International Trade

MATTHEW S. DUNNE, KRISTY BALSANEK, DEAN BARCLAY, ANDREA EWART, JULIO FERNANDEZ, PAUL LALONDE, LAURA MARTINO, ANN NEIR, AND JAMES RHODES*

I. Introduction

The year 2004 witnessed significant developments in the international trade arena. Multilateral negotiations, including the World Trade Organization's (WTO) Doha Round, the Organization for Economic Cooperation and Development's (OECD) steel negotiations, and the Free Trade of the Americas' negotiations, either faltered or ground to a halt in 2004. Meanwhile, there was a frenzy of bilateral negotiations, with countries around the world competing to enter into as many free trade agreements (FTA) as possible.

Dispute settlement at the WTO continued to be dominated by sparring between the United States and the European Communities, with new controversies over aircraft and agricultural subsidies adding some spice to the usual mix of antidumping and countervailing duty cases. U.S. trade remedy litigation reflected the continuation of old disputes (e.g., softwood lumber) and growing concerns over Chinese imports in all economic sectors.

On the legislative front, Congress was unusually active, implementing legislation for two FTAs, repealing other legislation to comply with WTO rulings, and acting on long-delayed legislation, such as the miscellaneous tariff bill.

*Matthew S. Dunne served as Editor of the 2004 International Trade Year in Review. Mr. Dunne is an attorney with Paul, Hastings, Janofsky & Walker LLP, concentrating in international trade litigation and international arbitration. Kristy L. Balsanek is an associate practicing international trade and customs law with Coudert Brothers LLP in Washington, DC. Dean A. Barclay is an associate with Williams Mullen in Washington, DC, where he helps clients engage in free, fair, secure, and customs-compliant trade. Andrea M. Ewart is a customs and trade attorney with her own law firm, Andrea M. Ewart, P.C., and is Of Counsel to the law firm of Adorno & Yoss in New York. Julio A. Fernandez is an International Trade Analyst with Paul, Hastings, Janofsky & Walker LLP in Washington, DC, specializing in trade-related proceedings and customs issues affecting international trade. Paul M. Lalonde is a partner with Heenan Blaikie LLP in Toronto, and serves as co-chair of its International Trade and Competition Law Group. Laura Martino is an associate with Neville Peterson, concentrating in customs regulation, litigation, trade policy, and trade remedies. Ann Neir is a law student at the University of Kansas specializing in international trade and finance. James M. Rhodes, a former partner with Coudert Brothers and Battle Fowler, specializes in international trade and international business transactions, and serves as an arbitrator in international commercial disputes.

II. Negotiating Developments

A. WTO Negotiations

1. *Accession Negotiations*

The Kingdom of Nepal joined the WTO as its 147th Member on April 23, 2004.[1] Cambodia later became the 148th Member on October 13, 2004, after a ten-year long accession process.[2] Laos and Libya began the long journey towards becoming WTO members in 2004, while Vietnam, Russia, and Saudi Arabia's accession negotiations reportedly made significant progress.

2. *Doha Round Negotiations*

In the wake of the failed Cancun Ministerial, the Doha Round negotiations seemed to be in jeopardy. In 2004, however, the Members of the WTO appeared more willing to make the commitments and sacrifices necessary for the negotiation of a comprehensive framework agreement. The deadlock in Cancun had impeded the resolution of key modalities, particularly agreements on (1) a date and a technical approach for implementing cuts in agricultural subsidies and (2) on how to proceed with the four Singapore issues (facilitation, investment, competition, and transparency in government procurement).

To help overcome this deadlock, the United States signaled its willingness to take the other Singapore issues off the table if trade facilitation could be negotiated within the framework agreement.[3] The United States reiterated its commitment to the elimination of trade-distorting agricultural subsidies and barriers to market access.[4] But the European Community (EC) announced that it would only eliminate export subsidies on non-sensitive commodities, which would exclude sugar, dairy, and beef from such cuts. The EC was willing to agree to the elimination of export subsidies only if the end date was determined at a later point in time.[5]

In August 2004, WTO members agreed on a framework for concluding the Doha Round of the multilateral talks.[6] The text of the new framework, although still ambiguous on many critical points, included narrowing the Singapore issues to trade facilitation, deepened commitment to reducing agricultural production subsidies, elimination of agricultural export subsidies (with no end date specified), and a commitment to deal with cotton subsidies.[7]

Notably, the General Council agreed to a framework for establishing modalities in agriculture. Furthermore, the framework provided guidance on the "three pillars" of agricultural trade—domestic support, export subsidies, and market access.[8]

---

1. Understanding the WTO, *Members and Observers*, *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited June 12, 2005).

2. *Id.*

3. *Zoellick Presses for Geneva Meeting To Reach Framework Deal*, Inside U.S. Trade, Feb. 20, 2004, at § 8, *available at* 2004 WLNR 73074 [hereinafter *Zoellick Presses*].

4. United States Trade Representative, *Pressing Forward in the WTO—The President's 2004 Trade Policy Agenda* (March 1, 2004), *available at* http://www.ustr.gov/WTO/Pressing_Forward_in_the_WTO_-_The_President's_2004_Trade_Policy_Agenda.html.

5. *Zoellick Presses*, *supra* note 3.

6. World Trade Organization General Council, *Doha Work Programme*, WT/L/579 (Aug. 2, 2004), *available at* http://www.wto.org [hereinafter *Doha Work Programme*].

7. *Id.*

8. *Id.* at Annex A, ¶ 4.

First, with regard to domestic support, members with more developed economies agreed on a tiered formula to deepen cuts in permitted trade-distorting domestic support and to major reductions in the overall level of trade-distorting support from bound levels.[9] Under this formula, members with higher levels of trade-distorting domestic support will make greater overall reductions in order to achieve harmonization.[10]

In addition, the framework placed a cap on "blue box" spending, generally considered less trade-distorting. The framework, however, redefines "blue box" spending to include domestic support not tied to limits on production or an obligation to produce but based on fixed bases and yields.[11] This redefinition would cover both direct payments as well as U.S countercyclical payments that compensate U.S. farmers for downturns in global commodity prices, thereby ensuring that these subsidies will not be subject to substantial reductions.[12] At the request of the G-20, an alliance of developing countries led by Brazil, China, and India, WTO members agreed to review and clarify the criteria for "green box" subsidies, which may lead to new disciplines for this category of domestic support.[13]

The framework recognized Special and Differential treatment as an integral component of domestic support, but seemed to distinguish between developing countries based on their allocations of domestic support.[14] Developing countries that allocate almost all *de minimis* support for subsistence and poor farmers will be exempt from commitments to reduce such *de minimis* support. This language implies that countries such as Brazil and Argentina that do not allocate most domestic subsidies to subsistence farmers may have to reduce their *de minimis* support.[15]

Second, with regard to export subsidies, members agreed to work toward the elimination of all forms of export subsidies and export measures with equivalent effect by an unspecified date.[16] Third, with regard to market access, members agreed on a tiered formula for tariff reductions that takes into account the different tariff structures of members. This agreement furthers the objective of tariff reduction while respecting the limitations of developing countries, which is consistent with the Doha mandate.[17] Finally, although much progress was made with respect to agriculture, no significant progress was made in regard to non-agricultural market access, services, trade facilitation, and rules.

B. OECD Steel Negotiations

The OECD steel negotiations, which had as their objective the elimination of all trade-distorting subsidies to the steel sector, grounded to a halt in 2004. The negotiations floun-

9. *Id.* at Annex A, ¶ 6.

10. *Id.* at Annex A, ¶ 7.

11. *Id.* at Annex A, ¶¶ 13-15.

12. "Blue box" subsidies are those subsidies that are tied to programs that limit production. G-20 to Press for New Disciplines on Direct Payments in WTO Farm Talks, 21 Int'l Trade Rep. (BNA), No. 46, at 1852 (Nov. 18, 2004).

13. *Doha Work Programme*, *supra* note 6, at Annex A, ¶ 16.

14. *Id.* at Annex A, ¶ 6.

15. The United States has indicated that it supports subjecting countries that are competitive in agricultural exports to tougher rules than less-advanced developing countries not competitive in agriculture. *Fight Looming Over Claims on Framework's Treatment for Brazil*, Inside U.S. Trade, Aug. 20, 2004, at § 8, *available at* 2004 WLNR 68904; *Johnson Says Brazil, Argentina Must Accept Different S&D Treatment*, Inside U.S. Trade, Sept. 17, 2004, at § 38, *available at* 2004 WLNR 70407.

16. *Doha Work Programme*, *supra* note 6, at Annex A, ¶ 17.

17. *Id.* at Annex A, ¶ 28.

dered over disagreements on what types of subsidies should still be permitted under the agreement. The United States supported a broad prohibition with only a narrow exception for the elimination of existing capacity. But the European Union (EU) and others wanted to include additional exceptions for environmental improvements and research and development. Furthermore, they favored exempting permitted subsidies from countervailing duty and antidumping investigations. The United States strongly opposed the inclusion of these provisions in the final agreement.[18]

C. Bilateral And Regional Negotiations

1. *Free Trade of the Americas*

No significant progress was made in the negotiations for a Free Trade of the Americas Agreement (FTAA) in 2004. The negotiations grounded to a halt due to differences between the United States and Brazil over a host of issues, including intellectual property rights, agricultural subsidies, and market access.[19]

2. *Other Free Trade Agreements*

As of January 1, 2004, the United States had implemented five bilateral and regional FTAs: the North American Free Trade Agreement (NAFTA), the Jordan Free Trade Agreement, the Israel Free Trade Agreement, the Chile Free Trade Agreement, and the Singapore Free Trade Agreement. In addition, the United States was in the process of negotiating four other FTAs: the South African Customs Union (SACU) with Botswana, Lesotho, Namibia, South Africa, and Swaziland; the Australia Free Trade Agreement; the Morocco Free Trade Agreement; and the Central America Free Trade Agreement (CAFTA), which included Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.

In 2004, the United States initiated negotiations on four additional bilateral and regional FTAs: the Bahrain Free Trade Agreement; the Andean Free Trade Agreement with Colombia, Peru, and Ecuador; the Thailand Free Trade Agreement; and the Panama Free Trade Agreement.[20] The United States also initiated negotiations with the Dominican Republic to become part of CAFTA (CAFTA-DR).

By the end of 2004, the United States had completed negotiations on the Australia FTA, the Morocco FTA, the Bahrain FTA, and the CAFTA-DR. In 2004, Congress passed implementing legislation for the Morocco FTA and for the Australia FTA.[21] But, Congress took no action on either the Bahrain FTA or the CAFTA-DR. While there was strong support in Congress for the Bahrain FTA, there was also vehement opposition to the CAFTA-DR due to its provisions on textiles, sugar, and other agricultural products.[22]

---

18. *Aldonas Says Steel Talks May Have Gone As Far As Possible In OECD*, Inside U.S. Trade, Apr. 23, 2004, at § 17, *available at* 2004 WLNR 77989; *Countries Agree To Shelve Formal OECD Steel Talks*, Inside U.S. Trade, June 18, 2004.

19. *U.S., Brazil Take Steps Toward Reviving FTAA Negotiations*, Inside U.S. Trade, Dec. 17, 2004, § 51, *available at* 2004 WLNR 14261081.

20. The United States also initiated and completed negotiations with Uruguay on a bilateral investment treaty in 2004. *Lack Of Investment Treaty Visa Rules Sparks Business Complaints, Inside U.S. Trade*, Nov. 26, 2004, § 48, *available at* 2004 WLNR 12408907.

21. The Australia FTA entered into force on January 1, 2005, but the Morocco Free Trade Agreement had yet to take effect by the end of 2004.

22. *CAFTA Opponents Spearhead Dual Congressional Lobbying Strategy*, Inside U.S. Trade, Dec. 3, 2004, § 49, *available at* 2004 WLNR 12969992; *Zoellick Says CAFTA Approval Less Likely This Year Than Other FTAs*, Inside U.S. Trade, Sept. 3, 2004, § 10, *available at* 2004 WLNR 73857.

In 2005, the United States will initiate negotiations for FTAs with Oman and the United Arab Emirates. In addition, the United States will continue its negotiations on the FTAA, the SACU, the Andean FTA, the Thailand FTA, and the Panama FTA. Many observers predict that the Panama FTA, the Andean FTA, the Oman FTA, the United Arab Emirates FTA, and the Thailand FTA will all be concluded by the end of the year. The outcome for the SACU remains in doubt.[23]

III. WTO Dispute Settlement

A. Consultations

1. *Successful Consultations*

The consultative mechanism yielded two successes in 2004. In July, the United States and China announced that they had resolved their dispute in China—Value-Added Tax on Integrated Circuits, in which the United States alleged that China subjected imported integrated circuits to higher taxes than domestic integrated circuits.[24] China agreed to eliminate the availability of Value-Added Tax refunds to domestic producers by April 1, 2005.[25]

In October, the EC and India announced that they had resolved their dispute in European Communities—Anti-Dumping Duties on Certain Flat Rolled Iron or Non-alloy Steel Products from India, in which India alleged that the EC had made a finding of injury on steel products from India, Egypt, Slovakia, Turkey, Libya, Iran, and Hungary, but had only imposed antidumping duties on Indian steel products.[26] The terms of the settlement agreement were not made public.[27]

2. *New Disputes*

The cases filed in 2004 reflected the continuing predominance of U.S.-EC disputes and antidumping and countervailing duty (AD/CVD) disputes. In United States—Continued Suspension of Obligations in the EC—Hormones Dispute, the EC requested consultations with Canada and the United States regarding their continued suspension of concessions and other obligations. in European Communities—Measures Concerning Meat and Meat Products (Hormones). The EC argued that the United States and Canada should have lifted their tariffs after the EC notified the Dispute Settlement Body (DSB) in October 2003 that it had implemented legislation removing the measures at issue.[28] The United

23. *Zoellick Suggests Deputy Minister Mechanism To Restart SACU FTA*, Inside U.S. Trade, Dec. 24, 2004, § 52, *available at* 2004 WLNR 14632678.

24. Request for Consultations by the United States, *China—Value-Added Tax on Integrated Circuits*, WT/DS309/1 (March 23, 2004).

25. Joint Communication from China and the United States, *China—Value-Added Tax on Integrated Circuits*, WT/DS309/7 (July 16, 2004).

26. Request for Consultations by India, *European Communities—Anti-dumping Duties on Certain Flat Rolled Iron or Non-alloy Steel Products from India*, WT/DS313/1 (July 8, 2004).

27. Notification of Mutually Agreed Solution, *European Communities—Anti-dumping Duties on Certain Flat Rolled Iron or Non-alloy Steel Products from India*, WT/DS313/2 (October 27, 2004).

28. Request for Consultations by the European Communities, *Canada—Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS321/1 (October 11, 2004); Request for Consultations by the European Communities, *United States—Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS320/1 (October 11, 2004); *EU Notifies WTO of Change In Hormone Ban, Argues It Is In Compliance*, Inside U.S. Trade, Oct. 31, 2003, Issue 44, *available at* 2003 WLNR 96039.

States and Canada stated that the replacement legislation did not implement the DSB's recommendations.[29]

In December, the long-running U.S.-EC dispute over subsidies to aircraft manufacturers finally reached the WTO, with both the United States and the EC filing requests for consultations.[30] But on January 11, 2005, the parties agreed to a three-month truce during which they attempted to negotiate a comprehensive agreement ending the subsidies at issue. It appeared likely that the WTO litigation would be revived if the negotiations failed to produce a satisfactory settlement.[31]

The respondent in most AD/CVD cases continued to be the United States. In United States—Measures Relating to Zeroing and Sunset Reviews, Japan challenged the U.S. practice of zeroing negative dumping margins, the presumptions used in sunset reviews, and waiver provisions that appeared to require the finding of a likelihood of recurrence of dumping.[32] Similarly, in United States—Provisional Anti-Dumping Measures on Shrimp from Thailand, Thailand challenged the U.S. practice of zeroing negative dumping margins and the use of "adverse facts available."[33] In United States—Section 776 of the Tariff Act of 1930, the EC challenged the United States for (1) its refusal to verify data submitted by the target company or to use that data in determining the margin of dumping; (2) its use of an "adverse inference" in the selection of available facts; and (3) its reliance on information contained in the complaint for the establishment of the margin of dumping and antidumping duty.[34]

B. Panel And Appellate Body Decisions

1. *Disputes under the Antidumping and Subsidies and Countervailing Measures Agreements*

a. Softwood Lumber

The long-running dispute between the United States and Canada over softwood lumber generated three Panel and Appellate Body Reports in 2004. In January, the Appellate Body issued a mixed ruling regarding the U.S. Department of Commerce's (DOC) final determination of subsidization.[35] The Appellate Body upheld the Panel's decision that Canada's stumpage fees for trees coming from government-owned land may constitute a financial

29. *U.S. Rejects EU Pledge Of Compliance In Beef Hormone Dispute*, Inside U.S. Trade, Nov. 13, 2003, Issue 46, *available at* 2003 WLNR 87370.

30. Request for Consultations by the European Communities, *United States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS317/1 (Dec. 10, 2004); Request for Consultations by the United States, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/1 (Dec. 10, 2004).

31. *U.S., EU Face Major Hurdle On Identifying Aircraft Subsidies Under Deal*, Inside U.S. Trade, Jan. 14, 2005, § 2, *available at* 2005 WLNR 534884.

32. Request for Consultations by Japan, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/1 (Nov. 29, 2004).

33. Request for Consultations by Thailand, *United States—Provisional Anti-Dumping Measures on Shrimp from Thailand*, WT/DS324/1 (Dec. 14, 2004).

34. Request for Consultations by the European Communities, *United States—Section 776 of the Tariff Act of 1930*, WT/DS319/1 (Sept. 11, 2004).

35. Appellate Body Report, *United States—Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R (Jan. 19, 2004).

contribution.[36] But it reversed the Panel's finding regarding the appropriate benchmark to be used to measure the benefit provided.[37]

While the Panel declared that an investigating authority was required to measure stumpage fees against private prices in the country of origin, the Appellate Body adopted a different test when the investigating authority establishes that the market in the exporting country is distorted by the government's predominant role in the scrutinized market. In such cases, an investigating body may use reference or benchmark prices other than those prevalent in the subsidizing country to determine the benefit.[38] Despite this change, the Appellate Body did not determine that the comparison price applied by the DOC in this case conformed to the provisions of the Agreement on Subsidies and Countervailing Measures (Sc Agreement).[39]

In March, a Panel reviewing the U.S. International Trade Commission's (ITC) injury determination held that the ITC's finding of a "likely imminent substantial increase in imports" did not meet the objectivity standard required from an investigating authority.[40] The Panel held that it must be "clear from the determination that the investigating authority has evaluated how the future will be different from the immediate past, such that the situation of no present material injury will change in the imminent future to a situation of material injury, in the absence of measures."[41] The Panel also declared that in failing to meet this standard, the ITC's determination was inconsistent with the Anti-Dumping Agreement.

In April, a different Panel upheld the legitimacy of the DOC's antidumping duties, but held that its method of calculating dumping margins using zeroing was inconsistent with article 2.4.2 of the Anti-Dumping Agreement.[42] In August, the Appellate Body upheld the Panel's majority decision on zeroing.[43]

b. United States—Sunset Reviews of Antidumping Measures on Oil Country Tubular Goods from Argentina

In July 2004, a Panel issued a mixed ruling regarding an expedited DOC sunset review of an antidumping duty order covering oil country tubular goods from Argentina.[44] The Panel held that section 751(c)(4)(B) of the 1930 Tariff Act regarding affirmative waivers, certain sections of the DOC's Regulations regarding deemed waivers, and section II.A.3 of the Sunset Policy Bulletin were inconsistent with the Anti-Dumping Agreement. On the other hand, the Panel found that sections 752(a)(1) and (5) of the Tariff Act that deal with the likelihood of injury recurrence, were not inconsistent with the Anti-Dumping Agree-

36. *Id.* at 66.

37. *Id.*

38. *Id.*

39. *Id.* at 67.

40. Panel Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada*, 121, WT/DS277/R (Mar. 22, 2004).

41. *Id.* at 99.

42. Panel Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (Apr. 13, 2004).

43. Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004); Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton Type Bed Linen from India*, WT/DS141/AB/RW (Apr. 8, 2003).

44. Panel Report, *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R (July 16, 2004).

ment.[45] The Panel also found that certain actions of the DOC and the ITC were not inconsistent with the WTO Agreements.

After the United States and Argentina appealed the Panel decision, the Appellate Body reversed the Panel's characterization of section II.A.3 of the Sunset Policy Bulletin as inconsistent with the Anti-Dumping Agreement.[46] The Appellate Body found the Panel did not "make an objective assessment of the matter" as required by the Dispute Settlement Understanding. But the Appellate Body upheld the Panel's findings of inconsistency regarding the sections of the Tariff Act and the DOC's Regulations.[47]

c. United States—Subsidies on Upland Cotton

In the first major ruling on the Peace Clause,[48] the Panel found that the U.S. export credit guarantee programs and a category of Step 2 marketing payments offered to exporters were prohibited export subsidies under articles 5(c) and 6.3(c) of the SCM Agreement.[49] The Panel found a causal link between certain U.S. price-contingent payments and significant price suppression of cotton on the world market. But the Panel did not find a causal link regarding U.S. non-price contingent payments, including the production-based Product Flexibility Contracts, Direct Payments, and crop insurance subsidies. The Panel ruled that the price-contingent payments were trade-distorting domestic subsidies that did not qualify as "green box" subsidies.[50] The Panel recommended that the prohibited cotton subsidies be withdrawn "without delay."[51] The United States appealed the Panel Report.[52] And the Appellate Body delayed its report until March 2005.[53]

2. *Other Disputes*

a. Mexico—Measures Affecting Telecommunications Services

In April 2004, the Panel held that Mexico acted inconsistently with its commitments under section 2.2(b) of a 1996 WTO Reference Paper that was incorporated into Mexico's commitments under the General Agreement on Trade in Services (GATS) and into Mexican law, by failing to ensure its major telecommunications supplier issued cost-oriented rates.[54] The Panel found that Mexico failed to maintain "appropriate measures" to prevent anti-competitive practices as mandated by the Reference Paper.[55] The Panel also found that

45. *Id.* at 80-81.

46. Appellate Body Report, *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (Nov. 29, 2004).

47. *Id.* at 134.

48. Until January 2004, article 13 of the Agreement on Agriculture (the "Peace Clause") protected most agricultural subsidies from dispute settlement challenges, provided that those subsidies did not exceed the agreed ceilings.

49. Panel Report, *United States—Subsidies on Upland Cotton*, 262-329 WT/DS267/R (Sept. 8, 2004).

50. *Id.* at 102. The fundamental requirement for a measure to qualify for "green box" treatment is that it must have no, or at most minimal, trade-distorting or production-related effects.

51. *Id.* at 350.

52. Appeal Notification, *United States—Subsidies on Upland Cotton*, WT/DS267/17 (Oct. 20, 2004).

53. Appellate Body Communication, *United States—Subsidies on Upland Cotton*, WT/DS267/AB/18 (Dec. 20, 2004).

54. Panel Report, *Mexico—Measures Affecting Telecommunications Services*, WT/DS204/R (Apr. 2, 2004). This dispute arose out of the difficulties experienced by two U.S. telecommunications providers in competition with the dominant Mexican telecommunications provider.

55. *Id.* at 76.

Mexico failed to meet its obligations under sections 5(a) and (b) of the GATS Annex on Telecommunications by failing to ensure access to telecommunications networks on reasonable terms by U.S. service providers.[56] The Panel found no violation of sections 2.2(b), 5(a), or 5(b) of the Reference Paper regarding cross-border supply.[57]

This decision marks the first time that a WTO Panel has concluded that the inadequacy of a member's antitrust measures is a violation of its WTO commitments.[58] The United States and Mexico subsequently reached an agreement resolving their differences.[59] Mexico agreed to allow foreign carriers to (1) negotiate their own rates with Mexican carriers for completing calls into the Mexican market[60] and (2) offer long-distance services by first buying minutes from telecommunications companies that have networks in Mexico, and then reselling those minutes through pre-paid phone cards and other means.[61]

b. United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services

Antigua challenged U.S. measures that prohibited Antiguan-based firms from providing U.S.-based customers with Internet gambling services.[62] The Panel held that the United States' Schedule under the GATS included specific commitments on gambling services, and that in order to satisfy the necessity test of article XIV the United States had to assess the availability of WTO-consistent alternatives before enacting the prohibition.[63] The Panel emphasized that WTO members have a right to regulate, and even prohibit, gambling activities, but that the U.S. prohibition was not consistent with the WTO.[64] The Panel acknowledged that the United States may not have intended to make the commitments at issue, but held that the Panel was required to interpret and apply the law, not to second-guess U.S. intentions.[65]

Furthermore, the Panel found that the restrictions on gambling services served important interests, but held that the United States was obliged to consider WTO-consistent alternatives through "good faith bilateral or multilateral consultations and/or negotiations with Antigua" before enacting the prohibition.[66] Because the United States had not engaged in such consultations and negotiations, the Panel held that the United States failed to dem-

56. *Id.* at 224-25.

57. *Id.* at 225.

58. For a discussion regarding the significance of this decision, *See* Rajeev Sharma & Jason Rosychuk, *The Collision of Trade and Competition Law: Assessing the Aftermath of the WTO Telemex Decision*, at 115-17 (July 15, 2004), *available at* http://www.heenanblaikie.com/en/media/pdfs/pdf/20040625_sharma.pdf.

59. *Mexico To Cut Rates, Open Market In Telecom Settlement With U.S*, INSIDE U.S. TRADE, Jan. 14, 2005, § 23, *available at* 2004 WLNR 80791.

60. Previously, the Mexican carrier Telmex negotiated a single rate that all Mexican carriers had to use when completing calls from the United States.

61. Agreement Notification, *Mexico-Measures Affecting Telecommunications Services*, WT/DS204/7/S/L/161 (June 2, 2004).

62. Panel Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004).

63. *Id.* at 272.

64. *Id.* at 273.

65. *Id.*

66. *Id.* at 261.

onstrate the necessity of the prohibition, as required under article XIV of the GATS.[67] The United States has indicated its intention to appeal the decision.[68]

c. Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain

In April 2004, the Panel rejected a U.S. claim that actions by Canada and the Canadian Wheat Board (CWB) were inconsistent with international rules on state trading enterprises, but held that the CWB discriminated against imported grain through its policies on railroad transport fees, grain segregation, and the entry authorization requirement.[69] In August, the Appellate Body affirmed the Panel's decision.[70]

d. European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries

India challenged the tariff preferences given to certain developing countries under the EC's Generalized System of Preferences (GSP).[71] In 2003, a WTO Panel ruled in India's favor, finding that these additional tariff preferences unfairly discriminated between developing countries in violation of the most favored nation (MFN) principle under article I:1 of the GATT.[72] This decision was appealed by the EC.[73]

In the appeal, the EC argued that the Panel incorrectly concluded that the Special Arrangements to Combat Drug Production and Trafficking provided in Council Regulation (EC) No.2501/2001 are inconsistent with article I:1 of the GATT.[74] The Panel had found that the GATT's "Enabling Clause"[75] is an exception to article I:1, that the Enabling Clause does not exclude the applicability of article I:1, and that the EC had the burden of proving that the Drug Arrangements were consistent with the Enabling Clause.[76]

On April 7, 2004, the Appellate Body upheld the Panel's findings on the Enabling Clause.[77] The Enabling Clause requires WTO members to provide "non-reciprocal and non discriminatory preferences" to developing countries under their GSP schemes.[78] How-

67. Article XIV allows restrictions on these grounds provided that they are not applied in an arbitrary or discriminatory manner or used to cloak restrictions on trade.

68. Office of the United States Trade Representative, Statement from USTR Spokesman Richard Mills Regarding the WTO Gambling dispute with Antigua and Barbuda (Nov. 10, 2004), *available at* http://www.ustr.gov; *U.S. Unlikely to Comply with Gambling Ruling Even If Appeal Fails*, INSIDE U.S. TRADE, Nov. 12, 2004, § 46, *available at* 2004 WLNR 7635621.

69. Panel Report, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R (Apr. 6, 2004).

70. Appellate Body Report, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, 73-74, WT/DS276/AB/R (Aug. 30, 2004).

71. The preferences were awarded based on various steps that the countries had taken to combat the trafficking and production of illegal drugs.

72. Panel Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R (Dec. 1, 2003) [hereinafter Granting Tariff Preferences].

73. Appeal Notification, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/7 (Jan. 8, 2004).

74. *Id.*

75. GATT, *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*, L/4903 (Nov. 28, 1979), *available at* http://www.wto.org/english/docs_e/legal_e/enabling_e.pdf [hereinafter *Differential*].

76. *See* Granting Tariff Preferences, *supra* note 72.

77. Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, 76 WT/DS246/AB/R (Apr. 7, 2004).

78. *Differential*, *supra* note 75.

ever, the Appellate Body found that it was incumbent upon India to raise the Enabling Clause in making its claim of inconsistency with article I:1, and interpreted the terms "non discriminatory" and "developing countries" in a different manner than the Panel.[79]

e. European Communities—Export Subsidies on Sugar

On October 15, 2004, a WTO Panel found that the EC had exceeded its scheduled commitments on sugar exports every year since 1995.[80] In addition, the Panel concluded that the EC acted inconsistently with its obligations under the Agreement on Agriculture by providing export subsidies in excess of its budgetary outlay commitment level of EUR499.1 million per year.[81] As a result of the findings under the Agreement on Agriculture, the Panel declined to rule on claims under the SCM Agreement as it found such a ruling unnecessary.[82] The EC plans to appeal the ruling.[83]

C. Implementation

Disputes over the implementation of particular Panel and Appellate Body decisions continue to dominate the DSB agenda. These cases can be grouped into two categories—disputes over a lack of compliance and disputes over the meaning of compliance.

1. *Lack of Compliance*

In United States—Continued Dumping and Subsidy Offset Act of 2000, the United States failed to repeal the Continued Dumping and Subsidy Offset Act (Byrd Amendment), which mandates the distribution of the antidumping and countervailing duties to companies that brought or supported AD/CVD petitions, by the December 27, 2003 deadline.[84] In response, Brazil, Canada, Chile, the EC, India, Korea, Japan, and Mexico requested authorization to suspend concessions against U.S. products in an amount equal to the amount of distributions made to U.S. companies. The arbitrator ruled that each complainant could suspend concessions in an amount equal to 72 percent of the disbursements made with respect to that country's exports.[85] Two bills are currently pending to repeal the Byrd Amendment, but Congress has not taken any action on either bill.[86]

In United States—Section 211 Omnibus Appropriations Act of 1998 (Section 211), the United States failed to repeal or amend a law that was found to discriminate against the

79. *Id.*

80. Panel Report, *European Communities—Export Subsidies on Sugar*, 199, WT/DS265/R (Oct. 15, 2004); Panel Report, *European Communities—Export Subsidies on Sugar*, 199, WT/DS266/R (Oct. 15, 2004); Panel Report, *European Communities—Export Subsidies on Sugar*, 199, WT/DS283/R (Oct. 15, 2004).

81. *Id.*

82. *Id.* at 198.

83. *See* Int'l Centre for Trade and Sustainable Development, *Panel Finds EU's Sugar Exports Vastly Overstep WTO Limits*, Bridges, Oct. 2004, at 13, *available at* http://www.ictsd.org/monthly/index.htm.

84. Arbitration under Article 21.3(c), *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/14 (June 13, 2003).

85. *Byrd Decision Sides With U.S. In Limiting Retaliation To Trade Damage*, Inside U.S. Trade, Sept. 3, 2004, at § 36, *available at* 2004 WLNR 69727.

86. United States Status Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/16/Add.11 (Dec. 7, 2004); *see also* Trade Readjustment and Development Enhancement for America's Communities Act of 2003, S. 1299, 108th Cong. (2003); To Repeal Section 754 of the Tariff Act of 1930, H.R. 3933, 108th Cong. (2004).

rights of certain nationals in the enforcement of trademark and trade name rights.[87] Four bills were introduced in the U.S. Congress in 2003 and 2004, but no significant action has been taken on any of these bills.[88] The United States and the EC agreed on a compliance period ending December 31, 2004 that was subsequently extended to June 30, 2005.[89]

In United States—Section 110(5) of the U.S. Copyright Act, the United States failed to repeal or amend the Fairness in Music Licensing Act of 1998, which permitted the playing of radio and television music in public places without paying a royalty fee.[90] A temporary arrangement reached in June 2003, by which the EC received monetary compensation for the violation, ended on December 20, 2004. By the end of 2004, Congress had taken no action to change the law.[91]

2. *Meaning of Compliance*

In United States—Tax Treatment for "Foreign Sales Corporations," the United States repealed two laws that were found to provide de facto export subsidies to U.S. exporters.[92] On March 1, 2004, the EC began imposing WTO-authorized[93] *ad valorem* tariffs on U.S. products, initially at a rate of 5 percent and increasing 1 percent each month up to a maximum rate of 17 percent.[94] In October 2004, President Bush signed the American Jobs Creation Act of 2004, which repealed both the Extraterritorial Income Act (ETI) and its predecessor, the Foreign Sales Corporation program.[95] In response, the EC lifted the tariffs effective January 1, 2005. But the EC sought consultations on whether the new law complied with the prior decisions and threatened to reimpose the tariffs as early as January 1, 2006, if a WTO Panel agreed that the new law was WTO-inconsistent.[96]

IV. U.S. Trade Remedy Cases

A. Court Of International Trade And Federal Circuit Cases

1. *Antidumping Cases: Department of Commerce Determinations*

In *Tung Fong Industrial Co. v. United States*, the Court of International Trade (CIT) reviewed the DOC's final affirmative antidumping determination regarding stainless steel

87. Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Jan. 1, 2002); Appellate Body and Panel Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/9 (Feb. 6, 2002).

88. S. 1299, *supra* note 86; H.R. 3933, *supra* note 86; Computer Software Privacy and Control Act of 2004, H.R. 4255, 108th Cong. (2004); A Bill to Modify the Prohibition on Recognition by United States Courts of Certain Rights Relating to Certain Marks, Trade Names, or Commercial Names, S. 2373, 108th Cong. (2004).

89. Modification of the Agreement under Article 21.3(b) of the DSU, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/15 (Dec. 21, 2004).

90. Panel Report, *United States—Section 110(5) of US Copyright Act*, WT/DS160/8 (July 31, 2000).

91. United States Status Report, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/24/Add.1 (Dec. 7, 2004).

92. Recourse to Arbitration by the United States, *United States—Tax Treatment for Foreign Sales Corporations*, WT/DS108/ARB (Aug. 30, 2002); Recourse to Article 21.5 of the DSU by the European Communities, *United States—Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/RW (Jan. 14, 2002).

93. Recourse by the European Communities, *United States—Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/26 (Apr. 25, 2003).

94. *EU Slaps U.S. Products With 5 Percent Duty For Failing To Repeal FSC*, Inside U.S. Trade, Mar. 1, 2004.

95. American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 101 (2004).

96. *EU Approves Regulation Repealing FSC Sanctions, Possibly Reimposing Them*, Inside U.S. Trade, Jan. 21, 2005.

butt-weld pipe fitting from the Philippines.[97] Soon after initiating its investigation, the DOC learned that the grounds on which it had based the initiation—the petition's assurances that two foreign manufacturers had home market sales at lower prices than sales in the U.S. market—were false.[98] The CIT held that, on remand, the DOC must reconsider the adequacy of the underlying antidumping duty petition and the consequences of falsity at the investigation's "very linchpin" (evidence of dumping).[99]

In *Shanghai Foreign Trade Enterprises Co. v. United States*, the CIT reviewed the DOC's affirmative final antidumping duty determination concerning non-malleable cast iron pipe fitting from China.[100] The CIT first held that the DOC had improperly used non-industry-specific data obtained from the Reserve Bank of India to calculate surrogate values for selling, general and administrative expenses, factory overhead, and profit.[101] The record contained a better source—the financial data of Indian producers of merchandise comparable to the subject imports. Moreover, the CIT held that the DOC had improperly used Indian import statistics to value the cost of foundry pig iron because the DOC did not explain its departure from prior norms.[102] The prior norms were to use import statistics only after concluding that they were based on commercially and statistically significant quantities.[103]

In *Timken Co. v. United States*,[104] the Court of Appeals for the Federal Circuit (CAFC) held that a statute[105] prohibiting parties from bringing claims directly against the government for acting inconsistently with the Uruguay Round Agreements Act did not prevent the CAFC from hearing the appeal because the CAFC could interpret the U.S. law under which the claim was brought so as to avoid a conflict with international obligations.[106] The DOC also properly zeroed any negative dumping margins because its zeroing practice arose from a permissible construction of the statutory definition of "dumping margin"[107] as "the amount by which the normal value *exceeds* the export price or constructed export price of the subject merchandise."[108]

Moreover, a WTO Appellate Body decision[109] holding that zeroing did not constitute a "fair comparison" between export price and constructed export price under the Anti-Dumping Duty Agreement, did not mandate an analogous result in the DOC case because the WTO decision did not bind the United States and involved an investigation rather than an administrative review.[110] In addition, the DOC properly applied the adverse-facts-available rate to the entered value as opposed to the sales because (1) further manufacturing

97. Tung Fong Indus. Co. v. United States, 318 F. Supp. 2d 1321 (Ct. Int'l Trade 2004).
98. *See id.* at 1326.
99. *See id.* at 1333.
100. Shanghai Foreign Trade Enters. Co. v. United States, 318 F. Supp. 2d 1339 (Ct. Int'l Trade 2004).
101. *See id.*
102. *See id.*
103. *See id.* at 1351-53.
104. Timken Co. v. United States, 354 F.3d 1334 (Fed. Cir. 2004).
105. 19 U.S.C. § 3512(c) (2004) (barring certain direct claims against the government).
106. *See* Timken, 354 F.3d at 1341.
107. 19 U.S.C. § 1675(a)(2) (2004) (defining "dumping") (emphasis added).
108. *See* Timken, 354 F.3d at 1343.
109. Appellate Body Report, *European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS/141/AB/R (Mar. 1, 2001) [hereinafter Antidumping Duties].
110. *See* Timken, 354 F.3d at 1344-45 (finding the DOC's zeroing practice reasonable even in light of the WTO decision).

in the United States added significant value; (2) the DOC's method was consistent with both the relevant regulation[111] and prior case law;[112] and (3) the method appropriately balanced the goal of accuracy against the goal of inducing compliance.[113]

In *Jilin Henghe Pharmaceutical v. United States*, the CIT held that once a final antidumping determination has been invalidated, it cannot serve as a basis for the imposition of additional duties.[114] The DOC issued liquidation instructions directing Customs to liquidate Jilin Henghe Pharmaceutical's entries of bulk aspirin pursuant to a previously invalidated antidumping order. The CIT, however, found that the instructions did not reflect the finding of a *de minimis* dumping margin, and there was no statutory foundation legitimatizing the liquidation of Jilin's entries under the DOC's discredited determination.[115]

In *SNR Roulements v. United States*,[116] the CIT upheld the DOC's practice of zeroing as proper and found that the WTO case, *EC—Bed Linen*, was neither binding nor persuasive in light of Commerce's longstanding use of converting negative dumping margins to zero.[117] The CIT also found that the DOC's use of adverse facts is reasonable if the importer does not cooperate fully or fails to show why its methodology for collecting facts is not distortive.

In *Hontex Enterprises., Inc. v. United States*, the CIT affirmed that the DOC could collapse affiliated exporters in non-market economies like China, even though the governing regulations were directed at producers, not exporters.[118] But the CIT held that the DOC's decision to collapse two exporters was not supported by substantial evidence.[119]

2. *Countervailing Duty Cases: Commerce Determinations*

In *Allegheny Ludlum Corp. v. United States*, the CAFC reviewed inconsistent findings by the DOC in two remand determinations.[120] In each determination, the DOC applied a different privatization methodology. The DOC's first remand determination applied the same-person methodology and found that countervailable subsidies survived the privatization of a French steel producer.[121] The DOC's second remand determination, by contrast, found that countervailable duties did not survive privatization because an overwhelming majority of those purchasing shares in the privatized entity had paid full market value, fair market value, or even more for it, effectively offsetting the prior subsidy.[122] The CAFC

111. 19 C.F.R. § 351.212(b)(1) (2004) (stating how the DOC would calculate the assessment rate).

112. NTN Bearing Corp. of Am. v. United States, 186 F. Supp. 2d 1257, 1315 (Ct. Int'l Trade 2002) (finding that the DOC could apply adverse facts available to entered value when further manufacturing occurred).

113. *See* Timken, 354 F.3d at 1345-46.

114. Jilin Henghe Pharm. Co. v. United States, 342 F. Supp. 2d 1301 (Ct. Int'l Trade 2004).

115. *See id.* at 13. The court found that neither 19 U.S.C. §§ 1516a(c)(1) nor 1516a(e) provides such an outcome.

116. SNR Roulements v. United States, 341 F. Supp. 2d 1334 (Ct. Int'l Trade 2004).

117. *See* Antidumping Duties, *supra* note 109; *see also* Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Apr. 13, 2004).

118. Hontex Enters., Inc. v. United States, 342 F. Supp. 2d 1225 (Ct. Int'l Trade 2004).

119. *Id.*

120. Allegheny Ludlum Corp. v. United States, 367 F.3d 1339 (Fed. Cir. 2004). A case separate from, yet related to and argued concurrently with Allegheny Ludlum, and applying the same reasoning, was GTS Indus. S.A. v. United States, 97 Fed. Appx. 333, (Fed. Cir. 2004).

121. *Id.* at 1342.

122. *See id.* Note that after the CIT affirmed the DOC's second remand determination in 2002, a 2003 WTO appellate report found that the same-person test violated the Uruguay Round Agreements Act. So in 2003, the DOC replaced it, prospectively, with a privatization methodology that examined instead the terms and conditions of the change in ownership, including whether the new owners had paid fair market value for the privatized business. *See id.* at 1342-43.

upheld the DOC's findings, holding that (1) the DOC must not apply "a *per se* rule in disguise" such as the same-person methodology[123] and (2) the CIT's second remand order properly focused on the particulars of privatization.[124]

Similarly, in *AG der Dillinger Hüttenwerke v. United States*, the CIT held that the DOC's same-person methodology was illegal.[125] In *Bethlehem Steel Corp. v. United States*, the CIT found that the DOC violated an agreement with the Brazilian Government to suspend a countervailing duty investigation of hot-rolled, flat-rolled, carbon-quality steel from Brazil.[126] The DOC violated the agreement by failing to meet with the domestic producers for two and a half years after signing the agreement, and then meeting with the domestic producers only two weeks before the DOC filed its final amended remand results with the CIT.[127] Furthermore, the DOC failed to address the extent of the domestic industry's opposition or why the CIT should prefer the DOC's judgment on the industry's best interests over the judgment of the industry itself.[128]

3. *Antidumping Cases: International Trade Commission Determinations*

In *Co-Steel Raritan, Inc. v. International Trade Commission*, the ITC terminated its investigation as to subject imports from Egypt, South Africa, and Venezuela after finding those imports to be negligible in its preliminary determination.[129] After the DOC amended the antidumping investigation's scope to cover subject imports from Egypt, South Africa, and Venezuela, the CIT ordered a remand and a negligibility determination.[130] The CAFC held that the CIT erred in doing so because the ITC had properly based its original preliminary determination on the facts as they existed at the time of the vote.[131]

In *Nippon Steel Corp. v. United States*, the CIT held that the affirmative injury determination on Japanese imports was unsupported by substantial evidence and, thus, compels a negative material injury determination.[132] The court concluded that further reconsideration would be futile because the ITC was unable to obtain new evidence to significantly supplement the record for several reasons, including the passage of time.[133] The court considered whether to leave the issue of reopening the record for further investigation to the ITC's discretion, as it ordinarily would, particularly because non-subject imports were not fully studied in this case. Here, the court believed such information would not change the result, and it would not be fair to parties involved to delay the matter further.[134] The court remanded the issue with instructions to issue a negative material injury determination.[135]

123. *See id.* at 1345-48.

124. *See id.* at 1348-49. In a concluding dictum, the CAFC also cast doubt on the second remand determination's assumption that the statute required the DOC to ascribe each subsidy's benefit either to the company or to its new purchasers, but never to both. Absent argument from any party, however, this inadequacy in the DOC's reasoning did not, according to the CAFC, necessitate disturbing the DOC's second remand analysis. *See id.* at 1349-50.

125. AG der Dillinger Hüttenwerke v. United States, 310 F. Supp. 2d 1347, 1357-58 (Ct. Int'l Trade 2004).

126. Bethlehem Steel Corp. v. United States, 316 F. Supp. 2d 1309, 1311 (Ct. Int'l Trade 2004).

127. *See id.* at 1313.

128. *See id.* at 1320-22.

129. Co-Steel Raritan, Inc. v. Int'l Trade Comm'n, 357 F.3d 1294 (Fed. Cir. 2004).

130. *See id.* at 1302.

131. *See id.* at 1309-17.

132. Nippon Steel Corp. v. United States, 350 F. Supp. 2d 1186 (Ct. Int'l Trade 2004).

133. *Id.*

134. *Id.* at 1222.

135. *Id.*

4. *TAA and NAFTA-TAA Cases*

In two cases, the CAFC held that statements from company officials constituted substantial evidence supporting Labor's negative determination, as long as the statements were creditworthy and the other evidence did not contradict them.[136] But in *Former Employees of Tyco Electronics v. U.S. Department of Labor*, the CIT held that when such statements were contradicted by other information, the government's position was no longer substantially justified.[137]

5. *CAFC Byrd Amendment Case*

In *Candle Corporation of America v. U.S. International Trade Commission*, the CAFC held that a company that initially declined to support the original antidumping petition and later expressly opposed it could not seek distributions under the Byrd Amendment, even if it subsequently acquired almost all the assets of two entities that had supported the petition.[138]

6. *CIT Preliminary Injunction Cases*

On December 30, 2004, the CIT issued a preliminary injunction in *U.S. Association of Importers of Textiles and Apparel v. United States*, which enjoined the Committee for the Implementation of Textile Agreements (CITA) from considering or acting on any threat based petitions for the imposition of "Special Textile Safeguard" quotas on textile and apparel articles from the People's Republic of China.[139] On January 1, 2005, all quotas on the importation of textile and apparel products made in WTO member countries were eliminated pursuant to the Uruguay Round Agreements.[140] Under China's Protocol on Accession to the WTO, however, the United States retained the authority to impose temporary textile-specific safeguard measures on Chinese imports if circumstances warranted such an imposition.[141] In May 2003, CITA initially stated that safeguard requests must be based on actual market disruption, but it later determined that safeguards could be based only on a threat of a possible surge in imports.[142]

Beginning in October 2004, the CITA agreed to consider twelve threat-based petitions, which alleged the threat of market disruption rather than actual market disruption.[143] The

136. *See* Former Employees of Barry Callebaut v. Chao, 357 F.3d 1377, 1383 (Fed. Cir. 2004) (holding that company officials' creditworthy, uncontradicted, sworn affidavits constituted substantial evidence); Former Employees of Marathon Ashland Pipe Line LLC v. Chao, 370 F.3d 1375, 1385 (Fed. Cir. 2004) (holding, inter alia, that Labor properly based its negative adjustment assistance determination on statements of company officials, because the Secretary reasonably concluded that those statements were creditworthy and not contradicted by other evidence).

137. Fomer Employees of Tyco Elec. v. U.S. Dep't of Labor, 350 F. Supp. 2d 1075 (Ct. Int'l Trade 2004).

138. Candle Corp. of Am. v. U.S. Int'l Trade Comm'n, 374 F.3d 1087, 1089-1090 (Fed. Cir. 2004).

139. *See* U.S. Ass'n of Importers of Textiles and Apparel v. United States, 350 F. Supp. 2d 1342 (Ct. Int'l Trade 2004).

140. *See* GATT Agreement on Textiles and Clothing, Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 1A, 33 I.L.M. 1125 (Apr. 15, 1994); *see also* 19 U.S.C. § 3511 (1994) (codifying approval of the Uruguay Round Agreements).

141. *See* World Trade Organization, Ministerial Declaration of 10 November 2001, WT/L/432; *see also* World Trade Organization, Ministerial Conference of 13 November 2001, ¶ 241-42, 342, WT/MIN(01)/3/Add.2.

142. *See* U.S. Ass'n of Importers of Textiles and Apparel, 350 F. Supp. 2d at 1342.

143. *Id.* at 1346. The petitions originated from members of the American Manufacturing Trade Action Coalition, which represents U.S. textile makers, labor unions, and other similar trade groups.

Court found that because the CITA accepted mere threat-based requests, the Association had shown both permanent economic loss and irreparable harm to business practices.[144] In contrast, the CITA will still be able to effectively administer the textile-specific safeguards guaranteed by China's Accession Agreement.[145]

B. Commerce And ITC Determinations

1. *Softwood Lumber from Canada*

The DOC issued a revised final affirmative countervailing duty determination with respect to softwood lumber products from Canada as a result of the WTO Appellate Body's review of the DOC's earlier final determination.[146] The DOC also issued final results in the antidumping and countervailing duty administrative reviews of softwood lumber from Canada. In its antidumping duty review for May 2002 through April 2003, the DOC issued weighted-average margins ranging from 1.83 percent to 10.50 percent.[147] In its countervailing duty review for imports made during the same period, the DOC issued a country-wide *ad valorem* subsidy rate of 17.18 percent for all Canadian producers and exporters of the merchandise under review.[148] As part of its final results in the countervailing duty review, the DOC found that four respondents received either zero or *de minimis* net subsidies during the period reviewed, and it also rescinded its review with respect to seven respondents.

2. *Shrimp from Brazil, China, Ecuador, India, Thailand, and Vietnam*

In the antidumping duty investigations of frozen and warm-water canned shrimp from Brazil, China, Ecuador, India, Thailand, and Vietnam, the DOC investigated a large number of respondents and reviewed critical circumstances allegations made by petitioners for all the countries except Brazil and Ecuador.[149]

3. *Pure Magnesium from Canada*

The DOC revoked the antidumping duty order on pure magnesium from Canada after an Extraordinary Challenge Committee (ECC) reviewed issues raised by a prior NAFTA Binational Panel, and the United States requested the formation of an ECC to review

144. *Id.*

145. *Id.* at 1349. The Association also questioned whether CITA's delegated authority to administer textile agreements includes the authority to issue regulations pursuant to China's Accession Agreement. If successful on the merits, CITA's China Textile Safeguard Regulations could be invalidated. Because of the limited scope of the preliminary injunction, the Court did not rule on this question. *See id.* at 1350.

146. Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Softwood Lumber Products From Canada, 69 Fed. Reg. 75305-02 (Dec. 16, 2004).

147. Notice of Final Results of Antidumping Duty Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products From Canada, 69 Fed. Reg. 75921-01 (Dec. 20, 2004).

148. Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products From Canada, 69 Fed. Reg. 75917-01 (Dec. 20, 2004).

149. International Trade Administration Office of Public Affairs, *Fact Sheet: Initiation of Antidumping Duty Investigations*, *available at* http://www.ita.doc.gov/media/FactSheet/0104/shrimp_012104.html (last visited June 12, 2005).

certain issues raised by the Panel.[150] Although the ECC found that the Panel had manifestly exceeded its powers by failing to apply the correct standard of review, the ECC went on to conclude that the Panel's actions did not pose a threat to the integrity of the binational review process. It affirmed the Panel's decision.[151]

4. *Wooden Bedroom Furniture from China*

In the antidumping duty investigation of wooden bedroom furniture from China, the DOC calculated margins ranging from *de minimis* to 198.08 percent for those respondents that were individually investigated, and a rate of 8.64 percent for the 115 firms qualifying for separate rates treatment.[152] During the final phase of its investigation, all six Commissioners of the ITC found that imports from China were causing material injury to the U.S. industry, and an antidumping duty order was subsequently issued.[153]

C. NAFTA BINATIONAL PANEL DECISIONS

1. *Softwood Lumber From Canada—Countervailing Duty Determination*

Following a prior decision by the Panel remanding the case to the DOC to redetermine the benefit, the DOC issued its Remand Determination on January 12, 2004.[154] Subsequently on June 7, 2004, the Panel rendered a second decision, remanding the matter to the Investigating Authority to address certain issues and redetermine the benefit, if any.[155] After reviewing the statutory and regulatory basis for the appropriate methodology, the Panel considered arguments relating to the Investigating Authority's use of private log prices and determined it would not disturb the DOC's finding that private log prices are useable as benchmarks.[156] The Panel also considered the use of cross-border benchmarks, and upheld the DOC's rejection of cross-border comparisons[157] finding that the rejection of export prices is not contrary to law.[158] In an extensive discussion of benchmark calculations, particularly relating to the various Canadian provinces, the Panel directed the DOC to recalculate the benchmark price for stumpage, taking into account the actual market

150. Pure Magnesium From Canada; Notice of NAFTA Binational Panel's Final Decision, Amended Final Results of Full Sunset Review and Revocation of Antidumping Duty Order, 69 Fed. Reg. 70649-02 (Dec. 7, 2004).

151. *Id.*

152. *Chinese Bedroom Furniture Dumped on U.S.Market, Commerce Says* (Nov. 9, 2004), *available at* http://hongkong.usconsulate.gov/uscn/trade/general/doc/2004/110901.htm.

153. George R. Tuttle, *Commerce Issues Antidumping Order and Revisions and Revisions to Final Determination in Case on Wooden Bedroom Furniture From China* (Jan. 11, 2005), *available at* http://www.tuttlelaw.com/newsletters; International Trade Administration Office of Public Affairs, *Fact Sheet: Final Determination in the Antidumping Duty Investigation on Imports of Wooden Bedroom Furniture from the People's Republic of China, available at* http://hongkong.usconsulate.gov.uscn/trade/general/doc/2004/110901.htm (last visited June 12, 2005).

154. International Trade Administration Office of Public Affairs, *Remand Determination: Implementing a NAFTA Panel Decision, available at* http://www.ita.doc.gov/media/factsheet/0104/lumber_011204.html (last visited June 12, 2005).

155. *See* Second Remand Determination, *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, NAFTA Binational Panel Review, Secretariat File No. USA-CDA-2002-1904-03 at 33-34, *available at* ia.ita.doc.gov/remands/usa-cda-2002-1904-03-cvd.pdf (last visited June 12, 2005).

156. *Id.* at 11.

157. *Id.* at 12.

158. *Id.* at 13.

conditions that govern the sale of timber in British Columbia and Ontario.[159] The Panel required the DOC to redo its benchmark calculations for Quebec, Ontario, Manitoba, British Columbia, Alberta, and Saskatchewan.[160] After considering profit adjustment issues, the Panel remanded the question of the proper profit adjustment for all provinces.[161] Finally, the Panel considered numerator and denominator issues, as well as company exclusions.

Following remand, the DOC issued its Second Remand Determination and the Panel issued its Decision on Second Remand.[162] Finding that the DOC addressed each of the issues previously remanded by the Panel, but noting the considerable controversy regarding the results of its consideration, the Panel discussed the issues according to province.[163]

2. *Softwood Lumber From Canada Injury Determination*

In another decision issued in 2004 with respect to softwood lumber, the NAFTA Binational Panel rejected the ITC's remand determination that the U.S. industry was threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at less than fair value.[164] The Panel determined that the ITC remand determination that the domestic softwood lumber industry is threatened with material injury was not in accordance with law and is not supported by substantial evidence.

In its decision, the Panel did find that the ITC's remand determination that "square-end bed frame components and flangestock are part of a continuum of softwood lumber products defined as a single domestic like product is in accordance with the law and supported by substantial evidence."[165] But the Panel determined that the ITC's finding that the subject imports are "likely to have a significant price-depressing or suppressing effect on domestic prices in the imminent future is not supported by substantial evidence" and that "subject imports would increase substantially in the imminent future is, likewise, not supported by substantial evidence." Thus, the Panel found the ITC's "remand determination that the domestic softwood lumber industry is threatened with material injury by reason of subsidized imports and dumped imports from Canada to be not supported by substantial evidence."[166] The Panel remanded to the ITC the Remand Determination of Threat of Injury dated December 15, 2003, and directed the ITC to "conduct its threat of injury analysis consistent with the . . . conclusions of the Panel."[167]

After the ITC issued its Second Remand Determination, it was reviewed by the Panel, which subsequently rejected the ITC's determination that the U.S. industry was threatened

159. *Id.* at 19.

160. *Id.* at 21-25.

161. *Id.* at 27.

162. *See* Decision of the Panel on Second Remand, *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, NAFTA Binational Panel Review, Secretariat File No. USA-CDA-2002-1904-03 (Dec. 1, 2004), *available at* http://www.usembassycanada.gov/content/can_usa/trade_softwoodlumber_120104.pdf.

163. *Id.* at 13-24.

164. Remand Decision of the Panel, *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination*, NAFTA Binantional Panel Review, Secretariat File No. USA-CDA-2002-1904-07, at 51-52 (Apr. 19, 2004), *available at* http://www.sice.oas.org/dispute/nafta/english/uc02190407be.asp.

165. *Id.* at 6.

166. *Id.* at 44.

167. *Id.*

with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at less than fair value. The Panel remanded the case to the ITC for it to make a determination consistent with the decision of this Panel that the evidence on the record does not support a finding of material threat and to make that determination within ten days from the date of the Panel's decision.[168]

The Panel held that in its Second Remand Determination the ITC relied on the same record evidence the Panel had twice before held insufficient as a matter of law to support the ITC's affirmative threat finding and concluded that, by so doing, the Panel could reasonably conclude there is no other record evidence to support the ITC's affirmative threat determination.[169] The Panel determined that this case is one of those "rare circumstances" where a remand is not warranted.[170] Accordingly, the Panel remanded the case to the ITC to make a determination consistent with the decision of the Panel that the evidence on the record does not support a finding of threat of material injury. The determination had to be made no later than ten days from the date of the Panel decision.[171]

3. *Pure Magnesium From Canada*

In response to a request, the ECC convened to render a decision and order dismissing the challenge and affirming the Panel decision.[172] The basis for the challenge from the U.S. government was that the Panel "had manifestly exceeded its powers, authority or jurisdiction and seriously departed from a fundamental rule of procedure and violated the standard of review."[173] In its review of whether the three-prong test had been satisfied, the ECC held that (1) the Panel had failed to apply the correct standard of review and manifestly exceeded its powers, meeting the first prong of article 1904.13, and (2) the Panel's failure to apply the correct standard of review materially affected its decision, meeting the second prong of the challenge test.[174] The ECC, however, was unable to find that the Panel failed to apply U.S. law. Consequently, the ECC found that the Panel's decision did not threaten the integrity of the binational review process and, thus, the third prong of the extraordinary challenge test had not been met.[175]

V. Legislative Activity

In 2004, the 108th Congress adjourned after a flurry of legislative activity on a number of substantive trade bills. In particular, Congress approved several major pieces of trade legislation, including the implementation of legislation for the U.S.-Australia and U.S.-

168. *See* Second Remand Decision of the Panel, *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination*, NAFTA Binational Panel Review, Secretariat File No. USA-CDA-2002-1904-07, at 7 (Aug. 31, 2004), *available at* http://www.sice.oas.org/dispute/nafta/English/uc02190407ce.asp.

169. *Id.* at 2.

170. *See id.* at 5.

171. *Id.* at 13.

172. *See* Decision and Order of the Extraordinary Challenge Committee, *In the Matter of Pure Magnesium from Canada*, Secretariat File No. ECC-2003-1904-01USA at 11 (Oct. 5, 2004), *available at* http://www.sice.oas.org/dispute/nafta/english/ecc03190401e.asp.

173. *Id.* at 5.

174. *Id.* at 8.

175. *Id.* at 10.

Morocco Free Trade Agreements, the Miscellaneous Tariff Bill, the African Growth and Opportunity Act, and the repeal of the Extraterritorial Income Tax Exclusion Act. In addition, Congress introduced several new bills for consideration concerning the Byrd Amendment, China, country of origin labeling, the imposition of countervailing duties on non-market economy country imports, the Ukraine Permanent Normal Trade Relations (PNTR), and Super 301. Congress, however, failed to pass several pieces of legislation from the previous year, including bills on sanctions reform, the Export Administration Act, the Russia PNTR and the WTO Dispute Rulings Commission.

A. Free Trade Agreements

Following the signing of the U.S.-Australia FTA, the Bush Administration sought the immediate passage for the FTA implementing legislation before Congress adjourned in August 2004.[176] On July 14, 2004, the House of Representatives easily approved the implementing legislation by a vote of 314 to 109, despite concerns over the FTA's provision concerning the re-importation of pharmaceuticals.[177] The U.S. Senate followed suit on July 15, 2004 when it approved the implementing bill by a vote of eighty to sixteen.[178] On August 3, 2004, President Bush signed the U.S.-Australia FTA Implementation Act into law.[179]

With congressional approval of the U.S.-Australia FTA, efforts to pass the U.S.-Morocco FTA before the summer recess gained momentum.[180] After negotiations began in January 2003, U.S. Trade Representative Robert Zoellick and Minister Delegate of Foreign Affairs and Cooperation Taib Fassi-Fihri signed the U.S.-Morocco Free Trade Agreement on June 15, 2004.[181] On July 21, 2004, the U.S. Senate approved the FTA without any controversy by an eighty-five to thirteen vote.[182] The House approved the agreement with a similarly strong show of support on July 22, 2004, by a vote of 323 to 99.[183] President Bush signed the legislation into law on August 17, 2004.[184]

Although the Australia and Morocco FTAs sailed through the House and Senate, the CAFTA encountered more serious obstacles. The Bush Administration signed a FTA with the five Central American countries of Costa Rica, El Salvador, Nicaragua, Honduras, and Guatemala on May 28, 2004, and with the Dominican Republic on August 5, 2004.[185]

176. *See Zoellick Looks for Australia FTA Approval, before August Recess*, Inside U.S. Trade, May 21, 2004, at § 21, *available at* 2004 WLNR 79851.

177. *See House Easily Approves Australia FTA, Drug Provisions Draw Fire*, Inside U.S. Trade, July 16, 2004, at § 29, *available at* 2004 WLNR 81800.

178. *See Senate Approves Australia FTA, Morocco Deal Next In Line*, Inside U.S. Trade, July 16, 2004, at § 29, *available at* 2004 WLNR 81808.

179. United States-Australia Free Trade Agreement Implementation Act, Pub. L. No. 108-286 (2004).

180. Press Release, Office of the U.S. Trade Representative, Statement of U.S. Trade Representative Robert B. Zoellick Following House Approval of Morocco Free Trade Agreement (July 22, 2004), *available at* http://www.USTR.gov [hereinafter Zoellick Statement].

181. Press Release, Office of the U.S. Trade Representative, United States and Morocco Sign Historic Free Trade Agreement (June 15, 2004), *available at* http://www.USTR.gov [hereinafter Historic FTA].

182. *See House, Senate Approve Morocco FTA With Strong Bipartisan Votes*, Inside U.S. Trade, July 23, 2004, at § 30, *available at* 2004 WLNR 81925.

183. Zoellick Statement, *supra* note 180.

184. *See* United States-Morocco Free Trade Agreement Implementation Act, Pub. L. No. 108-302 (2004); *see also* Historic FTA, *supra* note 181.

185. *See* Hill Watch: Central America FTA, 21 Int'l Trade Rep. (BNA), No. 28, at 1166 (July 8, 2004).

Unlike the strong congressional support for the Australia and Morocco FTAs, by the end of the year, neither the House nor the Senate had introduced implementing legislation for the CAFTA. The agreement's labor and environmental provisions drew heavy criticism from several congressional members.[186] For its part, the Bush Administration did not seek to push for the CAFTA's passage before the 2004 presidential elections.[187]

B. Miscellaneous Trade and Technical Corrections Act of 2004

One year after the House approved the Miscellaneous Trade and Technical Corrections Act of 2004 (MTTC), the Senate finally passed its own version on March 4, 2004.[188] On October 8, 2004, the House passed the conference report after making an agreement that concerned repealing the 1916 Antidumping Act.[189] Certain House members supported a prospective repeal of the 1916 Antidumping Act, meaning that it would not eliminate pending cases under the law.[190] But other members advocated a repeal that would end all existing court cases.[191] The two sides reached an agreement whereby the final conference report included a prospective repeal of the 1916 Antidumping Act, yet also granted Mauritius a one-year designation as a least-developed country under the African Growth and Opportunity Act (AGOA) effective October 1, 2004.[192]

On the Senate side, the bill stalled once again. In mid-October 2004, the Senate faced another roadblock and adjourned without approving the conference report.[193] Senators Russ Feingold (D-WI) and Herbert Kohl (D-WI) opposed a provision in the bill granting permanent, MFN status to Laos because of alleged governmental human rights violations against the Hmong.[194] It appeared that Congress would once again fail to pass the bill. However, on November 17, 2004, Senate Majority Leader Bill Frist (R-TN) filed a cloture motion to force a vote on the bill.[195] Finally, on November 19, 2004, the Senate approved the conference report with an eighty-eight to five vote—Congress had finally passed the MTTC.[196] President Bush signed the bill into law on December 3, 2004.[197]

While the MTTC primarily reduces or eliminates import duties, it also contains a number of additional trade policy provisions. The legislation annually grants renewable normal trade relations to Laos, repeals the 1916 Antidumping Act, grants most-favored nation status to Armenia, extends GSP benefits to allow duty-free entry for hand-knotted and

186. *See Grassley, Blunt Want CAFTA Passage In Possible Lame Duck Session*, Inside U.S. Trade, July 30, 2004, at § 31, *available at* 2004 WLNR 82162.

187. *Id.*

188. *See* Hill Watch: Miscellaneous Trade Bill, 21 Int'l Trade Rep. (BNA), No. 28, at 1164 (July 8, 2004).

189. *See Senate Holds Block Passage of Tariff Bill with 1916 AD Act Repeal*, Inside U.S. Trade, Oct. 15, 2004, at § 42, *available at* 2004 WLNR 272851.

190. *Id.*

191. *Id.*

192. *Id.*

193. *See id.*

194. *See id.*

195. *See Miscellaneous Tariff Bill Set for Passage After Cloture Filed*, Inside U.S. Trade, Nov. 19, 2004, at § 47, *available at* 2004 WLNR 10906228.

196. *See Miscellaneous Tariff Bill Approved, Supporters Seek New Approach*, Inside U.S. Trade, Nov. 26, 2004, at § 48, available at 2004 WLNR 12408881.

197. *See* Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108-429, § 118 Stat. 2434 (2004).

hand-woven carpets, contains numerous textile and apparel provisions, and amends the Caribbean Basin Economic Recovery Act (CBERA) to allow duty-free imports on certain CBERA-origin footwear.[198]

C. African Growth And Opportunity Act

The African Growth and Opportunity Act of 2004 (2004 AGOA) was signed into law by President Bush on July 13, 2004.[199] The law expands the current African Growth and Opportunity Act (AGOA) by providing trade benefits in several important areas for beneficiary sub-Saharan African countries. In addition, the 2004 AGOA extends overall preferential access for imports from its current expiration date of 2008 until 2015. The legislation also extends the third-country fabric provision for three years to September 30, 2007. In years one and two, the cap would remain at the full current level and would be phased down by 50 percent in year three.[200]

In addition, the 2004 AGOA contains additional congressional guidance for the administration on the bill. A statement of congressional policy provides that the administration should interpret the AGOA textile and apparel provisions in a broad and trade-expanding manner with the purpose of maximizing opportunities for African imports. The bill also expands current eligibility to allow duty preferences on apparel imports containing foreign-origin (non-AGOA) collars, cuffs, drawstrings, padding/shoulder pads, and waistbands. Lastly, an amendment to the 2004 AGOA under the MTTC grants lesser-developed beneficiary country status to Mauritius. As a result, the country may use third-country fabric and yarn in apparel wholly assembled in Mauritius and still enter the United States duty-free up to a certain limit.[201]

D. Trade Preferences

In 2004, Congress continued its efforts to grant duty preferences to Ukraine, Haiti and the Middle East. On March 11, 2004, Senator Carl Levin (D-MI) and Representative Sander Levin (D-MI) introduced bills seeking to extend PNTR status to Ukraine.[202] But Congress adjourned without acting on the bill.

On July 16, 2004, the Senate passed legislation to increase duty-free access for Haitian apparel products.[203] The Senate bill provided duty-free entry, subject to an annual cap, for Haitian, wholly assembled or knit-to-shape apparel items regardless of the country of origin of the fabrics, components, or yarns used in production.[204] The House, however, failed to pass their version of the bill due to a lack of assurances that the Senate would accept the

198. *Id.*

199. *See* Press Release, Office of the White House, President Bush Signs African Growth and Opportunity Act (July 13, 2004), *available at* http://www.whitehouse.gov.

200. *Id.*

201. *Id.*

202. *See* To authorize the extension of unconditional and permanent nondiscriminatory treatment to the products of Ukraine, S. 2205 & H.R. 3958, 108th Cong. (2004).

203. *See* Senate Passes Legislation to Extend Additional Textile Trade Benefits to Haiti, 21 Int'l Trade Rep. (BNA), No. 30, at 1242 (July 22, 2004).

204. *See House Fails to Pass Haiti Apparel Bill in Face of Republican*, Inside U.S. Trade, Nov. 26, 2004, at § 48, *available at* 2004 WLNR 12408930.

bill.[205] Senators from textile states opposed the House bill out of concern that it would harm the U.S. textile industry.[206] Ranking Member Charles Rangel (D-NY) vowed to make another effort in 2005.[207]

Furthermore, legislation introduced in 2003 to extend duty-free market access for imports from the "greater Middle East" failed to gain much ground in 2004.[208] On March 10, 2004, the Senate Finance Committee held a hearing on the bill introduced by Senators Max Baucus (D-MT) and John McCain (R-AZ). But the Committee never acted upon the proposed bill.

Lastly, bills introduced in 2003 to grant PNTR status to Russia again failed to move forward in 2004. United States pressure on Russia for greater market access for telecommunications and financial services and stronger protection of intellectual property rights continued to impede efforts to grant PNTR status to Russia.[209]

E. Extraterritorial Income Tax Exclusion Act Repeal

On October 22, 2004, President Bush signed into law legislation repealing export tax breaks under the Extraterritorial Income Exclusion Act's (ETIA) tax provisions.[210] The legislation responded to a January 2002 WTO finding that the ETIA constituted a prohibited export subsidy. Subsequently, the United States faced close to four billion dollars in trade sanctions by the EU if it failed to comply with the WTO ruling.[211] On March 1, 2004, the EU started to impose additional duties on certain U.S. exports to Europe starting at 5 percent, with monthly increases of 1 percent.[212] With pressure building, repealing the ETIA became one of Congress' highest priorities in 2004.[213] On May 11, 2004, the Senate approved its bill (S. 1637) with a ninety-two to five vote, and the House passed its version of the bill (H.R. 4520) on June 17, 2004 with a 251 to 178 vote.[214]

The legislation repealing the ETIA is contained in the American Jobs Creation Act.[215] Under the law, companies face a gradual reduction in ETI benefits from 100 percent in 2004, 80 percent in 2005, and 60 percent in 2006. The law simultaneously phases in a new tax deduction on all domestic manufacturing activity. In addition, the bill includes provisions aimed at reducing double taxation on U.S. businesses engaged in overseas operations.[216]

---

205. *See id.*

206. *See id.*

207. *See id.*

208. *See* Middle East Trade and Engagement Act of 2003, H.R. 2267 & S. 1121, 108th Cong. (2004).

209. *See* Hill Watch: Russia PNTR, 21 Int'l Trade Rep. (BNA), No. 28, at 1165 (July 8, 2004).

210. *See* Press Release, Office of the White House, The American Jobs Creation Act of 2004 (Oct. 22, 2004), *available at* http://www.whitehouse.gov.

211. Export Tax Repeal Heads 2004 Priority List for Congress Deadline Looms, Panel says, 21 Int'l Trade Rep. (BNA), No. 1, at 22 (Jan. 1, 2004).

212. *See* Council Regulations (EC) 2193/2003 Establishing Additional Customs Duties on Imports of Certain Products Originating in the United States of America, 2003 O.J. (L 328) 3, *available at* http://www.martinlittle.com/publications/Sanctions.reg.pdf.

213. *See* Export Tax, *supra* note 211.

214. *See* Senate Passes Export Tax Repeal; New Shelter Promoter Penalties Added, 21 Int'l Trade Rep. (BNA), No. 20, at 806 (May 13, 2004); Obstacles, Tobacco Buyout Loom Over Conference On Bills to Repeal Export Tax, 21 Int'l Trade Rep. (BNA), No. 25, at 1061 (June 24, 2004).

215. American Jobs Creation Act, Pub. L. No. 108-357, § 118 Stat. 1418 (2004).

216. *Id.*

F. Antidumping And Countervailing Duty Law

Congress introduced two important pieces of legislation in 2004 concerning antidumping and countervailing duty law. In January 2004, Representative Phil English (R-PA) introduced legislation (H.R. 3716) that would provide for the imposition of countervailing duties on imports from non-market economies, including China and Vietnam.[217] Senator Susan Collins (R-Maine) sponsored a companion Senate bill (S. 2212) on March 12, 2004.[218] These bills, which were aimed primarily at Chinese imports, sought to reverse a DOC policy, under which countervailing duty law does not apply to imports from non-market economies because of the difficulty in accurately calculating subsidies in such markets. Congress took no action on these bills.[219]

On March 11, 2004, Representative Jim Ramstad (R-MN) introduced legislation seeking to repeal the Byrd Amendment.[220] Under the Byrd Amendment, duties collected from antidumping and countervailing orders that previously went into the general U.S. Treasury, are given to affected domestic producers. In January 2003, the WTO ruled these Byrd payments illegal. The Byrd Amendment, however, continues to have strong support in the Senate.[221] Yet Congress took no action on the proposed measure.

G. China

Congressional attention on China focused on concerns over currency and textiles. On July 22, 2004, several members of Congress introduced new legislation titled the Currency Rate Adjustment and Trade Enforcement Act (H.R. 4986) that would require the Treasury Secretary to analyze whether China's exchange rate policies create an international trade advantage that would not otherwise exist if the renminbi were set by market forces.[222] The legislation calls for increased duties on Chinese imports to offset the impact of any undervalued currency. Congress adjourned without acting on the proposed bill.

In the area of textiles, various House members introduced the Textiles and Apparel China Safeguard Act (H.R. 5026) on September 8, 2004.[223] The bill directs the DOC to provide relief in cases where imports of textiles or apparel products of Chinese origin are threatening to impede trade in such products, including instances where Chinese finished products are hurting imported products made outside the United States with U.S.-origin textiles and apparel components. If imports fall under a safeguard action, the bill directs the Administration to immediately reach an agreement with China on the imposition of quotas. If an agreement cannot be reached, then the bill calls for the automatic imposition of quotas. In addition, the bill responds to mounting concern over the impact of China's textile imports on the U.S. textile industry that were anticipated to increase dramatically after the elimination of textile quotas on January 1, 2005. But Congress never acted upon the legislation.

217. *See* Members of Congress Seek to Apply Anti-Subsidy Trade Remedies to China, 21 Int'l Trade Rep. (BNA), No. 15, at 613 (Apr. 8, 2004).

218. *See id.*

219. *See id.*

220. *See* Ramstad Introduces Bill to Repeal Continued Dumping and Subsidy Offset Act, 21 Int'l Trade Rep. (BNA), No. 12, at 502 (Mar. 18, 2004).

221. *See* EU Official Urges Byrd Repeal; Congressional Action Unlikely This Year, 21 Int'l Trade Rep. (BNA), No. 37, at 1497 (Sept. 16, 2004).

222. Currency Rate Adjustment and Trade Enforcement Act, H.R. 4986, 108th Cong. (2004).

223. Textiles and Apparel China Safeguard Act, H.R. 5026, 108th Cong. (2004).

H. Miscellaneous Trade Legislation

Congress failed to revive the Super 301 program, under which the United States investigated foreign trade practices that violated trade agreements or restricted U.S. trade. A bill to replace a mandatory country of origin labeling program, due to be enacted in September 2006, with a voluntary program for meat, fish, and perishable agricultural products languished on the House floor.[224] Another bill for the establishment of a Congressional Advisory Commission on WTO Dispute Settlement to review all WTO dispute settlement decisions adversely affecting the United States suffered the same fate.[225] Similarly, Congress failed to move on certain pieces of legislation seeking reform of U.S. sanctions laws, such as a bill introduced in May 2004, providing for the expiration of certain trade and travel restrictions against Cuba unless annually renewed by Congress.[226] Finally, Congress failed to reauthorize the Export Administration Act, easing export controls because of national security concerns.[227] Existing authority for export controls continued to be exercised under the International Emergency Economic Powers Act.[228]

224. *See* Food Promotion Act of 2004, H.R. 4576, 108th Cong. (2004); *see also* Bill Creating Voluntary Labeling Program Introduced by House Agriculture Committee, 21 Int'l Trade Rep. (BNA), No. 25, at 1010 (June 17, 2004).

225. *See* Trade Law Reform Act 2003, H.R. 2365, 108th Cong. (2004).

226. *See* Cuba Sanctions Reform Act of 2004, H.R. 4457 & S. 2449, 108th Cong. (2004); *see also* Lawmakers Introduce Bill Requiring Congressional Approval of Cuba Sanctions, 21 Int'l Trade Rep. (BNA), No. 22, at 911 (May 27, 2004).

227. *See Juster Says DOC Wants New EAA, But No Administration Decision Yet*, Inside U.S. Trade, Dec. 14, 2004, at § 52, *available at* 2004 WLNR 14632636; *Business Debates Recommending Bush Seek New Export Control Bill*, Inside U.S. Trade, Dec. 17, 2004, at § 51, *available at* 2004 WLNR 14261088.

228. *See* Juster, *supra* note 227.