International Trade

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I. Introduction

The United States concluded the millennium with its status intact as the world's largest importer and exporter of goods and services. Buoyed by the continuing U.S. economic boom, 1999 imports surged to a record $1,228 billion, while exports totaled $960 billion. The result was an all-time high U.S. trade deficit in goods and services of $268 billion (the trade deficit in goods alone reached $347 billion), which, however, received minimal attention in light of the low unemployment rate and other favorable indicators in the U.S. economy.[1]

The year's achievements on the negotiating and legislative fronts were sparse. The biggest trade headlines of 1999 involved the collapse in December of efforts to launch a new round of negotiations within the World Trade Organization (WTO), while the U.S. Congress preserved the status quo by turning down both trade-liberalizing and trade-restrictive legislative measures. Efforts by developing countries and civil society (environmental, labor, and consumer) groups to insert their priorities more fully into the international trading system reached new heights in 1999, creating new and at least temporarily insurmountable challenges for the national and international bureaucrats with day-to-day responsibility for operating that system.

At the same time, 1999 was a tremendously important year in the young life of the WTO, as the organization's rules were elaborated through numerous panel and Appellate Body decisions, and various transition periods and expiration dates built into the WTO agreements matured. Trade remedy activity also continued at a high rate, both in the United States and around the world, in sectors where trade liberalization had proved disruptive and often generated intense political pressures. These and other 1999 highlights in the field of international trade are briefly summarized below.

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1. *See* Bureau of Census, U.S. Dep't of Commerce, FT900 (March 2000), *available at* <http://www.census.gov.foreign-trade/www/tradedata.html>. Whether a trade deficit is adverse to U.S. interests is an issue beyond the scope of this article.

II. Negotiating Developments

A. WTO

1. *Seattle Ministerial*

When the United States volunteered in mid-1998 to host a WTO Ministerial Conference in late 1999, it was envisioned that the meeting would be the crowning accomplishment of a successful decade of trade liberalization efforts—launching and setting parameters for a new "Millennium Round" of multilateral negotiations. Preparations for this ministerial, for which Seattle was selected as the host city, dominated the negotiating agenda throughout the year.

The built-in agenda for the contemplated round, based on commitments-to-negotiate set out in the Uruguay Round agreements, involved revisions to the existing WTO rules on agriculture, services, and intellectual property. The central questions facing negotiators during the preparations for Seattle were (1) how to structure negotiations on these topics and (2) what, if any, topics should be added. The WTO General Council established a three-stage process for proposing topics, selecting among the topics that had been proposed, and fashioning a draft Ministerial Declaration to be finalized and executed in Seattle.

This vision contrasted starkly with the reality. On December 4, the meeting broke up without the launch of a new round or the issuance of a Ministerial Declaration of any kind. What had gone wrong?

Press accounts tended to focus on an extraordinary outpouring of public opposition to the WTO that saw thousands of demonstrators, with a variety of agendas and dissatisfactions, take to the streets of Seattle and attempt to shut down both the city and the ministerial. Arrests and tear gas dominated the nightly news coverage, as anti-globalization forces marched against what they saw as an unaccountable and environmentally insensitive institution working to promote corporate welfare at the expense of human welfare and civil society.

The principal reason for the breakdown inside the negotiating rooms, however, was not the demonstrators but the incumbent governments of WTO members, among whom there was no shortage of culprits. The European Union (EU) and Japan sought to block any serious consideration of rules to eliminate trade-distorting practices in the agriculture sector—going so far as to announce a new doctrine, "multifunctionality," aimed at making agricultural protectionism sound more respectable. Developing countries pursued, under the banner of "implementation," a Seattle agenda that was not focused on implementing prior commitments at all but rather on side-stepping commitments they themselves had undertaken in the Uruguay Round. The United States, for its part, was reluctant to open formal talks on certain "new" WTO issues on which other members wanted to negotiate, such as investment and competition policy. Yet, it tried, at the same time, to push other members further than they were willing to go on the "new" issue of trade and labor rights.

In addition to the failure to launch a new round, the breakdown in Seattle precluded progress on a variety of WTO "housekeeping" issues, the most notable of these being the already delayed review of the WTO Dispute Settlement Understanding.

Later in December, trade officials from the largest WTO members sought to portray the events of Seattle as a temporary set back, and they pledged renewed efforts to launch a new round in 2000. The onset of a presidential election year in the United States—coupled with the evident lack of consensus among members about what should be included

in a new round—provided, as 1999 drew to a close, some reasons to question whether negotiating momentum could be so rapidly restored.

2. *China's Proposed WTO Accession*

A second major WTO negotiating initiative in 1999 involved China's proposed accession, which, in light of China's many years of development outside the multilateral trading system, presented huge challenges. Preparations to bring a country into the WTO have both a bilateral and a multilateral component, as the acceding country must negotiate market access packages with existing WTO members and also conclude a "protocol" setting out additional rules and accession criteria. During 1999, the main focus was China's bilateral dialogue with the United States, which focused mainly on market access issues and secondarily on protocol issues.

The year began on a promising note, with the lead negotiators' announcement in April of a comprehensive package aimed at clearing the way for full U.S. support of China's accession. Removal of the annual review process, by which the U.S. government each year debates whether to terminate Chinese goods' eligibility for most-favored-nation (now known as normal trade relations) tariff status, was a part of that package. (The legislation to end these annual reviews was named "PNTR," standing for Permanent Normal Trade Relations.) The U.S. government's fact sheet summarizing this agreement, entitled "Market Access and Protocol Commitments," began with the following summary:

> The broad set of commitments China has made today, and the substantial negotiations which remain to be held, will advance American interests in a fundamental way, and complement broader policies intended to move China toward internationally accepted standards of conduct. . . . Broadly speaking, the market access commitments China has made will bring China at or above existing WTO standards on issues and sectors of major concern to the U.S. . . . [T]he U.S. has achieved commitments that address the principal barriers to American products; are highly specific and fully enforceable; are phased-in over a relatively short period of time, with increased market access in every area as of day one of China's ultimate accession; do not offer China special treatment; and meet or exceed commitments made by many present WTO members. Significant commitments cited in the fact sheet include:
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> - Full market access for U.S. firms to distribute their products throughout China.
> - Tariff reductions immediately upon accession, with further phase-ins over reasonable periods of time to levels below those of most U.S. trade partners.
> - Bindings for all tariffs—i.e., China will be unable to raise tariffs again after accession.
> - Elimination of quantitative restrictions.
> - Resolution of outstanding problems with sanitary and phytosanitary standards for key agricultural products, effective immediately.
> - Participation in the three major multilateral agreements negotiated since the Uruguay Round: the Information Technology Agreement, the Agreement on Basic Telecommunications, and the Financial Services Agreement.
> - Commitments to more open service sectors that cover the broad range of sectors, including distribution, value-added telecommunications, insurance, computer and business services, environmental services, franchising and direct sales, legal and accounting, sound recordings, and entertainment software.

The document then continued with details under the headings: Agriculture Market Access, Market Access for Industrial Products, Services, and Protocol and Working Party Report Commitments.

In a move reported to have surprised his trade negotiators, however, President Clinton —just emerging from an impeachment trial and also facing major public concern over reports of Chinese espionage in the United States—declared himself unsatisfied with certain elements of the agreement. This opened a rift with Chinese negotiators, exacerbated by the United States' subsequent bombing of a Chinese diplomatic installation in Kosovo. Diplomacy resumed in the late summer and fall, however, culminating in the November 1999 announcement that a new and complete bilateral accord had been concluded.

The year thus ended with one important hurdle overcome but numerous others remaining. Where the United States was concerned, a fierce congressional battle was shaping up over the PNTR legislation. On other fronts, China still had to negotiate bilateral deals with several other WTO members, most notably the EU, and a difficult multilateral process on protocol issues still loomed.

3. *Status of WTO Obligations and "Work Programs"*

The failure to finalize major new agreements under WTO auspices did not equate to complete stasis during 1999 in terms of WTO obligations. On the contrary, even as members continued the extended process of implementing WTO commitments they had undertaken in 1994-98, the ground continued to shift as transition periods built into certain WTO agreements (e.g., the Agreement on Trade-Related Investment Measures and the Agreement on Trade-Related Intellectual Property Rights) matured, and various provisions adopted on a "trial basis" in 1994 expired. In one noteworthy example, provisions in the Agreement on Subsidies and Countervailing Measures establishing new "green" and "dark amber" categories of subsidies expired at the end of 1999, despite a Canadian- and European-led effort to promote at least a temporary extension.

In addition, "educational" work (with perhaps a limited and informal negotiating component) continued within various WTO bodies established at the Marrakesh (1993) and Singapore (1996) Ministerials. These included the Committee on Trade and Environment, the Working Group on the Interaction between Trade and Competition Policy, and the Working Group on Investment. These bodies did not, and were not expected to, propose new WTO rules in their respective areas of competence. They did, however, make progress in the technical and consensus-building work that will be a necessary part of the backdrop for any future WTO negotiations in these fields.

B. Negotiating Initiatives outside the WTO

The United States continued during 1999 its efforts to advance trade liberalization in a variety of non-WTO areas. To cite just a few examples: technical work continued within the various Free Trade Agreement of the Americas (FTAA) negotiating groups; regular meetings were held of the various bodies established by the North American Free Trade Agreement (NAFTA); high-level and working-level dialogue continued within the Asia Pacific Economic Cooperation (APEC) forum, and implementation proceeded on various accords negotiated within the Organization for Economic Co-operation and Development (OECD), including a convention requiring member states to criminalize bribery.

To capitalize on all this work and harvest concrete agreements will require, among other things, some kind of renewed arrangement between the political branches of the U.S. government on trade agreement implementing procedures.

Bilateral U.S. trade diplomacy continued during 1999 as well, but at a vastly reduced level compared to prior eras—a trend largely attributable to the entry into force of the WTO agreements.

III. WTO Dispute Settlement Activity

Use of the WTO dispute settlement system remained at a high level in 1999. Twenty-eight new requests for consultations were filed, along with twenty-one requests for the establishment of panels. The WTO Dispute Settlement Body (DSB) was very active both in adopting panel and Appellate Body reports, and in reviewing members' implementation of WTO decisions. Significant decisions and other WTO dispute settlement activities from 1999 are summarized below.

A. Panel and Appellate Body Reports

Eight panel reports and nine Appellate Body reports were adopted in 1999 and several other reports were announced too late in the year for adoption to become an issue until 2000. Insofar as the high-profile cases are concerned, one pattern distinguishing 1999 from prior years was the number of cases that involved subsidies and, therefore, required interpretation of the rules in the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the WTO Agreement on Agriculture. These cases elaborated on several areas of WTO subsidies "law," including what constitutes an export subsidy; what remedies are appropriate when a panel finds a non-recurring subsidy to be actionable in a WTO case; and how non-recurring subsidies can be allocated over time when ownership of the recipient changes hands in the middle of the subsidy amortization period.

Other significant 1999 decisions interpreted the WTO Agreement on Safeguards, the national treatment obligation in GATT 1994, article III, the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), and the exclusivity provisions of DSU, article XXIII.

1. *Disputes Over Subsidies and Anti-Subsidy Measures*

Early 1999 saw two concurrent WTO panel decisions, *Brazil—Export Financing Programme for Aircraft*[2] and *Canada—Measures Affecting the Export of Civilian Aircraft*,[3] that export financing provided by the Brazilian and Canadian governments to domestic aircraft manufacturers constituted prohibited export subsidies under the SCM Agreement. The panels issued their decisions in these cases on March 12, 1999. The panel ruling on Canada found that Canada account debt financing—a program alleged by Brazil to be used to support export transactions that the Export Development Corporation could not support through regular export credits—and Technology Partnerships Canada (TPC) assistance—a program created to address the needs of established companies in specific industrial segments—constituted prohibited export subsidies; it rejected Brazil's other claims. The panel ruling on Brazil found that PROEX interest rate equalization payments (grants to purchasers of exported Brazilian regional aircraft that reduced the purchaser's net interest rate) were prohibited export subsidies. The Appellate Body, on August 2, 1999, issued decisions generally upholding both panel decisions, including the panels' recommendations that both Brazil and Canada withdraw their prohibited export subsidies within ninety days.

2. Brazil—Export Financing Programme for Aircraft, Report of the Panel, WT/DS46/R (last modified Apr. 14, 1999) <http://www.wto.org>.

3. Canada—Measures Affecting the Export of Civilian Aircraft, Report of the Panel, WT/DS70/R (last modified Apr. 14, 1999) <http://www.wto.org>.

In another case featuring important subsidy issues, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*,[4] a WTO panel in May 1999 upheld a U.S. complaint involving Canada's support program for dairy exports and its tariff-rate quota system for imported milk. This case featured claims under the Agreement on Agriculture, GATT 1994, and the SCM Agreement. The panel ruled that by making discounts on milk for processors contingent on the use of such milk in exported dairy goods, Canada, under its Special Milk Classes Scheme, was providing an export subsidy in violation of articles 8 and 3.3 of the Agreement on Agriculture. The panel also found that Canada violated GATT 1994, article II:1b, by restricting access to the tariff-rate quota for fluid to consumer packaged milk. On grounds of judicial economy, the panel did not examine the claimed violation of article 3 of the SCM Agreement. On October 13, 1999, the Appellate Body upheld certain of the panel's findings, including the finding that the discount pricing involved payments-in-kind supported by government action. However, the Appellate Body overturned the panel's decision that the pricing system constituted a "direct subsidy" provided by "governments or their agencies," and also reversed the panel's findings under GATT 1994, article II. (The panel's findings on the SCM Agreement issues were not among those challenged on appeal.)

The question of what remedies are appropriate in a WTO anti-subsidy proceeding came front and center in a case that had been filed by the United States over Australian aid to an exporter of automotive seat leather.[5] The United States secured a Spring 1999 panel ruling in *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather*,[6] that the Australian government provided a prohibited export subsidy to Howe Leather in the form of a large cash grant whose receipt was contingent upon export targets accepted by Howe. The steps taken by Australia to comply with the panel ruling, however, involved only a partial retraction of the grant, coupled with a soft loan to Howe's parent company intended to compensate for the grant funds being withdrawn. The United States complained, via a "compliance" proceeding under DSU, article 21.5, that Australia had not met its obligation to bring its financial support of Howe into conformity with WTO obligations as defined by the original panel. Interestingly, the United States and Australia agreed in the article 21.5 proceeding that there was no obligation to retract the entire grant. Since some portion of the grant would already have been amortized under standard accounting rules by the time the U.S. complaint was filed, ordering full recovery of the grant funds would have been inconsistent, they both agreed, with the principle that WTO panels can only order prospective remedies. The two sides differed only on how much of the grant constituted the "prospective portion" that was subject to withdrawal (the United States advocating a larger portion). The article 21.5 panel, however, in a ruling leaked late in 1999 and formally released on January 21, 2000, interpreted the applicable SCM remedy provisions to mean that Australia was obligated to recover the grant in full, with interest running from the date of distribution.

4. Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products, Report of the Panel, WT/DS103/R & WT/DS113/R (last modified May 17, 1999) <http://www.wto.org>.

5. The most noteworthy 1999 developments in this case involved implementation of the initial panel ruling. While the case might logically fall within subsection III.B below on implementation, it is discussed here along with other 1999 subsidy decisions for convenience.

6. Australia—Subsidies Provided to Producers and Exporters of Automotive Leather, Report of the Panel, WT/DS126/R (last modified May 25, 1999) <http://www.wto.org>.

The two most important and controversial WTO subsidy decisions arrived as the year was drawing to a close. In *United States—Tax Treatment for "Foreign Sales Corporations,"*[7] a decision made public on October 8, 1999, a WTO panel upheld the EC's claim that U.S. tax benefits for foreign sales corporations (FSCs) constituted an export subsidy in violation of SCM article 3.1(a) and article 3.3 of the Agreement on Agriculture. This case had a long history, as the FSC legislation had been enacted as part of the bilateral settlement in 1981 of a GATT complaint filed by the EC against a predecessor U.S. tax provision. The predecessor provision was challenged by the EU on the theory that it allowed for the creation of "mailbox" companies through which export sales could be made to receive a tax deferral that could, in theory, last forever. Both the earlier provision and the FSC legislation were intended to offset, to a limited extent, the competitive disadvantage to U.S.-based producers arising from the fact that the indirect taxes heavily utilized by governments in Europe and elsewhere around the world could be border-adjusted under multilateral trade rules, whereas the direct taxes (income taxes) principally relied upon by the United States could not. In challenging the FSC provisions, the EC abrogated a political détente that had kept this inconsistent treatment of WTO members' tax regimes out of the headlines. This was arguably the biggest trade dispute to be brought before the WTO in 1999, affecting more than 7,000 FSCs and annual tax benefits in excess of $3 billion—although the extent to which these benefits translate into adverse trade effects suffered by the EU is unclear. The United States and the EC both filed appeals in late 1999 challenging elements of the panel report.

Finally, in a report circulated to members in December 1999, a WTO panel ruled, in *United States—Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,*[8] that the United States had violated its obligations under Part V of the SCM Agreement when it imposed countervailing duties on leaded steel bars shipped to the United States in 1994-96 by a U.K. enterprise that had undergone changes in ownership subsequent to its receipt of subsidies. The case focused on whether multi-year benefit streams arising from large capital subsidies were, as a matter of law, disrupted when the subsidized factory or productive unit is spun off and absorbed by a new corporate owner that pays fair market value. The WTO panel and the Appellate Body ruled that in these circumstances, any unamortized portion of previously bestowed subsidies is "extinguished" and can no longer be countervailed. This was an important decision substantively, as it interpreted the basic definitional provisions in SCM article 1, which sets out the elements of an actionable subsidy for purposes of both countervailing duty investigations under Part V and WTO subsidy cases under Parts II and III. The decision was also important politically because it involved a fundamental aspect of U.S. countervailing duty practice and a methodology the U.S. government believed to be insulated against WTO challenge when the SCM Agreement was finalized in 1994.

2. *Other Major Decisions*

An important pair of 1999 cases involved challenges to safeguard measures under GATT 1994, article XIX, and the WTO Agreement on Safeguards. In a report circulated on June

7. United States—Tax Treatment for "Foreign Sales Corporations," Report of the Panel, WT/DS/108/R (last modified Oct. 8, 1999) <http://www.wto.org>.

8. United States—Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Report of the Panel, WT/DS138/R (last modified Dec. 23, 1999) <http://www.wto.org>.

21, 1999, a panel upheld an EC complaint in *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*,[9] that Korea's safeguard measure (in the form of a quota limiting dairy imports) was inconsistent with articles 12.1, 12.2, and 12.3 of the Agreement on Safeguards. On appeal, the Appellate Body agreed that Korea had violated article 12.2 of the Agreement on Safeguards, although it did reverse certain conclusions reached by the panel, notably regarding the relationship between GATT 1994, article XIX, and the Agreement on Safeguards.

In a report made public on June 25, 1999, a panel upheld in *Argentina—Safeguard Measures on Imports of Footwear*,[10] an EC complaint over Argentina's safeguard measure in the form of specific duties imposed on footwear imports. One problem identified was the design of the remedy; the panel ruled that, having concluded in its safeguard investigation that imports from all sources were causing harm to its producers, Argentina could not tailor its safeguard measure to hit only non-MERCOSUR countries. But the panel also found that the determination itself did not meet the requirements of the Agreement on Safeguards, since the Argentine authorities neither evaluated all relevant factors, such as productivity and capacity utilization, nor adequately demonstrated a link between surging imports and injury suffered. On December 14, 1999, the Appellate Body upheld the panel's ruling regarding the violations of the Agreement on Safeguards. The Appellate Body added that WTO members applying safeguard measures must meet not only the requirements of the Agreement on Safeguards, but also those of GATT 1994, article XIX, which requires a showing that *unforeseen* developments led to the increased imports subject to a safeguard measure.

A second noteworthy pair of 1999 cases involved discriminatory liquor taxes. On January 18, 1999, the WTO Appellate Body upheld an earlier panel decision in *Korea—Taxes on Alcoholic Beverages*,[11] siding with the European Communities and the United States, who had claimed that South Korea violated WTO rules (including national treatment) by applying lower rates of internal tax on *soju*, a traditional Korean liquor, than on imported vodka, whiskey, gin, and tequila, all of which were "like" products. On June 15, 1999, a separate panel issued a similar ruling against Chile's system in *Chile—Taxes on Alcoholic Beverages*,[12] for taxation of distilled alcoholic beverages, finding that unequal tax rates resulted in a violation of GATT 1994, article III:2. The Appellate Body, in a report circulated on December 13, 1999, upheld the panel's interpretation and application of article III:2.

India—Quantitative Restrictions on Imports of Agricultural, Textile, and Industrial Products[13] involved a U.S. challenge to quantitative restrictions maintained by India on the importation of a large number of agricultural, textile, and industrial products. The United States contended that these restrictions were inconsistent with GATT 1994, articles XI:1 and XVIII:11, article 4.2 of the Agreement on Agriculture, and article 3 of the Agreement on

9. Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products, Report of the Panel, WT/DS98/R (last modified June 21, 1999) <http://www.wto.org>.

10. Argentina—Safeguard Measures on Imports of Footwear, Report of the Panel, WT/DS121/R (last modified June 25, 1999) <http://www.wto.org>.

11. Korea—Taxes on Alcoholic Beverages, Report of the Appellate Body, WT/DS75/AB/R & WT/DS84/AB/R (last modified Jan. 18, 1999) <http://www.wto.org>.

12. Chile—Taxes on Alcoholic Beverages, Report of the Panel, WT/DS87/R & WT/DS110/R (last modified June 15, 1999) <http://www.wto.org>.

13. India—Quantitative Restrictions on Imports of Agricultural, Textile, and Industrial Products, Report of the Panel, WT/DS90/R (last modified Apr. 6, 1999) <http://www.wto.org>.

Import Licensing Procedures. The April 6, 1999 panel report found violations of both GATT 1994 and the Agreement on Agriculture. The panel decision was upheld by the Appellate Body on August 23, 1999 and formally adopted by the DSB on September 22, 1999.

In *Japan—Measures Affecting Agricultural Products*,[14] the Appellate Body, on February 22, 1999, partially affirmed a panel decision upholding a U.S. complaint over Japanese quarantine procedures. The United States had claimed that by prohibiting the importation of each variety of a product requiring quarantine treatment until the quarantine treatment has been tested for that variety, even if the treatment had proven to be effective for other varieties of the same product, Japan violated articles 2, 5, and 8 of the SPS Agreement, article 4 of the Agreement on Agriculture, and GATT 1994, article XI. The Appellate Body upheld the panel's basic finding of SPS violations but disagreed with the panel on several points of law.

Finally, in *United States—Sections 301-310 of the Trade Act of 1974*,[15] a panel addressed claims by the European Communities that sections 301-10 violated the exclusivity provisions of the DSU as well as fundamental principles of GATT 1994. In a report circulated on December 22, 1999, the panel found that the challenged provisions (sections 304(a)(2)(A), 305(a), and 306(b)) were not inconsistent with DSU, article 23.2(a) or (c) or with GATT 1994, articles I, III, VIII, and XI. The panel's findings were based in large part on undertakings set out in, for example, the Uruguay Round Statement of Administrative Action (SAA), signaling an intention not to take action using section 301 authority that would violate DSU obligations. With respect to section 304, the panel warned that: "[s]hould any of the undertakings articulated in the SAA and confirmed and amplified by the United States to this panel be repudiated or in any other way removed by the U.S. administration or another branch of the U.S. government, this finding of conformity would no longer be warranted."

B. Implementation of WTO Dispute Settlement Decisions

Implementation of adopted WTO panel and Appellate Body decisions became a major focus in 1999 as the United States and the European Communities wrangled over bananas and beef.

The period for implementation for *European Communities—Regime for Importation, Sale and Distribution of Bananas*[16] expired on January 1, 1999. On January 12, 1999, the DSB agreed, at the request of both the European Communities and Ecuador, to convene a panel to determine whether the EC's implementing measures conformed to WTO rules. Two days later, the United States, pursuant to DSU, article 22.2, requested authorization to suspend concessions to the European Communities in the amount of U.S.$520 million. The European Communities responded by requesting arbitration on the level of suspension of concessions requested by the United States. Concerning the EC's implementing mea-

14. Japan—Measures Affecting Agricultural Products, Report of the Appellate Body, WT/DS76/AB/R (last modified Feb. 22, 1999) <http://www.wto.org>.

15. United States—Sections 301-310 of the Trade Act of 1974, Report of the Panel, WT/DS152/R (last modified Dec. 22, 1999) <http://www.wto.org>.

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

sures, the panel found that they were not fully compatible with the EC's obligations. Concerning the suspension of concessions by the United States, the arbitrators determined the trade damages suffered by the United States to be U.S.$191.4 million. On April 19, 1999, the DSB authorized the United States to suspend concessions to the European Communities in that amount.

With respect to the other major U.S.-EC trade dispute, *European Communities—Measures Affecting Meat and Meat Products (Hormones)*,[17] the EC informed the DSB on April 28, 1999 that it would consider offering compensation in light of the likelihood that it might not be able to comply with the WTO rulings by the May 13, 1999 deadline. In early June, the United States and Canada both requested authorization to suspend concessions to the European Communities. (The United States' estimate of damages was U.S.$202 million; Canada's was Cdn.$75 million.) The European Communities requested arbitration. The arbitrators determined the level of nullification suffered by the United States to be U.S.$168 million and that suffered by Canada to be Cdn.$11.3 million. The DSB authorized the suspension of concessions to the European Communities in these amounts on July 26, 1999.[18]

The twin disputes between Brazil and Canada (*Brazil—Export Financing Programme for Aircraft*[19] and *Canada—Measures Affecting the Export of Civilian Aircraft*[20]) over aircraft export financing programs also continued into the implementation phase. Both countries announced on November 19, 1999 that they had withdrawn the non-conforming measures and thus had implemented the rulings of the DSB within the time required. However, both countries, on November 23, 1999, requested the establishment of article 21.5 panels to challenge these claims of full implementation. The two countries reached an agreement concerning the applicable procedures and, on December 9, 1999, the DSB agreed to convene article 21.5 panels in both cases.

In April 1999, India presented its final status report on implementation of *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*,[21] in which it disclosed the enactment of pertinent legislation.[22] Also, Indonesia informed the DSB in July 1999 that it had issued a new automotive policy that effectively implemented the recommendations and rulings of the DSB in *Indonesia—Certain Measures Affecting the Automobile Industry*.[23]

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17. European Communities—Measures Affecting Meat and Meat Products (Hormones), Complaint by the United States, Report of the Panel, WT/DS26/R/USA (last modified Aug. 18, 1997) <http://www.wto.org>.

18. The EC's continued non-compliance in these cases led frustrated U.S. legislators to introduce legislation providing for "carousel" retaliation, the idea being to vary the targeted products and thereby maximize the disruption and economic pressure imposed on foreign governments subject to retaliation under section 301. The carousel provisions were enacted in May 2000 and at this writing are imminently expected to be used for the first time. These developments raise important dilemmas for the trading system, including the extent to which members are, or should be, "bound" to implement adopted WTO panel decisions rather than negotiating compensation or accepting retaliation.

19. Brazil—Export Financing Programme for Aircraft, Report of the Panel, WT/DS46/R (last modified Apr. 14, 1999) <http://www.wto.org>.

20. Canada—Measures Affecting the Export of Civilian Aircraft, Report of the Panel, WT/DS70/R (last modified Apr. 14, 1999) <http://www.wto.org>.

21. India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, Report of Panel, WT/DS50/R (last modified Sept. 5, 1997) <http://www.wto.org>.

22. *See* India—Parent Protection for Pharmaceutical and Agricultural Chemical Products, Status Report by India-Addendum, WT/DS50/10/Add. 4 & WD/DS79/6 (last modified Apr. 16, 1999) <http://www.wto.org>.

23. Indonesia—Certain Measures Affecting the Automobile Industry, Report of the Panel, WT/DS54/R, 55/R, 59/R & 64/R (last modified July 2, 1998) <http://www.wto.org>; Indonesia—Certain Measures Affecting

IV. Trade in Services

Trade in services is increasingly important. An ITC report released in May 2000 provides a graphic picture in which the provision of services is the principal economic activity of most Americans, providing seventy-seven percent of the U.S. GDP in 1998 while employing seventy-nine percent of the total workforce.[24] These services cover tourism, insurance, banking, telecommunications, shipping, health care, education, and the professions of accountancy, architecture, engineering, surveying, and of course, law. While trade in services was reported in 1998 to be only twenty-two percent of the nation's trade volume of $2 trillion, a surplus in the services trade account of $83 billion offset one-third of the trade deficit experienced in merchandise.[25]

Statistics on trade in services are, however, difficult to verify or even to collect. Contrary to goods that can be observed, counted, and valued when they are exported or imported from a country, services—in the form of architectural plans or insurance binders or legal opinions—can cross borders in at least the four "modes" recognized by the General Agreement on Trade in Services (GATS): (1) by being mailed or sent by electronic media (even phoned) from a site in the United States to a user, client, or buyer in another country; (2) by the personal delivery of the U.S. service provider who may temporarily cross the border to provide his/her services in a foreign consumer's office, in a hotel room, or even in a third country; (3) by providing the services in the provider's own U.S. location to a foreign consumer who comes to the United States to obtain the services;[26] and (4) by opening a local office in a foreign country in order to provide services abroad. This last is the most visible—and most controversial—mode of providing services and the most akin to trade in goods.

Most countries regulate the provision of services, particularly professional services, through a local presence. (Services provided in the other modes are much more difficult to regulate or even to detect.) Regulations affecting the opening of local offices are often administered by special bodies or commissions that may be selected by political entities below the national level, as lawyers in the United States, are admitted to the bar by agencies of the States. How such sub-national entities can be reached by international agreements is a continuing problem for federal states such as the United States. A major effort of the U.S. Trade Representative in 1999 was to prepare for the future negotiation of market access for U.S. service providers in the GATS countries. These negotiations are part of the "built-in agenda" of the Uruguay Round and were to begin in Seattle in December 1999. The United States is pursuing greater transparency in the regulation of professional and other service providers seeking to locate in offices in other countries, and the adoption of a principle that all regulations should be no more onerous than necessary to achieve a legitimate regulatory aim (such as consumer protection) but not protection of local service providers. A significant achievement of 1999 was the adoption by the GATS Council of prototype principles under which the qualifications of accountants from one WTO member will be recognized by other members to avoid requirements of re-testing.

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the Automobile Industry, Status Report by Indonesia, WT/DS54/17/Add. 1, WT/DS55/16/Add. 1, WT/DS59/15/Add. 1 & WT/DS64/14/Add. 1 (last modified July 2, 1999) <http://www.wto.org>.

24. *Recent Trends in U.S. Service Trade*, USITC Pub. No. 3306 (May 2000) at 1-3, 1-4.

25. *See id.* at 1-3, 2-1. Full-year statistics for 1999 were not available at the time of publication.

26. Foreign tourists in the United States are, of course, the best example of such "export recipients" of services within this country.

V. The Unfair Trade Remedies

A record high 328 antidumping (AD) investigations were initiated worldwide in 1999, well above the average figure of 213 during the previous four years. These 328 cases were opened by twenty-two different jurisdictions, the top two being the European Communities and India with sixty-five and sixty initiations, respectively. (The United States was third with forty-five, while South Africa, the most frequent initiator in 1998, fell to sixth place in 1999 with sixteen initiations.) By far the leading targets were Asian exports, with the top six respondent countries being China (thirty-nine), Korea (thirty-one), Japan (twenty-one), Taiwan (twenty), Indonesia (nineteen), and Thailand (seventeen). (The United States was in eighth place with thirteen cases filed against its exports.) As in prior years, more than half the cases opened in 1999 were in the chemicals and steel sectors.

Countervailing duty (CVD) initiations also increased in 1999, with thirty-eight new cases opened worldwide (compared with sixteen in 1997 and twenty-six in 1998). The European Communities accounted for nearly half (eighteen) of the new 1999 CVD cases, and the United States another ten. As with antidumping, the main targets of these cases were Asian. India, Taiwan, and Thailand led the way with five initiations apiece, followed by Indonesia (four cases), Korea (three), and Malaysia (two). More than half of the thirty-eight new CVD cases opened in 1999 involved steel products.

Complementing these new cases was a steady flow of administrative reviews and sunset reviews, as well as court appeals and WTO challenges, which made 1999 a very active year in the trade remedy field. Key developments affecting the administration of the U.S. trade remedy laws in 1999 are summarized below.

A. Developments at the Commerce Department and the ITC

Highlights of the year for the U.S. enforcement agencies included the onset of sunset review activity; a wave of new steel investigations; and interesting cases in sectors such as oil and cattle.

1. *Sunset Reviews*

Both agencies had to stretch their resources during 1999 to meet deadlines presented by the first major wave of five-year "sunset" reviews of outstanding AD and CVD orders. The process began with "transition" orders, many of which had been in place since well before the 1995 entry-into-force of WTO agreements, and thus presented some significant investigatory challenges. The sunset reviews require the agencies to determine whether revocation of an order would be likely to lead to continuation or recurrence of dumping or subsidy (investigated by the Commerce Department) and of material injury (investigated by ITC). During the period between July 1998 and December 31, 1999, the ITC instituted and worked on more than 300 distinct sunset reviews.

2. *Steel Cases*

A substantial number of new steel investigations confronted the agencies during 1999, filed in response to a steel trade crisis, which itself was a result, at least in part, of the financial-crisis-driven collapse in demand in Asia and Russia. The agencies issued determinations involving five different categories of steel products and fifteen different countries, with Commerce generally finding dumping and subsidy margins, and the ITC issuing a mix of positive and negative injury findings. One noteworthy aspect was the Commerce

Department's high-profile effort, opposed by the affected U.S. industry, to negotiate suspension agreements in the hot-rolled steel cases involving Russia and Brazil, as well as a broader steel trade pact with Russia. Under the hot-rolled agreements, investigations were suspended in light of commitments to keep imports within negotiated price and volume levels.

3. *Other Interesting Cases*

One 1999 highlight was the Commerce Department's treatment of the unprecedented request for trade relief filed by a group of domestic crude oil producers who alleged that dumped and subsidized imports of crude oil from Iraq, Mexico, Saudi Arabia, and Venezuela were causing injury. This politically charged proceeding ended abruptly in August 1999, when Commerce dismissed the petition based on lack of domestic industry support. Among the ITC's more notable negative determinations in 1999 was the controversial ruling in *Live Cattle from Canada*[27] (the largest agricultural dumping case litigated at the agency level in recent memory) and the *Ferrosilicon*[28] determination in which the ITC, upon reconsideration of an earlier affirmative finding, issued a negative finding that cited price-fixing on the part of the U.S. agricultural industry.

The ITC was busy with non-AD/CVD work during 1999 as well, with, for example, unusually active dockets of safeguard investigations concerning steel wire rod, lamb meat, and wheat gluten. The Commission made an affirmative serious injury determination with respect to imports of lamb meat, although it made negative findings, based in part on the special rules on global safeguards set out in NAFTA, with respect to lamb meat imports from Canada and Mexico.[29] The president subsequently imposed a higher duty on lamb imports than had been recommended by the ITC—reportedly the first time this had ever occurred. The Commission was evenly divided on the question of whether safeguard relief was warranted with respect to imports of steel wire rod.[30] Concerning wheat gluten, the Commission published its mid-term monitoring report, as required under section 204 of the Trade Act of 1974, expressing concern over the record levels of imports during 1998–1999 due in part to an overage of imports from the EU.[31]

B. Court Decisions

The courts responsible for AD/CVD appeals—the Court of International Trade and the Court of Appeals for the Federal Circuit—did not render any major precedent-setting decisions during 1999 concerning Commerce's antidumping methodology or the ITC's material injury analysis. There were two noteworthy decisions, however, concerning Commerce's CVD methodology. In *Inland Steel Industries v. United States*,[32] the Federal Circuit affirmed Commerce's decision that domestic subsidies provided by the French government

27. Live Cattle From Canada, Investigation No. 731-TA-812 (Final) (USITC Pub. 3255, Nov. 1999).

28. Ferrosilicon From Brazil, China, Kazakhstan, Russia, Ukraine, And Venezuela, Investigations Nos. 303-TA-23, 731-TA-566-570, and 731-TA-641 (Reconsideration) and Investigations Nos. 751-TA-21-27 (USITC Pub. 3218, Aug. 1999).

29. Lamb Meat, Investigation No. TA-201-68 (USITC Pub. 3176, Apr. 1999).

30. Certain Steel Wire Rod, Investigation No. TA-201-69 (USITC Pub. 3207, Jul. 1999).

31. Wheat Gluten, Investigation No. TA-201-68 (USITC Pub. 3258, Dec. 1999).

32. Inland Steel Indus., Inc. v. United States, 188 F.3d 1349 (Fed. Cir. 1999).

to a steel company could properly be tied, for calculation purposes, to the company's French production rather than spread over its worldwide production.

The Federal Circuit issued a second important CVD decision, with learning on the difficult issue of indirect subsidies, in *AK Steel v. United States*[33] (issued in October 1999). The Federal Circuit there acknowledged that a government that actively directs the allocation of credit within its economy may in appropriate circumstances be deemed to have "entrusted or directed" one or more private commercial banks to provide subsidies to favored borrowers, even if the government itself was not making the subsidized loans. The court also ruled, however, that the factual record before it did not contain support for Commerce's finding of a causal nexus between the government action and the benefit conferred.

C. WTO Challenges

Two Korean challenges against U.S. antidumping determinations were before the WTO during 1999. One case, *United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*,[34] challenged Commerce's affirmative dumping determinations as inconsistent with relevant provisions of the GATT 1994 and the Antidumping Agreement. Korea requested consultations on July 30, and sought the establishment of a panel on October 14. The panel was convened on November 19, 1999. The second case, *United States—Antidumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea*,[35] challenged more than a half-dozen different aspects of a U.S. Commerce Department antidumping determination on memory devices. In a report circulated on January 29, 1999, and adopted (without appeal) by the DSB on March 19, 1999, the panel sided with the United States concerning most of the Korean complaints but ruled that the manner in which the U.S. agency addressed the likelihood of continuance or recurrence of dumping was inconsistent with article 11.2 of the Antidumping Agreement.

As noted above, an important challenge to the U.S. countervailing duty law was also before the WTO during 1999 in *United States—Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*.[36]

Finally, late in the year, Japan initiated a WTO challenge to the dumping and injury findings issued by Commerce and the ITC, respectively, in the investigation of Japanese hot-rolled steel products.

D. President's Steel Action Program

Responding to immense political pressure over the steel trade crisis, and pledging to bring surging steel imports back to "pre-crisis levels" while addressing the problem's root causes, such as global overcapacity, the president announced a Steel Action Program in

33. AK Steel Corp. v. United States, 192 F.3d 1367 (Fed. Cir. 1999).

34. United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, Request for Consultations by Korea, WT/DS179/1 (last modified July 30, 1999) <http://www.wto.org>.

35. United States—Antidumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea, Report of the Panel, WT/DS99/R (last modified Jan. 29, 1999) <http://www.wto.org>.

36. United States—Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Report of the Panel, WT/DS138/R (last modified Dec. 23, 1999) <http://www.wto.org>.

January 1999, with concrete actions in a variety of areas. The idea was to complement the trade law enforcement activities described above with a broader, more proactive approach in a sector where such an approach was judged to be warranted. A revised Steel Action Program followed in August, focusing on a broad range of issues of significance to the steel industry, including the following items:

AUGUST 1999 STEEL ACTION PROGRAM
ELIMINATING UNFAIR PRACTICES THAT SUPPORT EXCESS CAPACITY

1. *Bilateral Initiatives to Address Unfair Practices Supporting Excess Capacity*
   a. *Japan*
   b. *Republic of Korea*
   c. *Engage Other Steel Exporting Nations*
   d. *NIS Countries*
2. *USG Commitment to Oppose International Financial Institution Lending that Increases Subsidized Steel Production*
3. *Examination of Subsidies and Market Distorting Trade Barriers for Steel and Steel Inputs*
4. *Assess Potential Unfair Pricing Practices on Steel, Iron Ore and Coke*

EARLY WARNING

5. *Enhanced Import Monitoring and Assessment*
   a. *Close Monitoring of Trade Trends*
   b. *Spotting Circumvention of Dumping Orders*
   c. *Early Trade Data Release*

STRONG TRADE LAWS

6. *Maintain Strong, WTO-Consistent U.S. Trade Laws Within Multilateral Fora*
7. *DOC to Promulgate Regulations on Critical Circumstances to Enhance AD/CVD Enforcement*
8. *Negotiate Tough Subsidies Disciplines during WTO Accessions*

OTHER MEASURES

9. *Enhance U.S. and Foreign Commercial Service Program to Promote Exports of American Steel*
10. *Conference on the Impact of Unfair Trade Practices on the U.S. Steel Industry and its Upstream Suppliers*
11. *Global High Level Conference on Excess Capacity in the Steel Industry*
12. *Steel Worker Training*

Certain elements of the work program contemplated by this Steel Action Program began in 1999, notably including bilateral negotiations with key steel exporting countries, and the launch of a major Commerce Department-led study of market-distorting practices in the steel sector.

VI. U.S. Trade Legislative Activity

No major trade legislative initiatives were enacted into law in 1999.[37] Among the more noteworthy measures unable to gain passage were: (1) legislation to articulate official U.S.

37. Early in the year, Congress did complete some unfinished business from 1998 by passing miscellaneous tariff legislation.

trade negotiating objectives and to renew special "fast track" congressional procedures for implementing trade agreements; (2) Caribbean Basin Initiative (CBI) enhancement legislation; (3) long-term extension of the Generalized System of Preferences (GSP) and Trade Adjustment Assistance (TAA) programs; and (4) legislation implementing the OECD Shipbuilding Agreement.

One important trade measure, however, did pass both the House and Senate: a bill conferring new trade benefits on Africa. The House approved this legislation in July, and the Senate approved it, in slightly different form and with the addition of CBI enhancement and various other provisions, in November. Still looming at year-end was the need to resolve in conference the differences between the House and Senate versions.[38]

In one of the year's most interesting trade legislative developments, the House—responding to a widely-acknowledged import crisis affecting the domestic steel industry—in March 1999 passed by a substantial majority (289-141), legislation to impose quotas limiting steel imports to "pre-crisis" levels. The Senate rejected the quota measure in June, however, by a vote of 57-42.

The year 1999 also saw the introduction of several trade law reform proposals aimed at updating or toughening trade statutes, such as the antidumping law (section 731 *et seq.* of the Tariff Act of 1930), the countervailing duty law (section 701 *et seq.* of the Tariff Act of 1930), the safeguard law (section 201 *et seq.* of the Trade Act of 1974), and the law on enforcement of U.S. rights under trade agreements and response to certain foreign practices (section 301 *et seq.* of the Trade Act of 1974). Bills in this category included, for example:

- H.R. 1505 (the "Fair Trade Law Enhancement Act of 1999"), introduced by Reps. Phil English (R-PA) and Ben Cardin (D-MD)
- H.R. 1120 (a bill "To modify the standards for responding to import surges under section 201 of the Trade Act of 1974, to establish mechanisms for import monitoring and the prevention of circumvention of U.S. trade laws, and to strengthen the enforcement of U.S. trade remedy laws") and H.R. 3393 (the "Trade Enhancement Act of 1999"), introduced by Reps. Sander Levin (D-MI) and Amo Houghton (R-NY)
- H.R. 412 (the "Trade Fairness Act of 1999") and H.R. 1201 (the "Unfair Foreign Competition Act of 1999"), introduced by Rep. Ralph Regula (R-OH)
- S. 261 (the "Trade Fairness Act of 1999") and S. 528 (the "Unfair Foreign Competition Act of 1999"), introduced by Sen. Arlen Specter (R-PA)
- S. 61 (the "Continued Dumping and Subsidy Offset Act of 1999"), introduced by Sen. Mike DeWine (R-OH)

None of these bills was the subject of a committee markup or floor vote.

Despite the absence of major enactments, Congress—particularly the committees with jurisdiction over trade issues—remained active in the area of oversight of trade policy. Hearings and less formal oversight activities were undertaken with respect to ongoing negotiations, key sectoral trade issues, agency budget allocations, etc. Additionally, the House in July 1999, rejected a resolution to disapprove the president's annual extension of China's

38. A conference report ultimately passed both Houses, and was signed into law by the president, in May 2000. The law includes CBI enhancement and several other items. Of these, one of the most significant is an extension of the U.S. Generalized System of Preferences (GSP) program, with duty-free benefits for developing and least-developed countries, subject to added conditionalities in areas such as child labor and anti-bribery measures.

normal trade relations (NTR) status. Focused consideration of NTR for China began in earnest, as described above, late in the year after the U.S.-China bilateral agreement on WTO accession was successfully concluded.[39] Preparations also began in 1999 for the five-year review (to occur during 2000) of Congress' approval of the WTO agreements, as provided for in section 125 of the Uruguay Round Agreements Act.

39. The House subsequently approved PNTR in May 2000.