International Trade

GABRIELA CARIAS-GREEN, STACY J. ETTINGER, LYNN FISCHER FOX,
MELANIE A. FRANK AND AMY STANLEY*

I. Introduction

There was significant activity in 2006 in the area of international trade. At the World Trade Organization (WTO), Vietnam concluded its accession negotiations and became the 150th member of the WTO. While the WTO Doha Development negotiations (Doha Round) remained contentious and ultimately were suspended, the United States and other countries continued to pursue a series of bilateral and regional free trade agreements (FTAs) in order to move forward on the trade liberalization that was not being achieved in the WTO process. The United States engaged in FTA negotiations with eleven countries, and signed new agreements with Oman, Columbia, Peru, and Panama.

Some key trade issues were challenged at the WTO, including the United States' use of a "zeroing" methodology in antidumping cases, the application of international law in domestic cases, and what constitutes appropriate implementation of a WTO panel decision. Although it was a fairly slow year for new U.S. trade remedy cases, a number of prior agency decisions were appealed and decided in U.S. courts in 2006, with the courts issuing important decisions relating to the International Trade Commission's (ITC) decisions in injury cases, the constitutionality of the Byrd Amendment, the use of zeroing in antidumping (AD) methodology, and the application of safeguard duties. In addition, the United States settled two massive and long-standing disputes: (1) the battle between Canada and the United States over softwood lumber; and (1) the dispute involving cement from Mexico. But the trade remedies arena also picked up at the end of the year when the Department of Commerce (Department or DOC) initiated a countervailing duty (CVD) case against China in response to the first CVD petition filed against China since 1991.

Finally, although a series of legislative proposals relating to trade enforcement and trade preferences were presented in 2006, very little action was taken until the very last week of the congressional session. In the final hours of the lame duck congressional session, Con-

* The authors are all attorneys who specialize in international trade law. Ms. Carias-Green and Ms. Frank are International Trade Associates with Hogan & Hartson LLP. Ms. Ettinger is Associate Chief Counsel with the Office of Chief Counsel for Import Administration at the U.S. Department of Commerce. Ms. Fischer Fox is Counsel with WilmerHale, and Ms. Stanley is International Trade Counsellor with International Business-Government Counsellors.

gress passed a comprehensive tax and trade package that extended preferential duty-free treatment for developing countries, granted permanent normal trade relations (PNTR) status for Vietnam, and reduced tariff rates on more than 500 products. With the November election and the change in Congress to a Democratic majority, many expect the FTA agenda to face hurdles in the coming year as some prior agreements may require renegotiation, regarding issues involving labor standards and the environment that are expected to become increasingly important in the trade agenda.

II. Negotiation Developments

A. WTO NEGOTIATIONS

1. *Accession Negotiations*

Only one country acceded into the WTO in 2006—Vietnam, which was formally approved by the WTO General Council to become the 150th member on November 7, 2006.[1] In addition, while there were no new accession applications in 2006, a number of countries with pending applications made progress toward accession.[2] Although Russia did not gain accession by the end of the year as it had hoped,[3] it did clear one of its final hurdles in November 2006, when it signed a bilateral agreement on market access with the United States.[4] The Ukraine also made progress toward accession in 2006. There was contention in the Ukrainian legislature regarding the proposed legal changes, but by the end of the year, the legislature appeared ready to pass all the laws needed for its entry into the WTO.[5]

2. *Doha Development Agenda*

The Doha Development Agenda collapsed in 2006.[6] Members could not find common ground on important trade issues; in particular, the United States and the European Union (EU) could not agree regarding tariff reductions in agriculture and the G-20 developing countries, with Brazil, India, and South Africa as leaders of the group, continued as well to press for market access in agriculture by developed nations.[7] As a result, in July,

1. *See* Press Release, World Trade Organization, General Council Approves Viet Nam's Membership (Nov. 7 2006), *available at* http://www.wto.org/english/news_e/pres06_e/pr455_e.htm.

2. *See* World Trade Organization, Accessions, http://www.wto.org/english/thewto_e/acc_e/acc_e.htm (last visited October 30, 2006).

3. *See* Kristy L. Balsanek et al., *International Trade*, 40 Int'l Law. 217, 218 n.4 (2006).

4. *See* Gary G. Yerkey & Daniel Pruzin, *U.S., Russia Reach Agreement in Principle on Terms of Russia's Membership in WTO*, 23 INT'L TRADE REPORTER (BNA) 1616 (2006), *available at* http://www.bna.com/itr/arch372.htm; *see also* Press Release, Office of the United States Trade Representative, US and Russia Work to Finalize Bilateral Negotiation (Nov. 10, 2006), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2006/November/US_Russia_Work_to_Finalize_Bilateral_Negotiations.html?ht=.

5. *Around the Globe-Ukraine*, WASH. TRADE DAILY, Nov. 14, 2006.

6. *See* Daniel Pruzin, *Doha "Blame Game" Heats Up, as U.S. Tactics Come Under Question*, WTO REPORTER, July 26, 2006.

7. *See* Susan Schwab, *Still Ready to Talk*, WALL ST. J., Nov. 9, 2006. Consistent with the development mandate, developing countries, and in particular the large developing countries, such as Brazil and India, have played an increasingly prominent role in the WTO negotiations.

the Doha negotiations were suspended.[8] After suspension of the talks, various members "quietly met"[9] throughout the fall of 2006 to try to rejuvenate the negotiations. But there were no real signs of progress,[10] and by the end of the year, it remained unclear whether the Doha Round would ever get back on track, in particular, given the July 2007 expiration of U.S. fast track authority.

B. Bilateral/Regional Negotiations

Bilateral and regional free-trade agreements were once again an important element of the Bush Administration's trade policy in 2006.[11] During the year, the United States engaged in negotiations with eleven countries[12] and concluded three new agreements, resulting in a total of nineteen completed U.S. FTAs with other nations and regions.[13]

The U.S.-Oman FTA was signed on January 19, 2006, and the President signed it into law implementing legislation in September 2006.[14] The United States already had FTAs with Israel, Jordan, Morocco, and Bahrain,[15] and the U.S.-Oman agreement was seen as a significant step towards a future Middle East Free Trade Area (MEFTA).[16]

The United States also made progress in 2006 on the U.S.-Andean FTA, signing trade promotion agreements with Columbia, Peru, and Panama.[17] Although none of the trade

8. World Trade Organization, General Council Support Suspension of Trade Talks, Task Force Submits "Aid For Trade" Recommendations, July 27-28, 2006, *available at* http://www.wto.org/english/news_e/news06_e/gc_27july06_e.htm; *see also* Rob Portman & Susan Schwab, *Free Trade Vision*, Wall St. J., May 1, 2006, at A14, *available at* http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=May&x=20060501091244ebyessedo7.072085e-02.

9. *Mr. Lamy's "Quiet" Visit to Washington*, Wash. Trade Daily (Nov. 6, 2006).

10. *See* Gary G. Yerkey, *Still Too Early to Expect Breakthrough in Bid to Revive WTO Talks, USTR Says*, WTO Reporter, Nov. 14, 2006.

11. *See* William H. Cooper, CRS Report RL31356, Free Trade Agreements: Impact on U.S. Trade and Implications for U.S. Trade Policy.

12. *See* Press Release, The United States Trade Representative, United States and Oman Sign Free Trade Agreement (Jan. 19, 2006), *available at* http://ustr.gov/assets/Document_Library/Press_Releases/2006/January/asset_upload_file25_8774.pdf.

13. *See id.*

14. *See* Press Release, The United States Trade Representative, Statement of U.S. Trade Representative Susan C. Schwab on President George W. Bush's Signing of Legislation to Implement the U.S.-Oman Free Trade Agreement (Sept. 26, 2006), *available at* http://ustr.gov/Document_Library/Press_Releases/2006/September/Statement_of_US_Trade_Representative_Susan_C_Schwab_on_President_George_W.html [hereinafter Schwab on U.S.-Oman Legislation]; U.S.-Oman Free Trade Agreement Implementation Act, Pub. L. No. 109-283, 120 Stat. 1191 (2006).

15. *See* Schwab on U.S.-Oman Legislation, *supra* note 14; *see also U.S. Denies Report Bahrain Continuing Boycott of Israel Despite Earlier Commitment*, 23 Int'l Trade Reporter (BNA) 774 (2006); Letter from Reps. Rangel, Levin, Cardin, and Becerrra to USTR Portman (March 29, 2006) (on file with author).

16. *See* Schwab on U.S.-Oman Legislation, *supra* note 14.

17. *See* Press Releases, The United States Trade Representative, United States and Columbia Sign Trade Promotion Agreement (Nov. 22, 2006), *available at* http://ustr.gov/Document_Library/Press_Releases/2006/November/United_States_Colombia_Sign_Trade_Promotion_Agreement.html; Press Releases, The United States Trade Representative, United States and Peru Sign Trade Promotion Agreement (Apr. 12, 2006), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2006/April/United_States_Peru_Sign_Trade_Promotion_Agreement.html; Press Releases, The United States Trade Representative, U.S. and Panama Complete Trade Promotion Agreement Negotiation (Dec, 19, 2006), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2006/December/US_Panama_Complete_Trade_Promotion_Agreement_Negotiations.html.

promotion agreements were ratified by Congress in 2006, members of Congress expressed hope that these agreements would be ratified in 2007.[18] But, as a result of the change in power in the U.S. Congress, these agreements may be stalled, as Congressional Democrats, who form the majority in the 110th Congress, have advocated modification of the agreements to provide heightened labor standards.

The President also announced intentions to enter into several new FTAs in 2006. On February 2, 2006, the Administration announced that it would begin talks with South Korea, which could lead to the "most commercially significant" U.S. FTA since the North American Free Trade Agreement (NAFTA).[19] The United States and Korea then engaged in five rounds of negotiations; however, the talks hit major roadblocks on key issues such as market access for rice, automobiles, and other manufacturing sectors.[20] Still, the United States expresses optimism that negotiations can be completed before trade promotion authority expires in July 2007.[21]

On March 8, 2006, the Administration also announced its intention to enter into bilateral negotiations with Malaysia, and the two countries held four negotiating rounds in 2006. By the end of the year, despite continued areas of contention,[22] the United States expressed confidence that the agreement could be concluded before the July 2007 expiration of trade promotion authority.[23] An agreement with Malaysia would be the United States' third agreement with a nation in Southeast Asia, signaling a strong U.S. commitment to advance the regional ASEAN Initiative.[24]

Although the U.S.-Thailand FTA negotiations had made significant progress in 2005, negotiations stalled in February 2006.[25] First the countries disagreed over trade concessions; then, on September 19, 2006, Thailand experienced a military coup overthrowing

18. *See* Rossella Brevetti, *Kolbe Sees Peru Pact Delayed Until Next Year*, 23 INT'L TRADE REPORTER (BNA) 1336 (2006).

19. *See* Press Release, United States Trade Representative, United States, South Korea Announce Intention to Negotiate Free Trade Agreement (Feb. 2, 2006), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2006/February/United_States,_South_Korea_Announce_Intention_to_Negotiate_Free_Trade_Agreement.html.

20. *See Steady Progress on Korea-US FTA*, WASH. TRADE DAILY, Oct. 31, 2006.

21. *Id.*

22. *See Around the Globe Malaysia*, WASH. TRADE DAILY, Nov. 6, 2006 ("The main area of contention is Malaysia government's policy of awarding tenders for projects, goods and services mostly to ethnic Malay companies under an affirmative action program. This has shut out not only domestic non-Malay companies but also US and other foreign businesses from bidding for any government contracts. Other sticking points in the negotiations are Malaysia's highly protected state car industry, its ban on majority foreign ownership of banks and poor intellectual property rights.").

23. *Id.*

24. *See* Press Release, United States Trade Representative, United States, Malaysia Announce Intention to Negotiate Free Trade Agreement (Mar. 8, 2006), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2006/March/United_States,_Malaysia_Announce_Intention_to_Negotiate_Free_Trade_Agreement.html; *Around the Globe China*, WASH. TRADE DAILY, Nov. 1, 2006.

25. *See Around the Globe Thailand*, WASH. TRADE DAILY, Nov. 6, 2006.

the government.[26] The United States has expressed a desire to resume negotiations with Thailand once a new democratic government is in place.[27]

Another major focus in 2006 was implementation of the Central American Free Trade Agreement (CAFTA-DR). By the end of the year, the United States had implemented the agreement with El Salvador, Honduras, Nicaragua, and Guatemala and was in the final stages of implementing the agreement with the two remaining countries—Costa Rica and the Dominican Republic.[28]

III. WTO Dispute Settlement Activity

The WTO dispute settlement proceedings in 2006 continued to focus largely on claims under the Agreement on Implementation of Article VI of the General Agreements on Tariffs and Trade (AD Agreement), the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and the General Agreement on Tariffs and Trade 1994 (GATT). Seventeen disputes were brought in 2006, up somewhat from the eleven disputes brought in 2005, but still significantly below the average of thirty-three disputes per year brought during the first ten years of WTO dispute settlement.[29]

In addition, it was a relatively quiet year for WTO dispute settlement decision-making with the issuance of only five panel decisions, six Appellate Body reports, and one arbitration award.[30] As discussed below, the issue of zeroing dominated the dispute settlement agenda, although there were some interesting decisions related to the relationship of international and WTO law and to implementation of previously adopted panel and Appellate Body rulings.

A. Zeroing

The saga of the issue of zeroing, beginning with the Panel and Appellate Body decisions in *EC—Bed Linen* adopted in 2001,[31] continues to play out in WTO dispute settlement. In late 2005, a panel in *US—Zeroing (EC)* found that the DOC's application of zeroing in the various investigations at issue was inconsistent with Article 2.4.2 of the AD Agree-

26. *See* Letter from House Ways and Means Trade Subcommittee member U.S. Rep. Phil English (R-Pa.) to President Bush, *available at* http://www.house.gov/list/press/pa03_english/thaiFTA.html; U.S. Dep't of State, United States Still Pursuing Free Trade Pact with Thailand, http://usinfo.state.gov/eap/Archive/2006/Jan/13-809058.html.

27. *See* Wash. Trade Daily, Nov. 6, 2006 (reporting Deputy United States Trade Representative Barbara Weisel as stating "[w]e would be interested in resuming negotiations (with Thailand) at a time when a democratic government is in place, so we are currently not negotiating.").

28. *See* Chandri Navarro-Bowman & Melanie A. Frank, *What CAFTA Will Mean for Business and Trade in the Americas*, 35 Int'l Law News 4, (2006); *see also* Rossella Brevetti, *Bush Administration, Congress Discuss GSP Renewal Veroneau Says*, WTO Reporter, Oct. 17, 2006.

29. World Trade Organization, Chronological List of Disputes Cases, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Mar. 10, 2007).

30. *See* WTO Dispute Settlement Reports, http://www.worldtradelaw.net (last visited Mar. 10, 2006); WTO Appellate Body Reports, http://www.worldtradelaw.net/reports/wtoab/index.htm (last visited Mar. 10, 2007); Article 21.3(c) "Reasonable Period of Time" Arbitration Awards, http://www.worldtradelaw.net/reports/213(c)awards/index.htm (last visited Mar. 10, 2007).

31. Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001); Panel Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R (Oct. 30, 2000).

ment.[32] The Panel also found that DOC's "zeroing methodology," as it relates to investigations, was a "norm" that was inconsistent "as such" with Article 2.4.2.[33] The Panel concluded, however, that it was permissible to interpret Article 2.4.2 as applicable only to determinations of dumping in the context of investigations and, thus, declined to find the DOC's calculation methodology as applied in the administrative reviews at issue WTO-inconsistent.[34]

In 2006, the EC successfully appealed certain aspects of the Panel's decision regarding administrative reviews.[35] In its ruling, the Appellate Body found that the DOC's use of zeroing in administrative reviews as applied was inconsistent with the AD Agreement. The Appellate Body reasoned that, by disregarding the result of comparisons where the export price exceeded the contemporaneous average normal value, the DOC calculated an amount of AD duty that exceeded the foreign producers' or exporters' margin of dumping. Thus, the DOC's application of zeroing in the various administrative reviews at issue was found to be inconsistent with Article 9.3 of the AD Agreement and GATT Article VI:2.[36] The Appellate Body's reasoning is premised upon the notion that a "margin of dumping" must be determined for the "product as a whole."[37]

The United States was unsuccessful in its appeal of the Panel ruling that its zeroing methodology in investigations constituted a norm.[38] Specifically, the Appellate Body concluded that: (1) the evidence before the Panel was sufficient to identify the "precise content" of the zeroing methodology; (2) the "zeroing methodology" was attributable to the United States; and the zeroing methodology had "general and prospective application."[39] Thus, the Appellate Body upheld the Panel's conclusion that this methodology was inconsistent "as such" with Article 2.4.2 of the AD Agreement.[40]

The Appellate Body had a second opportunity to address the issue of zeroing in 2006. In April, a compliance panel reviewing the DOC's implementation of the Panel and Appellate Body rulings in *US—Softwood Lumber V (Article 21.—Canada)* upheld the DOC's new margin calculation as applied in the investigation, which was based on a transaction-to-transaction comparison methodology, concluding that zeroing under those circumstances was permissible under Article 2.4.2 of the AD Agreement.[41] The Panel also rejected Canada's claim that the DOC's calculations violated the fair comparison obligation provided for in the first sentence of Article 2.4 of the AD Agreement.[42]

---

32. Panel Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, ¶ 7.32, WT/DS294/R (Oct. 31, 2005).

33. *Id.* ¶ 7.106.

34. *Id.* ¶¶ 7.145-7.223. On this basis, the Panel also rejected the EC's "as such" claims with respect to the DOC's "methodology of zeroing" in administrative reviews. *Id.* ¶¶ 7.289-7.291.

35. Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (Apr. 18, 2006) [hereinafter Zeroing Appellate Ruling].

36. *Id.* ¶¶ 132-135.

37. *See, e.g., id.* ¶¶ 126-127, 132.

38. *Id.* ¶ 3(a).

39. *Id.* ¶ 204.

40. *Id.* ¶¶ 185-205, 263(b). The United States did not appeal the Panel's finding that the DOC's application of zeroing in the various investigations at issue was inconsistent with Article 2.4.2 of the AD Agreement.

41. Panel Report, *United States—Final Dumping Determination on Softwood Lumber from Canada—Recourse to Article 21.5 of the DSU by Canada*, ¶¶ 5.65-5.66, WT/DS264/RW (Apr. 3, 2006).

42. *Id.* ¶¶ 5.72-5.78.

But, in August 2006, the Appellate Body reversed both of those findings. The Appellate Body concluded that Article 2.4.2 does not allow the use of zeroing under the transaction-to-transaction comparison methodology in the investigation, reasoning that "margins of dumping" are represented by the aggregation of all the transaction-specific comparisons of export prices and normal value, and the results of comparisons in which export prices are above normal value can not be disregarded.[43] The Appellate Body also concluded that the use of zeroing under the transaction-to-transaction methodology was not consistent with the "fair comparison" requirement in Article 2.4, based on the notion that it results in higher margins of dumping.[44] The DOC did not revise the margin calculations in this dispute a second time because the AD duty order on *Softwood Lumber from Canada* subsequently was revoked as a result of the *Softwood Lumber Agreement* between the United States and Canada.[45]

In the midst of these dispute settlement proceedings, the DOC initiated a process pursuant to Section 123 of the Uruguay Round Agreements Act[46] to implement that portion of the Panel's report in *US—Zeroing (EC)* that the United States did not appeal (i.e., the finding that the DOC's application of zeroing in the various investigations at issue in the dispute was inconsistent with Article 2.4.2 of the AD Agreement). In March 2006, the DOC published a Federal Register notice announcing its intent to abandon the use of zeroing in average-to-average comparisons in investigations and requesting public comment on appropriate alternative approaches.[47] In December, the DOC concluded the Section 123 process and published its decision to no longer "zero" when applying the average-to-average comparison methodology in investigations.[48] The DOC indicated that it would apply the modification to all ongoing investigations, as well as to all future investigations.[49]

While the Appellate Body in *US—Zeroing (EC)* made an as-such finding with respect to zeroing in investigations, it did not do so with respect to zeroing in administrative reviews. The Appellate Body will likely address this issue next year when it issues a decision in *US—Zeroing (Japan)*.[50]

B. Relationship of International Law and WTO Law

The relationship between international law and WTO law is a recurring issue in WTO dispute settlement. This year's decisions in *Mexico—Taxes on Soft Drinks* and *EC—Biotech*

43. Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada—Recourse to Article 21.5 of the DSU by Canada*, ¶ 94, WT/DS264/AB/RW (Aug. 15, 2006).

44. *Id.* ¶ 142.

45. *See Notice of Rescission of Antidumping Duty Reviews and Revocation of Antidumping Duty Order: Certain Softwood Lumber Products from Canada*, 71 Fed. Reg. 61,714 (Oct. 19, 2006).

46. 19 U.S.C. § 3533 (2006).

47. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11,189 (Mar. 6, 2006).

48. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 71 Fed. Reg. 77,722 (Dec. 27, 2006).

49. *Id.*

50. It is notable that, on July 31, 2006, the Chair of the Panel in the *Japan Zeroing* case, Mr. David Unterhalter, was appointed as a member of the Appellate Body. *See* Press Release, World Trade Organization, WTO Appoints New Appellate Body Member (July 13, 2006), *available at* http://www.wto.org/English/news_e/pres06_e/pr448_e.htm.

Products address different aspects of this issue. In *Mexico—Taxes on Soft Drinks*, Mexico had requested that the Panel refrain from exercising jurisdiction in the dispute because, according to Mexico, only a NAFTA arbitral panel could resolve the concerns of both Mexico and the United States. The Panel rejected Mexico's request and the Appellate Body upheld the Panel's decision.[51] The Appellate Body reasoned that a Member is "entitled" to a ruling by a WTO panel and that a panel is "not . . . in a position to choose freely whether or not to exercise its jurisdiction."[52] In addition, the Appellate Body rejected certain legal principles invoked by Mexico that would have required a determination as to whether the United States acted inconsistently with its NAFTA obligations. The Appellate Body reasoned that there was "no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes."[53]

In *EC—Biotech Products*, the EC argued that the Panel was required to interpret the WTO agreements at issue in the dispute in light of other rules of international law, in particular the 1992 Convention on Biological Diversity and the 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity. The Panel concluded that it was not required to take the Conventions into account in interpreting the WTO agreements because these treaties were not in force for certain WTO Members involved in the dispute and, thus, were not applicable in the relations between these Members or between these Members and all other WTO Members.[54]

C. IMPLEMENTATION

There were a few disputes over the implementation of Panel and Appellate Body decisions in 2006. In *EC—Chicken Cuts*, the only DSU Article 21.3(c) decision in 2006, the arbitrator determined that nine months is a reasonable period of time for the EC to implement the Panel and Appellate Body rulings in the case. The arbitrator rejected the assertion that, as a first step, the EC needed eighteen months to seek and receive a tariff classification ruling from the World Customs Organization (WCO). The arbitrator reasoned that seeking a WCO ruling was outside the EC's normal domestic decision-making processes and that the EC had failed to demonstrate that external element was necessary to the EC's effective compliance.[55] In *US—FSC (Article 21.5—EC II)*—the first of three DSU Article 21.5 decisions issued during 2006—the Appellate Body upheld the Panel's findings that the American Jobs Creation Act of 2004 continued to violate the Agreement on Subsidies and Countervailing Measures and the Agriculture Agreement, because it maintained subsidies previously found to be prohibited.[56]

---

51. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶¶ 52-53, WT/DS308/AB/R (Mar. 6, 2006) (quoting the Panel Report, ¶ 7.8, with approval).

52. *Id.*

53. *Id.* ¶¶ 55-56.

54. Panel Reports, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶¶ 7.71-7.75, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006).

55. Award of the Arbitrator, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, ¶¶ 51-52, WT/DS269/13, WT/DS286/15 (Feb. 20, 2006).

56. Appellate Body Report, *United States—Tax Treatment for "Foreign Sales Corporations"—Second Recourse to Article 21.5 of the DSU by the European Communities*, ¶ 96, WT/DS108/AB/RW2 (Feb. 13, 2006).

In *US—Softwood Lumber VI (Article 21.5—Canada)*, the Appellate Body clarified the standard of review for panels reviewing trade remedy determinations.[57] In particular, the Appellate Body faulted the Panel for failing to engage in the type of "critical and searching analysis called for by Article 11 of the DSU," but explained that it was unable to complete the analysis after reversing the Panel's findings.[58] Finally, in *US—Oil Country Tubular Goods Sunset Reviews (Article 21.5—Argentina)*, the Panel found that, although the United States had amended its Sunset Regulations in an attempt to comply with Panel and Appellate Body rulings, the regulatory provisions, in conjunction with the statute, remained WTO-inconsistent because, according to the Panel, the amended regulations "may, in some situations," preclude the DOC from making a reasoned determination of likelihood based on an adequate factual basis.[59] The Panel also found that the DOC's revised sunset determination lacked a sufficient factual basis and was therefore inconsistent with Article 11.3 of the SCM Agreement.[60] In January, 2007, the United States appealed the Panel's findings regarding the operation of the statute and regulations.[61]

IV. U.S. Trade Remedy Cases

Ten AD and CVD cases were initiated in 2006,[62] making it a relatively slow year for agency activity. But a number of important decisions affecting trade remedies were issued by the U.S. Court of International Trade (CIT) and the U.S. Court of Appeals for the Federal Circuit (CAFC).

A. Court of International Trade and Federal Circuit Cases

1. *Judicial Review of U.S. International Trade Commission Cases*

a. Bratsk Aluminum Smelter v. United States

In *Bratsk Aluminum Smelter v. United States*,[63] the CAFC clarified and extended the causation requirement originally set forth in *Gerald Metals v. United States*.[64] In a remand to the ITC, the CAFC clarified that the holding of *Gerald Metals* was not limited to the unique facts of that case, but rather triggered an obligation to consider the impact of non-subject imports "whenever the antidumping investigation is centered on a commodity

57. Appellate Body Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada—Recourse to Article 21.5 of the DSU by Canada*, ¶ 93, WT/DS277/AB/RW (Apr. 13, 2006).

58. *Id.* ¶¶ 113, 138, 160-161.

59. Panel Report, *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina—Recourse to Article 21.5 of the DSU by Argentina*, ¶ 7.41, WT/DS268/RW (Nov. 30, 2006).

60. *Id.* ¶ 7.102.

61. Notification of Appeal by the United States, *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina—Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/19 (Jan. 16, 2007).

62. Certain Activated Carbon from China, USITC Pub. 3852, Inv. No. 731-TA-1103 (May 2006); Certain Polyester Staple Fiber from China, USITC Pub. 3878, Inv. No. 731-TA-1104 (Aug. 2006); Coated Free Sheet Paper from China, Indonesia, and Korea, USITC Pub. 3900, Inv. Nos. 731-TA-1107-1109, 701-TA-444-446 (Dec. 2006); Lemon Juice from Argentina and Mexico, USITC Pub. 3891, Inv. Nos. 731-TA-1105-1106 (Nov. 2006).

63. Bratsk Aluminum Smelter v. United States, 444 F.3d 1369 (Fed. Cir. 2006)

64. Gerald Metals, Inc. v. United States, 132 F.3d 716 (Fed. Cir. 1997).

product, and [the] price competitive non-subject imports are a significant factor in the market."[65] The CAFC found that the ITC's failure to consider the impact of non-subject imports was inconsistent both with an agency's obligation to "examine the relevant data and articulate a satisfactory explanation for its action"[66] and with the CAFC's holding in *Gerald Metals*.[67] When commodity products are at issue, the CAFC held that "the increased in volume of subject imports . . . and the decline in domestic market share are not in and of themselves sufficient to establish causation."[68] The CAFC remanded for the ITC to "address whether the non-subject imports would have replaced subject imports during the period of investigation."[69] The ITC has interpreted *Bratsk* to require a new causation test: "whether non-subject imports would have replaced the subject imports without any beneficial effect on domestic producers."[70] The CAFC's subsequent decision in *Caribbean Ispat*, discussed *infra*, and the CIT's decision in *Sichuan Changhong Electric v. United States*[71] appear to support this interpretation. At least two ITC Commissioners have called the test illegal and proposed that perhaps the *Bratsk* court intended instead only to reiterate the *Gerald Metals* requirement to consider non-subject imports in the causation analysis.[72]

b. Caribbean Ispat Ltd. v. United States

The CAFC again addressed the issue of the role of other imports in the Commission's determinations in *Caribbean Ispat Ltd. v. United States*.[73] In that case, the Caribbean Basin Economic Recovery Act mandated that the ITC make a separate injury determination for subject imports from Trinidad and Tobago without cumulating those imports with subject imports from other countries. The CAFC found that in cases where imports are not cumulated, the ITC must treat the other subject imports in a manner similar to non-subject imports when determining whether there is injury "'by reason of'" the de-cumulated imports.[74] The CAFC remanded, holding that the "Commission is required to make a specific causation determination and in that connection to directly address whether [other LTFV imports and/or fairly traded imports] would have replaced [Trinidad and Tobago's] imports without any beneficial effect on domestic producers."[75]

65. *Bratsk*, 444 F.3d at 1375.

66. *Id.* at 1373 (quoting Motor Vehicle Mrfs. Ass'n v. State Farm Mut. Auto Inc. Co., 463 U.S. 29, 43 (1983)).

67. *Gerald Metals, Inc.*, 132 F.3d at 716.

68. *Brutsk*, 444 F.3d at 1374.

69. *Id.*

70. Certain Lined Paper School Supplies from China, India, and Indonesia, USITC Pub. 3884, Inv. Nos. 701-TA-442-443, 731-TA-1095-1097, 39 (Final) (Sept. 2006).

71. Sichuan Changhong Elec. v. United States, 06-168, slip op. at 25 (Ct. Int'l Trade Nov. 15, 2006) (remanding to "directly address whether non-subject imports would have replaced the subject imports without any beneficial effect on domestic producers").

72. *Id.* at 56.

73. Caribbean Ispat Ltd. v. United States, 450 F.3d 1336 (Fed. Cir. 2006).

74. *Caribbean*, 450 F.3d at 1341.

75. *Id.* (brackets in the original).

c. Nippon Steel Corp. v. United States

In 2006, the CAFC finally ended the long saga of *Nippon Steel Corp. v. United States*, with a strongly worded reminder that the courts may not second-guess the ITC as the trier of fact.[76] This case began in 2000 with an affirmative finding of injury by the ITC that was remanded by the CIT.[77] Rather than remanding the ITC's re-determination a second time, the CIT vacated the affirmative determination and directed the ITC to enter a negative determination.[78] On appeal, the CAFC held that the CIT had abused its discretion, vacated the CIT decision, and ordered a remand to the ITC.[79] On review of the third remand, the CIT again ordered the ITC to enter a negative determination, which the ITC did under protest.[80] On appeal, the CAFC vacated the CIT's third remand, found that the ITC's affirmative injury determination was supported by substantial evidence, and ordered that the determination be reinstated.[81] The CAFC held that the CIT erred in second guessing factual determinations of the ITC, including assessing credibility and re-weighing evidence,[82] but declined to make a broader holding that the CIT could never find that a remand was "futile."[83]

2. *Judicial Review of Department of Commerce Cases*

a. Wheatland Tube v. United States

In *Wheatland Tube v. United States*,[84] the CIT addressed the issue of whether Section 201 safeguard duties must be deducted from export price as import duties. This issue of first impression arose out of an administrative review of an AD duty order on circular welded carbon steel pipes and tubes from Thailand. In the administrative review, the Department allowed the Thai respondent to increase its export price by the amount of a billing adjustment it made to account for Section 201 duties. The Department did not require a deduction of the Section 201 duties actually paid by the importer, finding that the statutory requirement of 19 U.S.C. § 1677a(c)(2)(A) to deduct "United States import duties" from export price was not applicable to Section 201 duties.[85] The domestic parties appealed both decisions. The CIT upheld the Department's decision to allow the addition of the Section 201 price adjustments to export price, but found that Section 201 duties were U.S. import duties and must therefore be deducted from export price.[86] The government appealed this decision to the CAFC in July 2006, and a decision from the appellate court is expected in 2007.

76. Nippon Steel Corp. v. United States, 458 F.3d 1345 (Fed. Cir. 2006).
77. Nippon Steel Corp. v. United States, 182 F. Supp. 2d 1330, 1340 (Ct. Int'l Trade 2001).
78. Nippon Steel Corp. v. United States, 223 F. Supp. 2d 1349 (Ct. Int'l Trade 2002).
79. Nippon Steel Corp. v. United States, 345 F.3d 1379 (Fed. Cir. 2003).
80. *Nippon Steel Corp.*, 458 F.3d at 1349.
81. *Id.* at 1359.
82. *Id.*
83. *Id.*
84. Wheatland Tube Co. v. United States, 414 F. Supp. 2d 1271 (Ct. Int'l Trade 2006).
85. *See id.* at 1275.
86. *Id.* at 1285-86.

b. Decca Hospitality Furnishings v. United States

This case had its origins in a 2005 decision of the CIT. In *Decca Hospitality Furnishings v. United States*,[87] the CIT remanded the Department determination that non-mandatory respondent Decca was not entitled to a Section A Rate because it had not provided a timely response to Section A of the Department's questionnaire.[88] The CIT remanded because the Department did not attempt to deliver the questionnaire to all Chinese producers of wooden bedroom furniture; rather, it sent the questionnaire only to the Chinese Ministry of Commerce (MOFCOM) and the seven largest producers that had been selected as mandatory respondents. Decca alleged that it never received the questionnaire from MOFCOM and consequently missed the deadline for submitting the required information. On appeal, the CIT held that:

> [S]ending information on how to rebut the presumption of state-control only to MOFCOM, then treating the non-responsiveness of companies that did not receive the request for information as proof that they are state-controlled, is not a reasonable means of obtaining the sought after information. Companies that are not state-controlled are the least likely to have any relationship with MOFCOM.[89]

On remand, the Department found that Decca was entitled to the Section A Rate of 6.65 percent.[90] But the Department declined to order Customs to stop requiring a 198 percent cash deposit for imports of Decca's merchandise pending the outcome of a CAFC appeal initiated by the U.S. industry.[91] On Decca's motion to enforce the judgment, the CIT determined that a writ of mandamus was appropriate, holding that: (1) eventual refund of the 198 percent cash deposit rate did not provide Decca with effective relief; and (2) pursuant to *Timken v. United States*,[92] Decca was entitled to the benefits of the CIT decision lowering its cash deposit rate at the time the CIT decision became final.[93] Upon issuance of the writ of mandamus, the U.S. industry withdrew its appeal.

c. Sichuan Changhong Elec. v. United States and Dorbest v. United States

In two decisions issued in autumn of 2006, the Court of International Trade provided some guidance and limits on the Department's discretion in determining surrogate values in non-market economy (NME) cases. In general, the two cases affirm the Department's

87. Decca Hospitality Furnishings, LLC v. United States, 391 F. Supp. 2d 1298 (Ct. Int'l Trade 2006).

88. In dumping investigations involving non-market economies, the Department presumes that all companies are state-controlled unless the company can prove otherwise. The Department establishes a single rate, known as the "All China Rate" for all state-controlled companies; in the present case that rate was 198%. Companies that establish their freedom from state control qualify for a separate rate equal to the weighted-average margin calculated for the mandatory respondents. In the *Wooden Bedroom Furniture* case, that rate was dubbed the Section A Rate because its was granted to respondents that completed Section A of the questionnaire and established freedom from state control. *See* Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture from the People's Republic of China, 70 Fed. Reg. 329 (Jan. 4, 2005).

89. *Decca Hospitality Furnishings, LLC*, 391 F. Supp. 2d at 1307.

90. Decca Hospitality Furnishings, LLC v. United States, 412 F. Supp. 2d 1311 (Ct. Int'l Trade 2006).

91. Commerce itself did not appeal the Court's decision. Decca Hospitality Furnishings, LLC v. United States, 427 F. Supp. 2d 1249, 1253-54.

92. Jimken Co. v. United States, 893 F.2d 337, 340 (Fed. Cir. 1990).

93. *Decca Hospitality Furnishings, LLC*, 427 F. Supp. 2d at 1258-63.

discretion with regard to selection of data to be used for surrogate values. In *Dorbest v. United States*,[94] the Court affirmed the Department's general preference for the broad Indian import statistics found in the Monthly Statistics of Foreign Trade in India (MSFTI) and rejected plaintiff's arguments that MSFTI data is overbroad, and that better, more specific information was available from other sources, including InfoDrive India, a source that more precisely identifies the imports in question.[95] In contrast, in *Sichuan Changhong Electric v. United States*,[96] the CIT affirmed the Department's discretion to rely on InfoDrive India data, instead of MSFTI data as a source of surrogate values.[97] In both cases, however, the court remanded certain aspects of the Department's specific surrogate value decisions, noting that Commerce failed to provide adequate explanations of its surrogate value choices.[98] Of particular note in the *Dorbest* case, the CIT upheld the Department's use of a regression analysis to calculate NME wage rates, but remanded the determination to the agency, finding that the Department arbitrarily excluded numerous countries from the data set used to generate the wage rate.[99]

d. Zeroing Cases

In 2006, the CIT issued two other decisions regarding the DOC's controversial zeroing methodology. In *Paul Muller Industrie GmBH & Co. v. United States*,[100] the CIT rejected arguments that WTO decisions made subsequent to *Timken Co. v. United States*[101] required the court to revisit its zeroing decision in that case and in *Corus Staal BV v. Department of Commerce*.[102] The CIT made a similar holding in 2005 in *Corus Staal BV v. United States*,[103] finding that the WTO decision in the *Softwood Lumber*[104] case was an "as applied" decision and thus was not applicable beyond the specific facts of that case.[105] In 2006, the CIT's decision in *Corus Staal* was upheld by the CAFC in a per curiam decision without written opinion.[106] But it is unlikely that the zeroing disputes have been fully resolved. As detailed earlier in the summary of WTO dispute settlement cases, the WTO has now ruled that some aspects of U.S. zeroing methodology in AD investigations are contrary, "as such," to WTO obligations, and the Department has modified its approach to calculation of dumping margins in investigations.[107]

94. Dorbest v. United States, No. 06-160, 2006 WL 3103140, at *1, (Ct. Int'l Trade, Oct. 31, 2006).
95. *Id.* at *11, *31-33.
96. Sichuan Changhong Elec. v. United States, 460 F. Supp. 2d 1338 (Ct. Int'l Trade 2006).
97. *Id.* at 1342-44.
98. *Id.* at 1348 ("In order to rely on the Infodriveindia statistics, on remand, Commerce must point to record evidence supporting its conclusion that quantities shown in the Infodriveindia data represent commercial quantities, and explain why its conclusion is valid"). *Dorbest*, 2006 WL 3103140, at *34 ("Commerce's individual determinations, on a factor input by factor input basis, must also be supported by substantial evidence.")
99. *Dorbest*, 2006 WL 3103140, at *51-52.
100. Paul Muller Industrie GMBH & Co. v. United States, 435 F. Supp. 2d 1241 (Ct. Int'l Trade 2006).
101. Timken Co v. United States, 354 F.3d 1334 (Fed. Cir. 2004).
102. *Paul Muller Industrie GMBH & Co.*, 435 F. Supp. 2d at 1245.
103. Corus Staal BV v. United States, 387 F. Supp. 2d 1291 (Ct. Int'l Trade 2005).
104. Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004).
105. *Corus Staal BV*, 387 F. Supp. 2d at 1299-300.
106. Corus Staal BV v. United States, 186 Fed. Appx. 997 (Fed. Cir. 2006); *see also* FED. R. CIV. P. 36.
107. *See, e.g.*, Zeroing Appellate Ruling, *supra* note 35.

3. *Judicial Review of Other Trade Cases*

a. Tembec, Inc. v. United States

In a pair of cases, a three-judge panel of the CIT clarified the role of WTO and NAFTA panel decisions in U.S. AD/CVD determinations and in the refund of duties as a result of NAFTA Panel decisions.[108] These cases have their origins in NAFTA challenges to the AD and CVD orders issued against softwood lumber imports from Canada. After a series of remands to the ITC, the NAFTA panel finally ordered the ITC to issue a negative threat of injury determination, and then affirmed the resulting negative determination issued by the ITC.[109] That panel decision was upheld by the NAFTA Extraordinary Challenge Committee.[110]

In a separate WTO proceeding, a panel also determined that the United States' finding of threat of injury was inconsistent with the United States' WTO obligations. Following that decision, the United States issued a re-determination of threat of injury as part of its Section 129 WTO implementation decision, and the WTO compliance panel upheld the re-determination.[111] Thus, although the United States had already issued a negative finding of injury in 2004, rather than implement that determination, the United States reinstated its threat of injury finding as part of the NAFTA process. United States Trade Representative (USTR) then ordered the Department to continue to collect duties on the AD/CVD orders based on that finding. In *Tembec I*, the Canadian parties challenged USTR's authority to order implementation of that determination. The Court held that USTR did not have the authority to order implementation of an affirmative ITC determination under Section 129 and further held that the AD/CVD orders on softwood lumber were not supported by an affirmative ITC finding and were therefore terminated.[112]

In *Tembec II*, the Court rejected the U.S. Government argument that it was obligated to refund only those cash deposits collected after Commerce's publication of a *Timken* notice on November 30, 2005. The Court held that where there is an invalidated AD/CVD order, all cash deposits on entries that were suspended pursuant to the NAFTA appeal

108. Tembec, Inc. v. United States, 441 F. Supp. 2d 1302 (Ct. Int'l Trade 2006) (*Tembec I*); Tembec, Inc. v. United States, No. 05-00028, 2006 WL 2942870 (Ct. Int'l Trade 2006) (*Tembec II*).

109. *See* Antidumping and Countervailing Duty Investigations of Certain Softwood Lumber Products from Canada—NAFTA Panel Decision, 69 Fed. Reg. 69,584, 69,585 (Nov. 30, 2004).

110. *See* Opinion and Order of the Extraordinary Challenge Committee, *In the Matter of Certain Softwood Lumber Products from Canada*, ECC-2004-1904-01USA (Aug. 10, 2005), *available at* http://www.nafta-secalena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ue2004010e.pdf.

111. Panel Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada—Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/RW (Nov. 15, 2005). Canada appealed the Article 21.5 Panel decision to the Appellate Body and the Appellate Body reversed the Article 21.5 Panel decision. Appellate Body Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada—Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW (April 13, 2006), *available at* http://www.wto.org/english/tratsp_e/dispu_e/277abrw_e.pdf. But the Appellate Body was unable to complete the analysis to determine whether the United States' Section 129 determination was consistent with the AD and CVD Agreements, noting that there was an absence of pertinent factual findings by the Panel. *Id.*; *see also* Dispute Settlment, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada*, DS277, *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds277_e.htm (last visited Mar. 10, 2007). While the proceedings were still ongoing, on October 12, 2006, the United States and Canada informed the Dispute Settlement Body that they had reached a mutually agreed solution in the form of a comprehensive agreement, notably the 2006 Softwood Lumber Agreement. *Id.*

112. *Tembec I*, 441 F. Supp. 2d at 1343.

must be refunded. The Court found that in implementing the dispute settlement provisions of NAFTA, "Congress relied upon the principle that a final appellate decision applies to all entries . . . for which liquidation has been suspended."[113]

b. "Byrd Amendment" Cases

In *PS Chez Sidney L.L.C. v. United States International Trade Commission*,[114] the CIT considered the constitutionality of the Continued Dumping and Subsidy Offset Act of 2002 (the Byrd Amendment).[115] The Byrd Amendment required that AD/CVD duties collected by the U.S. government be paid out to domestic producers that incur certain eligible expenses. To be eligible for its pro-rata share of the collected duties, a U.S. producer must have expressed support for an AD petition during the ITC investigation.[116] Chez Sidney, a U.S. producer of crawfish meat, had checked the "take no position box" on the ITC questionnaire in the original 1996 investigation. But, in 2002, in an effort to collect Byrd Amendment distributions, Chez Sydney sent a letter to the ITC seeking payment. The ITC denied Chez Sydney's request because it "did not show the requisite support for the petition."[117] The CIT found that "speech" under the Byrd Amendment is constitutionally protected and is due strict scrutiny by the court.[118] The court further found that the Byrd Amendment violated the First Amendment of the Constitution because it could not meet the strict scrutiny burden of being "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end."[119] In finding the Byrd Amendment unconstitutional the CIT held:

> To the extent that the Government seeks, and is required to seek, accurate information about the level of support for an antidumping petition it can, and indeed must, make the inquiry at issue. To the extent, however, that it conditions the payment of benefits to those who answer the inquiry upon the content of their opinion, it may no more do so than it may base the condition upon the color of their skin.[120]

In *SKF USA Inc. v. United States of America*,[121] the CIT considered the constitutionality of the Byrd Amendment on equal protection grounds. In facts similar to those in the *Chez Sydney* case, SKF challenged the government's refusal to make Byrd Amendment disbursements. The court found that the rational basis standard was the appropriate level of review for the Byrd Amendment because the classification of companies based on support for the petition was neither based on suspect lines, nor did it infringe a fundamental constitutional right.[122] The court held that the plain language of the Byrd Amendment failed

113. *Tembec II*, 2006 WL 2942870 at *7.
114. PS Chez Sidney, LLC v. United States Int'l Trade Comm'n, 442 F. Supp. 2d 1329 (Ct. Int'l Trade 2006).
115. The Byrd Amendment was passed in 2002, Pub. L. No. 106-387, § 1003, 114 Stat. 1549, 1623 (2002) (codified at 19 U.S.C. § 1675c), but was then repealed by Congress effective Oct. 2007, Pub. L. No. 109-171, Title VII § 7601(a), 120 Stat. 154.
116. 19 U.S.C. § 1675(c)(6).
117. *PS Chez Sidney, LLC*, 442 F. Supp. 2d at 1335.
118. *Id.* at 1355.
119. *Id.* at 1356.
120. *Id.*
121. SKF USA Inc. v. United States, No. 05-00542, 2006 WL 2604616 (Ct. Int'l Trade 2006).
122. *Id.*

to "rationally indicate why entities who supported a petition are worthy of greater assistance than entities who took no position or opposed the petition when all the domestic entities are members of the injured domestic industry."[123]

In *Canadian Lumber Trade Alliance v. United States*,[124] the Court of International Trade considered the legality of the Byrd Amendment as it applies to duties collected on Canadian imports. Section 408 of the statute implementing the NAFTA (NAFTA Implementation Act) provides that "[a]ny amendment . . . [to] title VII of the Tariff Act of 1930, or any successor statute . . . shall apply to goods from a NAFTA country *only to the extent specified in the amendment.*"[125] The court found that the Byrd Amendment did not specifically apply to Canada or Mexico, as required by the NAFTA Implementation Act. The Court held that:

> [E]ssentially, the Byrd Amendment converts what was just a tariff into a broader compensatory regime. Certainly, this change in the nature of the remedies available under the trade laws is something Section 408 is meant to foreclose as to Canadian and Mexican goods where Congress has not explicitly stated an intent to change the statutory remedies as to Canada and Mexico.[126]

The Court ordered Customs not to distribute future Byrd money with respect to AD/CVD orders on Canadian merchandise, but declined to require disgorgement of monies already distributed to U.S. producers.[127]

B. Administrative Determinations

1. *Department of Commerce Determinations*

a. Brake Rotors from the People's Republic of China

In *Brake Rotors from the People's Republic of China*,[128] the Department revived the infrequently used procedure of using sampling to select mandatory respondents. If the Department is unable to calculate individual dumping margins for all respondents, the statute permits it to calculate individual rates for a limited number based either on a "statistically valid" sample or the "largest volume . . . that can be reasonably examined."[129] The Department has largely relied on the latter methodology. In this case, reviews were requested for sixteen respondents. In previous reviews, the Department had conducted individual reviews for all respondents. In what was widely seen as a first step toward wider use of sampling, particularly in Chinese cases, the Department elected to use a sampling methodology to select five mandatory respondents in this case. Respondents protested the

123. *Id.* at 1361-62.

124. Canadian Lumber Trade Alliance v. United States, 425 F. Supp. 2d 1321 (Ct. Int'l Trade 2006).

125. 19 U.S.C. § 3438 (emphasis added).

126. *Canadian Lumber Trade Alliance*, 425 F. Supp. 2d at 1370.

127. Canadian Lumber Trade Alliance v. United States, 441 F .Supp. 2d 1259 (Ct. Int'l Trade 2006).

128. *Brake Rotors from the People's Republic of China*, 71 Fed. Reg. 66,304 (November 14, 2006); Issues and Decision Memorandum for the Final Results in the 2004/2005 Administrative Review and New Shipper Review of Brake Rotors from the People's Republic of China (Nov. 14, 2006), *available at* http://hongkong.usconsulate.gov/uploads/images/IbB_oSmrsmF16-o9Zp8utw/uscn_t_others_2006111405.pdf [hereinafter *I&D Memo*].

129. 19 U.S.C. § 1677f-1(c).

Department's decision as unnecessary, and as contrary to the statute for various reasons, including failure to create a "statistically valid" sample. Notably, the Department responded that the phrase "statistically valid" in the statute refers only to the "manner in which respondents are selected, not to the size of the sample under review."[130] The Department went on to use a sampling methodology in the *Softwood Lumber* administrative review.[131]

b. Certain Lined Paper Products from China

In *Certain Lined Paper Products from China*,[132] the Department reviewed China's status as an NME. U.S. law requires the Department to treat as an NME any country that it determines "does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." The *Certain Lined Paper* respondents sought a review of China's status. The Department determined that although China had enacted significant and sustained economic reforms, market forces were not yet sufficiently developed to permit the use of prices and costs for purposes of dumping margin calculations.[133]

c. Coated-Free Sheet Paper from the People's Republic of China

On November 21, 2006, the Department initiated a CVD case against China in response to the first CVD petition filed against China since 1991.[134] In 1986 the CAFC held that the Department was not obligated to accept CVD petitions against NME countries.[135] Subsequently, the Department has refused to apply the CVD statute to NME countries. The initiation of this investigation requires the Department to review its policy of not applying the CVD law to NMEs.[136] If the Department determines that CVD law is applicable to China, and the courts uphold that determination, this case could open the door for a number of new CVD cases against China and other NMEs.

2. *Settlements*

a. Mexico Cement Agreement

In March 2006, the DOC announced the settlement of the long-standing dispute of the AD order on cement from Mexico. The Department invoked its settlement authority under 19 U.S.C. § 1617, a rarely used provision that allows the U.S. Government to "compromise" any "claim arising under the customs laws."[137] The settlement suspended

130. *I&D Memo*, *supra* note 128, at 6.

131. *See* Certain Softwood Lumber Products from Canada: Extension of the Time Limit for the Preliminary Results of Antidumping Duty Administrative Review, 71 Fed. Reg. 2,023 (Jan. 12, 2006).

132. *See* Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People's Republic of China, 71 Fed. Reg. 53,079 (September 8, 2006).

133. *Id.*

134. International Trade Administration (ITA), Fact Sheet: Commerce Initiates Countervailing Duty Investigation on Coated Free Sheet Paper from the People's Republic of China, http://ia.ita.doc.gov/download/factsheets/factsheet-prc-cfsp-cvd-initiation-112006.pdf [hereinafter ITA Fact Sheet].

135. Georgetown Steel v. United States, 801 F.2d 1308 (Fed. Cir. 1986).

136. ITA Fact Sheet, *supra* note 134.

137. 19 U.S.C. § 1617.

on-going litigation before NAFTA panels and WTO dispute resolution panels and allowed termination of the AD order on Mexican cement if the agreement remains in place until March 2009.[138] The settlement requires an export licensing system in Mexico and an import licensing system in the United States and limits the amount of Mexican cement that can be imported into the United States.

b. Softwood Lumber Agreement

Near the end of 2006, the United States and Canada reached a settlement of the hard-fought *Softwood Lumber* AD and CVD cases.[139] The settlement, the Softwood Lumber Agreement of 2006 (SLA 2006),[140] resulted in revocation of the AD and CVD orders on *Softwood Lumber from Canada* and rescission of the on-going administrative reviews. The agreement also required the termination of all on-going litigation before NAFTA panels and the U.S. courts.[141] Under the terms of the SLA 2006, the AD/CVD duties would be replaced with a combination of export taxes and quotas put in place by the Government of Canada.[142] Of the approximately $5.3 billion in cash deposits collected on imports of Canadian softwood lumber, $4.3 billion would be refunded to the importers of record. The U.S. industry would receive $500 million, with an additional $50 million disbursed to a binational industry council and $450 million disbursed for "meritorious initiatives" in the United States, including disaster rebuilding efforts.[143]

V. Agency Policy Initiatives

A. Suspension of Bonding Privilege for "New Shippers"

In the past, an entity that was a new shipper to the United States (i.e., a company that had never previously exported goods covered by an AD or CVD order or did not export such products at the time of an original AD/CVD investigation) had the option to post a bond or other security in lieu of cash deposits in order to satisfy the security deposit requirements at the time of entry. On August 17, 2006, the President signed into law the Pension Protection Act of 2006, which included a provision that suspended the authority of the Department to instruct the U.S. Customs and Border Protection Agency (CBP) to

138. Agreement Between The Office of the United States Trade Representative and the Department of Commerce of the United States of America and the Ministry of Economy of the United Mexican States (Secretaria De Economia) on Trade in Cement, U.S.-Mex., Mar. 6, 2006, *available at* http://ia.ita.doc.gov/download/mexico-cement/cement-final-agreement.pdf.

139. *Notice of Recission of Countervailing Duty Reviews and Revocation of Countervailing Duty Order: Certain Softwood Lumber Products from Canada*, 71 Fed. Reg. 61,714, (Oct. 19, 2006).

140. Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America, U.S.-Can., Oct. 12, 2006, *available at* http://www.for.gov.bc.ca/HET/Softwood/SLA%202006%20Final%20Agreement.pdf.

141. Softwood Lumber Agreement, U.S.-Can., Sept. 12, 2006, at Annex 2A, 35 I.L.M. 1195, *available at* http://www.dfait-maeci.gc.ca/eicb/softwood/SLA-main-en.asp.

142. *Id.* at art. VII.

143. *Id.* at art. XIII; Annex 2C, ¶ 5.

collect such a bond or other security.[144] As a result, new shippers are now subject to the same cash deposit requirements as all other exporters to the United States.

B. Valuation of Market Economy Inputs and Wages in NME Cases

On October 19, 2006, the Department announced that it was revising its methodology for calculating AD rates in cases involving NME countries.[145] First, the Department indicated that, when conducting its factors of production analysis, the Department was instituting a threshold for when it would rely on market economy input purchases by the producer in question.[146] Previously, the Department normally had relied on market economy input prices as the basis for valuing the inputs of a company if that company's market economy purchases were commercially meaningful. But there was no established definition for what constituted a "meaningful" volume of market economy purchases, and certain commentators expressed concern that the use of a market economy purchase price may not constitute the "best available information" if a company has a very small portion of market economy inputs.[147] The Department's new policy presumes that, under normal circumstances, market economy input prices are the best available information for valuing an entire input of a company only when the total volume of the input purchased from market economy sources exceeds 33 percent of the volume of inputs purchased from all sources.[148] In contrast, where the volume of market economy input purchases is below the 33 percent threshold, the Department will now weight-average the market economy prices with a surrogate value.[149]

The Department announced several changes to its calculation of NME wage rates.[150] In its NME calculation, the Department calculates an hourly wage rate for the NME based on international labor statistics and a regression analysis.[151] The Department has revised its methodology to include data from a larger basket of countries (all countries for which data is available), based on the principle that use of a larger universe of data minimizes the effects of any potential year-to-year variability in the data and, thus, will lead to more accurate and predictable results.[152]

C. Duty Drawback

The Department also requested comments regarding its methodology for calculating "duty drawback."[153] When calculating an AD rate, in accordance with Section 772(c)(1)(B) of the Tariff Act, the Department takes into account any foreign import du-

144. Pension Protection Act of 2006, Pub. L. No. 109-280, § 1632, 120 Stat. 780 (2006); *see, e.g., Certain Forged Stainless Steel Flanges from India: Notice of Partial Rescission of New Shipper Reviews*, 71 Fed. Reg. 57,468, 57,469 (Sept. 29, 2006).

145. *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 Fed. Reg. 61,716 (Oct. 19, 2006).

146. *Id.* at 61,718, 61,720.

147. *Id.* at 61,718.

148. *Id.*

149. *Id.*

150. *Id.* at 61,719, 61,723.

151. *Id.*

152. *Id.*

153. *Id.*

ties that are refunded or not collected by the foreign country as a result of the exportation of the product.[154] In other words, the U.S price (or export price) is increased by the amount of uncollected import duties in the foreign country. Current Department practice adjusts the U.S. price for all duty drawback received, regardless of whether the drawback received in the home country is related to U.S. sales. In its notice, the Department proposed revising its methodology to allocate the total drawback received against all exports by a company that may have incorporated the drawback, regardless of destination.[155] This may reduce the drawback adjustment on U.S. sales because the amounts will be attributed to global sales of a company. The Department requested comments by November 17, 2006, and, at the time of this writing, had not issued its final policy.

VI. Legislative Activity

There was a great deal of activity in 2006 on trade legislation. As noted above in the discussion of bilateral and regional negotiations, Congress enacted implementing legislation for several agreements, including the CAFTA, the U.S.-Bahrain FTA, and the U.S.-Oman FTA. The U.S. Congress also repealed the Byrd Amendment, a long-standing controversial provision that had been declared WTO-illegal. Finally, although a number of bills dealing with contentious issues such as duty-free treatment for developing countries (e.g., GSP, AGOA, and HOPE)[156] and renewal of permanent normal trade relations (PNTR) for certain countries had been controversial and languished throughout the year, in the last hours of the lame duck Congressional session, Congress enacted a comprehensive trade package that addressed many of the outstanding trade bills.

A. Antidumping and Countervailing Duty Laws

One of the first items of business in 2006 was to repeal the controversial Byrd Amendment. On October 27, 2005, Senator Judd Gregg introduced the Deficit Reduction Act of 2005 (S. 1932), which included a measure to repeal the Continued Dumping and Subsidy Offset Act (or the Byrd Amendment). Shortly thereafter, the bill passed both the House and Senate; however, it was referred back to the House on December 22nd due to a procedural complication. After coming back into session, on February 1, 2006, the bill passed the House and was signed into law by the President on February 8, 2006.[157] The repeal applies to all entries after September 30, 2007.[158]

B. Comprehensive Trade Bill

The most notable legislation passed in 2006 was the comprehensive trade bill that was passed in the last hours of the lame duck session for the 109th Congress. After months of

154. Tariff Act of 1930, Pub. L. No. 103-465 § 772(c)(1)(B) (1994); *see also* 19 U.S.C. § 1677a (1994).
155. 71 Fed. Reg. 61,716, 61,723.
156. GSP refers to the Generalized System of Preferences; AGOA refers to the African Growth and Opportunity Act; and HOPE refers to the Haitian Hemispheric Opportunity through Partnership Encouragement (HOPE) Act.
157. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006).
158. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601, 120 Stat. 4, 154 (2006) (Subtitle F—Repeal of Continued Dumping and Subsidy Offset).

debate and in the late hours of the evening of the last week of the congressional session, the House and Senate passed a comprehensive tax and trade bill, relying on a strategic procedural move that allowed passage by both the House and Senate within hours of each other.[159]

Certain trade provisions in the bill were particularly contentious, including new duty-free treatment for Haiti and renewal of PNTR for Vietnam.[160] In addition, the legislation included a two-year extension, through 2008, of the Generalized System of Preferences (GSP),[161] which was set to expire on December 31, 2006. There had been congressional pressure to alter the GSP rules in order to disqualify key products from Brazil and India, and the final bill that was passed tightens the rules for receiving GSP treatment, such that eligibility is based on competitive need.

The trade package also included an extension of duty-free access to the United States for six months for the four countries that are negotiating the Andean FTA (Peru, Bolivia, Ecuador, and Columbia), and an extension until 2012 of benefits under the African Growth and Opportunity Act, which provides duty-free treatment for products from sub-Saharan countries. Finally, the bill amended the U.S. Harmonized Tariff Schedule to suspend or reduce tariff rates on more than 500 products unavailable in the United States.[162] Despite controversy throughout much of the 109th Congress over several provisions that were wrapped into the bill, the final comprehensive package passed with bipartisan support (212-187) and became public law on December 22, 2006.[163]

In addition, on March 14, 2006, the House introduced a Miscellaneous Trade Bill, HR 4944, to amend the Harmonized Tariff Schedule to modify temporarily certain rates of duty and to make other technical amendments to the trade laws. This bill passed the House by roll call vote and then provisions of the bill were incorporated into HR 4, the Pension Protection Act of 2006 on July 28, 2006. The bill also passed the Senate on July 28, 2006, and was signed into law on August 17, 2006.[164]

159. *Laundry List Awaits Lame-Duck Congress*, CNN.com, December 4, 2006; *Lame-Duck Congress Reconvenes after Democratic Victory*, FoxNews.com, Nov. 13, 2006.

160. *See Highlights of the Tax and Trade Legislation, with Added Provisions*, CQ DAILY, Dec. 7, 2006; *see also* Letter to the United States Senate from Senators Frist, Hastert, Grassley, Thomas, DeWine, Reid, Pelosi, Baucus and Rangel, Dec. 7, 2006 (on file with author), and *compare*, *NGOs Urge Support of Haiti Preferences in Trade Bill*, INSIDE US TRADE, Dec. 8, 2006.

161. The U.S. Generalized System of Preferences (GSP), a program designed to promote economic growth in the developing world, provides preferential duty-free entry for more than 4650 products from 144 designated beneficiary countries and territories. The GSP program has been renewed periodically since 1976, most recently in 2002, when President Bush signed legislation that reauthorized the GSP program through 2006.

162. *See Highlights of the Tax and Trade Legislation, with Added Provisions*, CQ DAILY (Dec. 7, 2006).

163. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 (2006).

164. Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006).