obtain on the market. If the DOC determines that the firm could not have obtained long-term loans from commercial sources, the agency has long added a premium to account for the additional risk of default being taken on by the government. The new regulations significantly increase this premium by specifying that the benchmark for an uncreditworthy company will be the average default rate reported by Moody's Investor Service for speculative-grade corporate bonds (those rated Caa to C).[32] The DOC explains that data from corporate bond issuers in the country under investigation is unavailable and that the new risk premium will more accurately reflect the added exposure to default substantially.

The Asian economic crisis focused attention on the transnational subsidy exception, which has long provided that subsidies by one country to companies in another country, or by international lending and development agencies such as the World Bank and the IMF, are not actionable under U.S. countervailing duty law.[33] In order to forestall arguments that the existence of funds from major bailout packages from the IMF somehow shielded countries, such as Korea, that in the past had been found to subsidize their key export industries, the DOC clarified in the new rules that the transnational subsidy exemption would continue to apply if the funding for the subsidy is supplied "in accordance with, and as part of," a program or project funded by another government or an international lending or development institution.[34] In short, dams and hydroelectric plants that are the stuff of international development programs continue to enjoy exemption from the countervailing duty statute, but countries should not attempt to shield programs that otherwise would meet the criteria for countervailable subsidies on the grounds that the money for the subsidy can be traced to funds given by an international organization.[35]

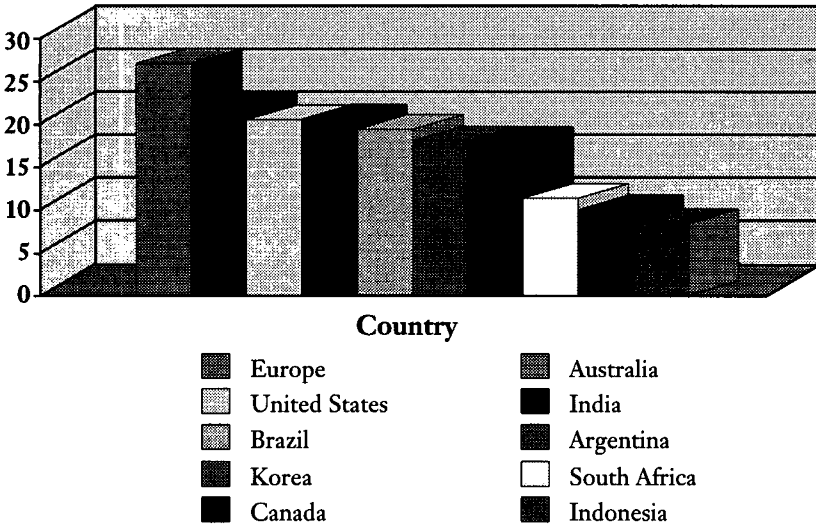
In order to reflect the impact over time of non-recurring benefits, such as a large one-time grant, the DOC has for the past several years allocated such subsidies over the average useful life of physical assets for the recipient firm. The new regulations continue this practice, but with a twist. Under the recent rule, the DOC has created a presumption that the average useful life in question is that of the industry concerned as reflected in asset depreciation tables of the U.S. Internal Revenue Service (IRS).[36] The company in question can rebut this presumption by showing that the average useful life of its physical assets is different by one or more years. The purpose of the presumption is to reduce the burden on all parties of gathering complex data when the ultimate result is often substantially the same as readily-available data from the IRS tables.

32. 19 C.F.R. § 351.505(a)(3)(iii), 63 Fed. Reg. 65,408 (1998).
33. North Star Steel Ohio v. United States, 824 F. Supp. 1074 (Ct. Int'l Trade 1993).
34. 19 C.F.R. § 351.527, 63 Fed. Reg. 65,417 (1998).
35. *See* 63 Fed. Reg. 65,405 (1998).
36. 19 C.F.R. § 351.524(c)(2), 63 Fed. Reg. 65,416 (1998).

D. Defense of U.S. Exporters in Foreign Trade Remedy Investigations

In the 1970s and 1980s, the four countries with the largest and most open markets—the United States, Europe, Canada, and Australia—were the most active users of trade remedy laws. That story is changing rapidly. Although these four countries have by no means trimmed their caseloads, other countries have assumed the role of major users of these laws.

Today some fifty-five countries have antidumping laws on the books, and in 1997, the year in which this trend became manifest, twenty-three of these countries carried out 200 antidumping investigations, a marked increase over recent years.



As the chart[37] shows, while the traditional users of the trade remedy laws continue to use them, the new users have begun to conduct a substantial number of investigations. For example, note that India, Brazil, and Argentina conducted almost as many cases in 1997 as the top three (Europe, Australia, and the United States), and they were followed closely by Korea and South Africa. Even Indonesia has become a significant player on this scene. Based on partial 1998 data, Mexico can be counted in the top echelon of countries using the trade remedy laws, and the Asian economic crisis has ensured that Brazil and Argentina in particular will remain in this class for last year as well.

These results should not surprise us, once we consider the major strides these countries have made in recent years to open their markets. When a country has high tariffs, licensing systems,

37. Data are taken from the 1997 Report of the Committee on Anti-Dumping Practices, G/L/204 (Nov. 6, 1997), and cover the last six months of 1996 and the first six months of 1997.

and unfriendly distribution networks, it does not need trade remedy laws to protect its industries from unfairly-traded imports. Without those trade barriers, however, the trade remedy laws become the only legitimate tools to address the injury caused by unfair trading practices.

This trend continued in 1998. Fifty-nine countries had enacted antidumping laws, and twenty-one of them started 235 investigations.[38] While the traditional antidumping activists increased the number of cases initiated over 1997 (117 versus 78), the new enthusiasts of trade remedies maintained close positions immediately behind the leaders. Perhaps the most striking change from 1997 was by South Africa, which initiated twenty-three cases in 1998, twice as many as Canada, India, Brazil, and Indonesia, and almost as many as the United States.[39]

As newcomers to trade remedies opened investigations, the United States, through the U.S. Trade Representative (USTR), the DOC,[40] and the U.S. International Trade Commission (ITC), increased its interventions in overseas actions in order to ensure that U.S. exporters received the benefit of the transparency and detailed rules negotiated during the Uruguay Round. A major foreign antidumping action against U.S. exporters that engaged the resources of ITA in 1998 (as well as those of the U.S. International Trade Commission and the Office of the U.S. Trade Representative) was Mexico's investigation of high-fructose corn syrup (HFCS). Initiated in February 1997 by the Mexican Commerce Department (SECOFI), the investigation resulted in large antidumping duties assessed against U.S. exporters by the end of January 1998. The U.S. industry is pursuing its private remedies against SECOFI under the binational panel procedure of Chapter 19 of NAFTA; that case is ongoing. Meanwhile, the U.S. government requested and held consultations with the Mexican government twice, on October 8, 1997, and again on June 12, 1998, under the auspices of the WTO.[41] Since the consultations did not result in resolution of the matter, a WTO panel is being formed and the case will proceed in 1999. The major issue in the WTO case is SECOFI's initiation of an antidumping proceeding on HFCS, when the petitioner was the Mexican sugar industry. Other issues concern weaknesses in SECOFI's threat of material injury finding, the length of time for which it imposed provisional measures, and certain technical and procedural matters.

DOC officials also were involved in other foreign trade remedy investigations in 1998. For example, the European Union conducted antidumping investigations involving polysulphide polymers and large aluminum electrolytic capacitors from the United States. The U.S. industries met with officials from the DOC and USTR regarding the issues arising in each of those cases and the agencies conferred with the European Union regarding the WTO consistency of these investigations. The investigation of polysulphide polymers was completed in September 1998 and, as of this writing, the European Union is completing the investigation of capacitors.

38. 1998 Report of the Committee on Anti-Dumping Practices, G/L/268 (Nov. 5, 1998).

39. *Id.* A note as to Mexico is in order. Although Mexico initiated relatively fewer cases in the past two years than in prior years, Mexico ranks fifth in antidumping usage in the ten years ending in 1997 and clearly is among the new enthusiasts of trade remedies. See Jorge Miranda et al., *The International Use of Antidumping: 1987-1997*, 5 J. WORLD TRADE 32, 65 (1998).

40. Import Administration posts on its Web site a listing of foreign trade cases against U.S. firms together with information on how companies may receive U.S. government assistance. *See Monitoring Foreign Antidumping and Countervailing Duty Cases* (visited Feb. 22, 1999) <http://www.ita.doc.gov/import_admin/records/foradcvd/index.html>.

41. The consultations were held pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakish Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND; 33 I.L.M. 1226 (1994) [hereinafter DSU] and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, WTO Agreement, *supra*, Annex 1A [hereinafter Antidumping Agreement].

Also in 1998, China (MOFTEC) conducted its first antidumping investigation against United States, as well as Canadian and South Korean, newsprint exporters. While not a member of the WTO, China made some effort to follow WTO procedures. It issued a preliminary determination in July 1998, imposing a substantial (seventy-nine percent) antidumping duty on U.S. companies and margins ranging to that level on Canadian and Korean companies. The DOC has provided advice to U.S. exporters concerning useful approaches to Chinese antidumping authorities. MOFTEC has not yet issued a final determination.

Finally, SECOFI has also been active in initiating antidumping cases against U.S. exporters of cattle, beef, and swine, and in taking other antidumping actions affecting U.S. companies. In October it initiated cases against U.S. beef and live cattle; there has been discussion about the possible deletion of cattle from the case. Meanwhile, an antidumping case initiated on October 21, 1998, against U.S. exports of live swine is ongoing. Also in October SECOFI issued a final antidumping determination against U.S. cut bond paper, with margins ranging from five percent to eighteen percent. Likewise in 1998, Mexico expanded its "reference price" system on import-sensitive products, whereby Mexico monitors import prices, allegedly to combat under-invoicing. The system has occasioned complaints from exporters in various nations, who are concerned that Mexico may use the information collected to initiate antidumping actions.

E. Circumvention of Trade Orders

In the area of anticircumvention, the DOC has continued to aggressively enforce the statutory prohibition against circumventing orders through minor alterations of merchandise.[42] The DOC initiated two "minor alterations" proceedings arising from very similar allegations that foreign producers were circumventing orders on steel products by adding trace amounts of the element boron, so as to remove their products from the technical scope of the antidumping duty orders.[43] The outcome of these inquiries remains unclear, however, because parties have challenged before the CIT the DOC's authority to conduct such inquiries where the merchandise as altered is not covered by the scope of the department's antidumping duty order.

In the most significant development in this area, the Court of Appeals for the Federal Circuit in *Wheatland v. United States*[44] upheld a prior ruling by the CIT that the DOC could not conduct an anticircumvention inquiry where the merchandise in question was clearly excluded from the scope of the antidumping duty order.[45] The court reasoned that the "minor alterations" provision allows the DOC to reach merchandise not within the "literal scope" of the antidumping duty order, if the alteration was insignificant; however, it does not permit the DOC to include merchandise which was "expressly and unambiguously" excluded from the scope. In *Wheatland*, the court based its holding that the DOC could not conduct an anticircumvention inquiry on its finding that: (1) the product in question existed at the time the DOC conducted its initial investigation and established the scope of the order; (2) the petitioner explicitly excluded the product from the scope of the order; and (3) the ITC had explicitly excluded the product from the like product subject to its original injury analysis.

42. *See* 19 U.S.C. § 1677j(c) (1994).

43. *See* Corrosion-Resistant Carbon Steel Flat Products from Japan; Initiation of Anticircumvention Inquiry on Antidumping Duty Order, 63 Fed. Reg. 58,364 (1998); Cut-to-Length Carbon Steel Plate From Canada; Initiation of Anticircumvention Inquiry on Antidumping Duty Order, 63 Fed. Reg. 29,179 (1998).

44. Wheatland v. United States, No. 98-1102, 1998 U.S. App. LEXIS 29823 (Fed. Cir. 1998).

45. Wheatland v. United States, 973 F. Supp. 149 (Ct. Int'l Trade 1997).

In the litigation arising from the boron-steel inquiries, discussed above, plaintiffs cited the *Wheatland* decision to support their motions to enjoin the DOC's anticircumvention proceedings. The DOC cited the same decision as support for its position that it had the legal authority to conduct its proceedings. On December 16, 1998, the CIT issued an order preliminarily enjoining the Canadian boron-steel inquiry, but with no rationale accompanying the order. The court continued a temporary restraining order on the Japanese boron-steel inquiry. In addressing these and future minor alterations cases, the CIT, and possibly the Court of Appeals, will have to clarify the distinction drawn in *Wheatland* between situations in which the DOC may use the minor alterations provision to address circumvention by products outside the scope of the order, and situations in which it may not.

F. WTO Dispute Settlement Panels

The 1998 year also saw the first antidumping cases move through the WTO's dispute settlement system. In two cases, ***Anti-dumping Investigation Regarding Portland Cement From Mexico*** and ***Anti-dumping Duty On Dynamic Random Access Memory Semiconductors (DRAMs) Of One Megabit Or Above From Korea,***[46] important issues regarding the initiation of antidumping investigations, the revocation of antidumping orders, and the jurisdiction of dispute settlement panels were addressed.

Cement from Mexico concerned the first antidumping investigation conducted by Guatemala's Ministry of Economy.[47] In submissions before the panel, Mexico argued that the initiation of the investigation contravened various provisions contained in Article 5 of the Agreement on the Implementation of Article VI of the GATT 1994 (AD Agreement). In particular, Mexico maintained that Guatemala lacked sufficient evidence regarding dumping, injury, and causation to justify the initiation of an antidumping proceeding. Guatemala sought to refute these allegations. It also argued, with the support of the United States (as third party), that Mexico's claims were not properly before the panel.[48] According to Guatemala and the United States, a panel may be established only to examine the WTO consistency of a particular measure (or measures) identified in a request for consultations and in the request for establishment of a panel. In the context of a dispute under the AD Agreement, they argued, a WTO member may challenge any action as long as the claim relates to (and identifies) one of three measures: a final antidumping determination, a price undertaking, or a preliminary determination having a significant impact.[49] Because the final antidumping determination was not identified in Mexico's request for consultation, there was no price undertaking, and Mexico had not argued (let alone shown) that the preliminary determination had a significant impact, Guatemala and the United States maintained that the panel lacked jurisdiction.

The panel's ruling was issued to the parties on May 7, 1998. In the ruling, the panel rejected the views advanced by Guatemala and the United States. According to the panel, Article 17.4 of the AD Agreement does not limit the scope of dispute settlement to certain measures. Instead, it merely provides for when a panel may be requested—that is, after a final or preliminary measure has been taken, or after a price undertaking has been accepted.[50] Disputes in anti-dumping cases,

46. Because the panel's report was not made public during 1998, and is in any event subject to appeal, it will be summarized in next year's review.

47. *Guatemala—Anti-dumping Investigation Regarding Portland Cement From Mexico*, WT/DS60/R para. 9.114-230 (June 19, 1998) [hereinafter *Cement From Mexico*].

48. *See id.* paras. 4.0-.100.

49. *See id.* paras. 4.3 & 7.4 (citing 17.4 of the Anti-Dumping Agreement).

50. *See id.* para. 7.10.

the panel declared, may concern any "action taken, or not taken, during the course of the investigation."[51] According to the panel, "[t]his interpretation of the provisions of Article 17 provides for a coherent set of rules for dispute settlement specific to anti-dumping cases, taking account of the peculiarities of challenges to anti-dumping investigations and determinations, that replaces the more general approach of the DSU."[52]

In August, Guatemala notified the DSB, pursuant to Article 16.4 of the DSU, of its intention to appeal various aspects of the panel's ruling. In written submissions Guatemala argued, with the support of the United States, that the panel's so-called "replacement doctrine" (under which the dispute settlement rules in Article 17 completely replace similar rules in the DSU) was infirm. Guatemala and the United States insisted, for example, that Articles 4.4 (concerning requests for consultations) and 6.2 (concerning requests for panels) of the DSU could be read in harmony with Article 17 of the AD Agreement.[53] Under this approach, every matter that seeks to challenge the application of a member's antidumping regime must identify the measure taken against it. If there is no measure (i.e., if there is no affirmative determination leading to a measure), then there is no matter, at least none that may be the subject of consultations under Article 17.3 of the AD Agreement or of a panel request under Article 17.4.

The Appellate Body issued its report on November 2, 1998.[54] In a stunning victory for Guatemala and the United States, the Appellate Body held that Mexico's case was never properly before the panel. According to the Appellate Body, the panel's replacement theory ignored the "integrated nature of the WTO dispute settlement system established by Article 1.1 of the DSU."[55] Articles 4.4 and 6.2 of the DSU could be read, as Guatemala and the United States had urged, in harmony with one another.[56] The Appellate Body also held that the panel had defined the term "measure" in the DSU too broadly, and had blurred the distinction between a "measure" and a "claim."[57] According to the Appellate Body, every "matter" referred to the DSB has two elements: "the specific *measures* at issue and the *legal basis of the*

51. *Id.* para. 7.16.

52. *Id.* In other sections of its report, the panel also took issue with Guatemala's claim that evidence of dumping, injury, and causal link in an antidumping petition is inherently "sufficient" under Article 5.3 of the Anti-Dumping Agreement if it constitutes all of the evidence "reasonably available" to the petitioner in accordance with Article 5.2. *See id.* paras. 7.49-.52 & 7.79. According to the panel, investigating authorities have two distinct obligations under Article 5.2 and 5.3 of the Anti-Dumping Agreement. First, under Article 5.2, authorities must determine that a petition contains such information of dumping, injury, and causation as was "reasonably available" to the petitioner. If, and only if, this condition is satisfied, authorities are required to determine under Article 5.3 whether that evidence is sufficient to justify the initiation of an investigation. While the panel did acknowledge that the quantum and quality of evidence required at the time of initiation is less than that required at the time of a preliminary or final determination, it also ruled that the type of evidence set forth in Article 2 of the Anti-Dumping Agreement (e.g., evidence of normal value and export price) was a prerequisite to initiation. *See id.* para. 7.64.

53. *Guatemala—Anti-dumping Investigation Regarding Portland Cement From Mexico*, WT/DS60/AB/R, Report of the Appellate Body circulated Nov. 2, 1998, paras. 5-7, 50-51 [hereinafter *Appellate Body Report on Cement From Mexico*].

54. The members of the Appellate Body that heard Guatemala's appeal were Julio Lacarte-Muro (Presiding Member), Christopher Beeby (Member), and Said El-Naggar (Member).

55. *Appellate Body Report on Cement From Mexico, supra* note 53, para. 67.

56. In the opinion of the Appellate Body, the "special or additional" rules and provisions on dispute settlement in a covered agreement (such as the Anti-Dumping Agreement) should only prevail over the comparable rules in the DSU when "adherence to . . . one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them." *Id.* para. 65 (emphasis in original).

57. *See id.* para. 69. The panel considered the use of the term "measure" to be a "shorthand reference to the many and varied situations in which obligations under the WTO Agreements might not be fulfilled." *Cement from Mexico, supra* note 47, para. 7.26.

complaint (or the *claims*)."[58] While a "claim" may relate to any action that allegedly results in the "nullification or impairment of benefits or the impeding of the achievement of any objective in a dispute under the *Anti-dumping Agreement*,"[59] Article 17.4 makes clear that only three measures may be referred to the DSB as part of the "matter" in dispute: a final antidumping determination, a price undertaking, or a preliminary determination having a significant impact.[60] In the case before it, the Appellate Body held, Mexico had not identified any measure in its request for a panel; instead, it had merely identified the initiation and subsequent conduct of Guatemala's investigation.[61]

IV. U.S. International Trade Commission

The past year was not a highly active year for the ITC, at least if measured by the issuance of decisions. Yet there were a number of notable events. The first was a court decision potentially affecting the ITC's general methodology for causation findings, the second involved the issuance of the final version of the ITC's sunset procedural regulations, and the third was the beginnings of the processing of sunset reviews.

A. Gerald Metals

The most important court case in 1998 actually occurred in the last week of 1997, but was not covered by last year's survey.[62] On December 23, 1997, the U.S. Court of Appeals for the Federal Circuit issued its decision in *Gerald Metals, Inc. v. United States*.[63] In the eighteen years since the passage of the Trade Agreements Act of 1979, there have been precious few CIT decisions affecting the operations of the ITC. The inherent latitude to consider the host of factors listed in the statute gives to the ITC commissioners wide discretion to decide cases as they wished, without much risk of the courts' criticizing (let alone overturning) the ITC's decision.

The *Gerald Metals* decision is a marked departure from those earlier rulings and, because it is a U.S. Court of Appeals' decision, promises to constrain the ITC's freedom in two respects. The case resulted from the ITC's antidumping investigation of magnesium imports from Russia, the Ukraine, and China. The ITC (on a three to three vote) had found material injury to the U.S. industry by reason of imports from these countries. The DOC found that much of the record highlighted information about imports from Russia, and much of those imports were fairly traded.[64] Those Russian or third country trading companies with zero or de minimis calculated dumping margins had been excluded from the scope of the DOC's affirmative final Less-Than-Fair-Value (LTFV) determination.

Gerald Metals argued that because the fairly-traded imports were substitutes for the LTFV Russian imports, U.S. purchasers could meet their demand without relying on LTFV imports

58. *Appellate Body Report on Cement From Mexico*, *supra* note 53, para. 72 (emphasis in original).

59. *Id.* para. 79.

60. *See id.*

61. *See id.* paras. 83-88. Having reversed the panel on jurisdictional grounds, the Appellate Body did not find it necessary to consider the merits of Guatemala's arguments regarding the initiation and conduct of its antidumping investigation. *See id.* para. 89.

62. John F. Murphy, *International Legal Developments in Review: 1998—Introduction*, 32 Int'l Law. 215, 319, 335-36 (1998).

63. *See* Gerald Metals, Inc. v. United States, 132 F.3d 716 (Fed. Cir. 1998).

64. *See id.* at 718.

and without necessarily resorting to purchases from the U.S. industry.[65] There was no evidence that, in the absence of the LTFV sales, the U.S. products would have replaced the imported products, or that the U.S. industry would have been able to raise its prices.

The CIT ruled against Gerald Metals, finding that the ITC had in fact considered the fairly traded imports. They had been discussed at the ITC's hearing, and there had been subsequent inquiries about them by certain commissioners.[66] Further, the ITC was not to weigh the various causes of injury. It was sufficient for the ITC to find imports contributed "minimally" or "even slight[ly]."[67]

The court of appeals began its analysis by agreeing that the fairly traded Russian imports and the unfairly traded Russian imports were perfect substitutes for each other, and the Russian and Ukrainian imports were close substitutes.[68] Then, unlike the CIT below, the court of appeals concluded that the two Russian producers sold to fairly-trading importers almost as often as to unfairly trading importers and that U.S. purchasers purchased from both groups of importers in similar amounts. Absent more careful economic analysis of such purchasing patterns, the court concluded that it could not uphold the CIT's finding of no evidence to support Gerald Metals' proposition.[69] The court therefore remanded the case back to the CIT for further analysis.

More fundamentally, the court of appeals concluded that the CIT had been wrong to conclude that "minimal" or "slight" contribution to material injury by the LTFV goods was enough to satisfy the statutory "by reason of" causality requirement. The court interpreted the "by reason of" phrase as requiring a showing of more than a minimal or tangential contribution by the LTFV imports to the material injury of the U.S. industry. "[D]e minimis (e.g. minimal or tangential) causation of injury does not reach the causation level required under the statute."[70] Upon remand, the ITC (on a 2 to 1 vote) found no material injury by reason of the imports, and the CIT subsequently upheld the remand results.[71]

The CIT in 1998 showed some interest in making the ITC conduct meaningful analysis under the Federal Circuit's new standard. There have been three CIT decisions citing the Federal Circuit's new standard. Two merely reference the new standard and then find that the ITC's determination was supported by substantial evidence.[72] In the third, *NEC Corporation & HSNX Supercomputers, Inc. v. United States*,[73] the CIT did find in the record "significant economic factors having a negative impact on the domestic industry that are entirely unrelated

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65. *See id.* at 719.

66. *See* Gerald Metals, Inc. v. United States, 937 F. Supp. 930, 935 (Ct. Int'l Trade 1996).

67. *See id.* at 936 n.30.

68. *See Gerald Metals*, 132 F.3d at 720.

69. *See id.* at 721.

70. *Id.*

71. Gerald Metals, Inc. v. United States, 27 F. Supp. 2d 1351 (Ct. Int'l Trade 1998), slip op. 98-148 (October 20, 1998). In a footnote, the CIT elaborated on its interpretation of the CAFC ruling, and the interplay of the ruling with the legislative history instructing the ITC not to compare or contrast the effect from the LTFV imports to the effects stemming from other factors. The CIT recognized that another event could have so significant an effect as to make the LTFV harm insignificant, and at the same time emphasized that there could be more than one material cause of the injury. *See id.* at 1355 n.7.

72. *See* Coalition for the Preservation of Am. Brake Drum & Rotor Aftermarket Mfrs v. United States, 15 F. Supp. 2d 918 (Ct. Int'l Trade 1998); Goss Graphics Sys. Inc. v. United States, No. 96-10-02314, slip op. 98-147 (Ct. Int'l Trade Oct. 16, 1998). The *Goss Graphics* decision, however, was upholding a ITC negative determination and therefore did not need to satisfy the *Gerald Metals* standard.

73. NEC Corp. & HSNX Supercomputers, Inc. v. Department of Commerce & U.S. Int'l Trade Comm'n, No. 98-164, 97-11-01967, slip op. 98-148 (Ct. Int'l Trade Dec. 15, 1998).

to the subject imports." Because of the lack of any ITC analysis of these factors, the CIT could not determine if the LTFV imports made a material contribution to the threat of injury. The CIT also was not convinced that the ITC had adequately analyzed the relative importance of price versus non-price considerations when it gave weight to aggressive import pricing as a basis for finding a significant depressing or suppressing effect on domestic prices. The CIT therefore remanded these issues back to the ITC for further investigation.[74]

It remains to be seen whether the ITC's behavior will be significantly altered by the court of appeal's decision. The ITC may choose to: (1) merely alter its boilerplate in its decisions; (2) include in the narrative portion of its decisions case-specific analysis of fairly traded goods and the materiality of the effect of LTFV goods on the U.S. industry; or (3) actually undertake data analysis of the two issues. Because there were only four final determinations in 1998 that even mentioned *Gerald Metals*, it is unclear whether the Federal Circuit's instructions will be taken seriously or will be quickly watered down. It is unlikely that the first course would be tolerated by the courts if a pattern of boiler repetition evolves. As for the second, narrative discussion can easily deteriorate into writing around *Gerald Metals*, that is, adding case-specific minimal discussion to show that the issues were considered.

Finally, there is the interesting methodological question of extending the principle of examining the impact of fairly traded goods. The court of appeals only dealt with the situation when separate sellers were found to have traded fairly, but the same principle can apply to the fairly traded sales by a seller who, on the basis of overall sales activity, is found to be trading unfairly. The DOC calculates and reports to the ITC one weighted average dumping margin but, consistent with the logic of *Gerald Metals*, one could argue for subdividing the seller's sales into those that were fairly traded and those that were not. A relatively few sporadic giveaway sales can create an overall weighted-average dumping margin. Analysis of the causal effect of sporadic high margin sales would likely lead to different conclusions than presuming that all of a seller's sales have dumping margins.

B. Sunset Reviews

1. *The ITC's Regulations*

On June 5, 1998, the ITC issued its final procedural regulations for Section 751(c) sunset reviews.[75] The final regulations are notable for their retreat from the precise and inflexible regulations proposed by the ITC on October 23, 1997.[76] Under the proposed regulations:

1. Domestic producers and respondents would have had to submit substantial amounts of information thirty days after the notice instituting the review whether or not the domestic industry was interested in defending the continued existence of the order;[77]
2. The ITC proposal contained numerical guidelines, for cases involving multiple members of the domestic industry and/or multiple foreign producers or exporters, to determine whether the collection of responses was adequate. Responses from more than fifty percent of the potential response group would be a strong indication of an adequate response, while responses from less than twenty-five percent would be a strong indication of an inadequate response.[78] The proposal did not address what

74. *See id.* at 29-35.
75. *See* 63 Fed. Reg. 30,599 (1998).
76. *See* 62 Fed. Reg. 55,185 (1997).
77. *See id.* 55,193, 55,195.
78. *See id.* 55,190.

would happen in cases involving multiple exporting countries when the exporters in some countries were deemed responsive, while those in other countries were deemed not responsive.

The final regulation dispensed with these and other contentious issues. In particular, the ITC and the DOC established an initial screening mechanism, administered by the DOC, to determine whether the domestic industry was interested in participating in a sunset review in order to retain the order. Without such an initial expression of interest, an order would be automatically revoked.[79] The ITC also reduced the amount of empirical data that was to be submitted with the initial response to institution of an ITC review.[80] The ITC kept the question of asking parties whether they agreed with the domestic like product and domestic industry definitions from the original investigation. This information is particularly useful in the first reviews of old orders—where the product or industry might have changed in the years since the order was issued.[81] As for the adequacy of individual responses, and how an inadequate response could affect other companies, the final regulations backed off from any general rule, preferring instead case-by-case decision-making.[82]

2. *Early Rulings*

Because the ITC's initial round of sunset reviews only began in July 1998, and because the investigations take 150 days (expedited review) or 360 days (full reviews) to complete,[83] there were no completed full reviews in 1998, and very few completed expedited reviews. Therefore there is no meaningful information about the methodological approaches that the commissioners are using in these reviews.

We do know that the no domestic interest initial screening by the DOC is resulting in significant numbers of cases being revoked. Of the sixty-one orders eligible for review in the first six months of this initial sunset cycle, thirty (49.2 percent of the total) have been revoked due to no domestic industry interest:

Month of 1998	Total Orders Eligible for Review	Orders Under Review	Orders Terminated for Lack of Domestic Interest
July	8	1	7
August	7	5	2
September	8	2	6
October	14	8	6
November	13	11	2
December	11	4	7
Total	**61**	**31**	**30**

Source: ITC Website

79. *See* 63 Fed. Reg. 30,600-01 (1998).
80. *See id.* 30,601, 30,610.
81. *See id.* 30,602, 30,610.
82. *See id.* 30,602-04.
83. *See id.* 30,611.

With regard to reviews underway, the ITC has been releasing voting sheets and synopses of how the individual commissioners have voted on the adequacy of responses. In addition, certain commissioners, specifically Commissioners Crawford, Bragg, and Koplan, have released statements elaborating on particular votes. These statements have flagged certain issues:

1. In Roller Chain from Japan, a trade association filing a response on behalf of five of the nine U.S. manufacturers;
2. In Elemental Sulfur from Canada, a fundamental shift in the nature of the industry and an ambiguity about the original like product and domestic industry definitions;
3. In Melamine from Japan, a finding that a response by a company representing thirty-seven percent of total domestic production (fifty percent of open market sales) was adequate;
4. In Stainless Steel Plate from Sweden, counsel to five domestic interested parties submitting an aggregated response covering the five companies as well as two other U.S. producers not represented by counsel;
5. In Synthetic Methionine from Japan, the domestic interested parties also being foreign producers; and
6. In Sorbitol from France and in Anhydrous Sodium Metasilicate from France, a response of a large domestic producer filed one day late.

None of these discussions thus yields any insight into how commissioners are determining whether individual responses are adequate.

There was only one final determination issued in 1998. That was for the expedited review of Elemental Sulfur from Canada. The ITC found that because of a significant shift in the nature of the industry, injury was not likely if the order was revoked. The review was expedited because only one domestic producer (representing seventeen percent of domestic production) and one Canadian producer (representing a low percentage of imports and Canadian production) responded. The fact that only they responded reflected the shift in the industry.

When the order was issued in 1973, sulfur produced through mining represented seventy-nine percent of U.S. production, while in 1997, it represented only twenty-one percent. The rest of the production stems from sulfur recovery during the production of petroleum, sour natural gas, and petrochemicals. Such recovered sulfur cannot be stored or inventoried, and therefore the price of elemental sulfur was not likely to affect the supply of recovered sulfur. Further, because elemental sulfur is primarily used to produce sulfuric acid which, in turn, is used to produce phosphate fertilizers, the price of sulfur did not significantly affect its demand. Next, because of prior DOC revocations regarding particular companies, the remaining imports subject to the order represented only twenty percent of imports from Canada, and overall Canadian imports represented only 12.6 percent of U.S. sulfur consumption. Therefore, the subject merchandise represented only 2.5 percent of the market and would not be significant in the future. Additionally, the market share for total Canadian imports had remained the same as before the issuance of the order despite the order's issuance and despite the subsequent DOC revocations. Therefore there was no likelihood significant increase if the order were revoked. Also, there were no barriers against the import of such sulfur into other countries. The ITC further concluded the responding U.S. company was vulnerable to injury from the increasing predominance of recovery sulfur, but in any event that company constituted a minority of the U.S. industry. Because the rest of the U.S. industry did not respond to the ITC, there was no data to show vulnerability of the recovery sulfur producers.

V. Trade Legislative Activity

A. Summary

During 1998, no major trade legislative initiatives passed both the House and Senate. In particular, legislation failed to pass both chambers in the following six key areas: (1) legislation to articulate priority U.S. trade negotiating objectives and to renew the president's ability to use special procedures in the House and Senate for consideration of implementing legislation for trade agreements (so-called fast-track procedures), which was rejected by the House and did not come up for a vote in the Senate; (2) the African Growth and Opportunity Act, which passed the House but was not brought to a vote in the Senate; (3) Caribbean Basin Initiative (CBI) enhancement legislation, which was rejected by the House and was not brought to a vote in the Senate; (4) long-term extension of benefits under the Generalized System of Preferences (GSP) and Trade Adjustment Assistance (TAA) programs, which was not presented to either the House or the Senate; (5) authorizations for USTR, the Customs Service, and the ITC, which similarly was not voted on by the House or the Senate; and (6) legislation implementing the OECD Shipbuilding Agreement, which also was not voted on by the House or the Senate.

The following trade legislation was enacted into law in 1998: (1) one-year extensions to June 30, 1999, of the GSP and TAA programs; (2) substitution of the term normal trade relations (NTR) for MFN treatment in the U.S. trade laws; and (3) increased monitoring by the Customs Service of foreign products made with child labor. In addition, on June 25, the Ways and Means Committee ordered adversely reported a resolution to disapprove renewal of MFN treatment for China.[84] The House defeated the China resolution on July 22 (166-264). On July 29, the Ways and Means Committee ordered adversely reported a resolution to disapprove waiver authority for trade and investment relations with Vietnam. The House defeated the Vietnam resolution on July 30 (163-260).

Finally, one major legislative initiative with an important relationship to trade passed the Congress in 1998: additional IMF funding in response to the Asian financial crisis. A supplemental funding package of $18 billion passed the Congress as part of H.R. 4328, the omnibus appropriations bill that was passed by the House on October 20, 1998, and by the Senate on October 21.

In 1998, the two major trade legislative initiatives that failed to become law were those (1) identifying trade negotiating objectives and extending trade implementing authority, and (2) providing for improved trade relationships with the countries of sub-Saharan Africa. Each of these is discussed in greater detail below.

B. Negotiating Objectives and Trade Agreement Procedures

On June 25, 1998, Speaker Gingrich announced that he would schedule House consideration in September of legislation setting out trade negotiating objectives and renewing trade agreement approval procedures. The scheduling of a vote on the legislation before the November elections was regarded by the administration, most Democrats, and some in the private sector as primarily a political move to embarrass the president and split the Democrats. Most Republicans and

84. Legislation changing the term MFN to NTR was signed into law on July 22, 1998, a month after the committee reported the disapproval resolution and on the same day that the disapproval resolution failed in the House. Accordingly, the term contained in the disapproval resolution was MFN rather than NTR.

some others in the business community saw it as consistent with the administration's stated commitment to pass legislation in this area.

On July 6, President Clinton responded to Speaker Gingrich, stating that while he was strongly for fast track, it would be a mistake to call the legislation up if there was no reason to believe that the legislation could pass. Doubts about the ability of the legislation to pass had arisen in November 1997, when the bill had been pulled from floor consideration in the House, over concerns that it did not have the votes to pass.

On July 31, the Senate Finance Committee marked up and reported S. 2400. Title II of the bill contained trade negotiating objectives and trade agreement negotiating authority. The provisions of S. 2400 overall were similar to, but different in a number of key respects from, the provisions of H.R. 2621. For example, S. 2400 took a more traditional approach to the question of whether implementing bills could include provisions that were necessary or appropriate to the implementation of the trade agreement, or could include only necessary provisions.. Without using the traditional terminology that had been contained in all fast-track provisions from 1974 to 1991, section 2003(b)(3) of S. 2400 would have sanctioned inclusion in implementing legislation of provisions that are necessary for enforcement, and adjustment to the effects of such trade agreement.

On September 25, H.R. 2621, the same bill reported in 1997 by the Committee on Ways and Means (24-14), as modified by a Manager's Amendment developed by House Republicans, was defeated by a roll call vote (180-243). The Manager's Amendment contained a number of provisions related to agriculture and agricultural products, including stringent new requirements related to tariff negotiations and language proposed by the Chairman of the Committee on Agriculture. The bill also included a reporting requirement on the extent to which foreign parties to trade agreements have in place laws governing exploitative child labor, but did not address core issues concerning the relationship between trade agreements, on the one hand, and the operation of labor markets and environmental regulation, on the other.

The president responded to the House vote by identifying the need to forge a new consensus on trade, calling on the Congress to pass important trade-related legislation such as the African Growth and Opportunity Act, CBI enhancement, and the IMF funding package, and stating that we should do the hard work of building a bipartisan coalition for traditional negotiating authority. The president also stated that he would work with Congress to pass bipartisan legislation early in the 106th Congress.

On September 29, House Ways and Means Committee Chairman Archer wrote to the president, stating that he remained committed to passing fast track and agreed with the president on the need to forge a new consensus on trade. Chairman Archer called on the president to identify a date certain for a vote on fast-track legislation in 1999.

On October 2, Ways and Means Trade Subcommittee Ranking Democrat Robert Matsui, together with Congressmen Dicks, Fazio, Hoyer, and Cardin, in turn wrote to Chairman Archer stating that no fast track will win passage until a fair and bipartisan bill, which can garner significant support from both sides of the aisle, is negotiated. The letter further stated that it is clear that in order for any such negotiations to be fruitful, provisions related to labor and the environment must be included in any bill that stands a chance at final passage.

C. African Growth and Opportunity Act

On March 11, 1998, H.R. 1432, the African Growth and Opportunity Act passed the House (233-186). The bill extended GSP benefits to eligible sub-Saharan African countries for ten years, added non-import-sensitive products to the program (including textiles and apparel)

and provided quota-free treatment for textiles and apparel from countries that establish effective measures against textile transshipments. The duty-free, quota-free treatment applied to apparel assembled in sub-Saharan Africa from fabric and yarn produced in the United States, Africa, or third countries. The bill also directed the president to develop a plan for the eventual negotiation of a free trade agreement with sub-Saharan African countries and called for the creation of a sub-Saharan Africa Economic Cooperation Forum. Finally, the bill also provided equity and infrastructure funds and included provisions supporting deep debt relief especially for the poorest African countries under the Heavily Indebted Poor Countries (HIPC) initiative and development aid.

Title I, Subtitle A of S. 2400, which was reported by the Senate Finance Committee on July 31, 1998, included trade provisions for sub-Saharan African countries based on the House bill. S. 2400 granted duty-free, quota-free treatment only for apparel (not textiles) assembled from U.S. fabric made with U.S. yarn (either cut in the United States, or cut and assembled in sub-Saharan Africa from U.S. thread), as well as handmade, hand-loomed, folklore articles. (This more limited coverage was defeated as part of a motion to recommit the House bill by a vote of 193-224.) The Senate bill contained other trade provisions similar to the House bill, but did not include aid provisions, which were in the jurisdiction of the Senate Committee on Foreign Relations.