International Trade

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I. Introduction

Important developments occurred in the international trade law field during 2005. It was a particularly active year for multilateral and bilateral negotiations. At the World Trade Organization (WTO), a record number of countries engaged in accession negotiations, though only two—Saudi Arabia and Tonga—actually acceded during the year. The WTO's Doha Development Agenda (Doha Round) negotiations continued throughout the year, culminating in the Hong Kong Ministerial in December. Given the difficult issues being discussed, not much progress was made, but many viewed the negotiations and the Ministerial itself as a success compared with previous years. At this point, the fact that Members are still seeking to resolve their differences is viewed as better than the alternative. Meanwhile, because of the stalled WTO talks, many countries have entered bilateral and plurilateral free trade area negotiations aiming to gain trade liberalization that is slow to materialize through the WTO. For the United States, though several such talks with its trading partners were held, only two agreements actually became law—the Central America-Dominican Republic Free Trade Agreement (CAFTA-DR) and the Bahrain Free Trade Agreement (Bahrain FTA).

It was a significant year for WTO dispute settlement, where important jurisprudence was developed on agriculture subsidization and on other aspects of subsidy law. Meanwhile, appeals and implementation rulings are pending on the controversial issues of zeroing of dumping margins and the reach of the fair comparison requirement under antidumping rules. Implementation battles also continue over the U.S. trade remedy determinations on softwood lumber from Canada, the now infamous Byrd Amendment, and the Foreign Sales Corporation progeny.

It was a relatively slow year for U.S. trade remedy cases, though important changes may be on the horizon for non-market economy (NME) cases and multi-respondent adminis-

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trative reviews. U.S. federal court review of agency decisions saw a good deal of activity, but the most interesting cases remain unresolved on remand.

Finally, there were many trade-related bills introduced in Congress this year, but very few reached full decision, with most remaining stuck in committee. The primary success in Congress this year was the passage of CAFTA-DR and the Bahrain FTA. Various outstanding bills may see more activity in 2006 as mid-term elections approach and as members of Congress seek to score points with their constituents, primarily those involving China. The Bush Administration will also likely seek passage of more free trade agreement (FTA) implementing legislation in anticipation of the President's trade promotion authority expiration in mid-2007.

II. Negotiating Developments

A. WTO Negotiations

1. *Accession Negotiations*

As of November 2005, there were thirty ongoing WTO accessions in progress as follows (in order of their application): Algeria, the Russian Federation, Saudi Arabia, Belarus, Ukraine, Sudan, Uzbekistan, Vietnam, Seychelles, Tonga, Kazakhstan, Azerbaijan, Lao People's Democratic Republic, Samoa, Andorra, Lebanese Republic, Bosnia and Herzegovina, Bhutan, Cape Verde, Yemen, Bahamas, Tajikistan, Ethiopia, Libya, Iraq, Afghanistan, Republic of Serbia, Republic of Montenegro, Iran, and Sao Tomé and Principe.[1] While many of these applicants made progress in the accession process,[2] only two countries, Saudi Arabia and Tonga, were granted access to the WTO in 2005, becoming the 149th and 150th members of the WTO, respectively.[3]

Two other countries, Russia and Vietnam, had also hoped to conclude accession negotiations in time for the Hong Kong Ministerial in December 2005. Though each fell short of completing the accession process, both made significant progress in the negotiations.[4]

1. World Trade Organization, Accessions, http://www.wto.org/english/thewto_e/acc_e/acc_e.htm (last visited Feb. 27, 2006). Only two of these countries—Iran and Sao Tomé and Principe—commenced the accession process in 2005. World Trade Organization, Accession Working Parties Established for Iran, Sao Tomé and Principe (May 26, 2005), http://www.wto.org/english/news_e/news05_e/acc_iran_sao_may05_e.htm.

2. Eleven applicant countries held formal accession working party meetings in 2005, including Algeria, Ukraine, Belarus, Kazakhstan, Serbia and Montenegro, Yemen, Bhutan, Saudia Arabia, Russia, Vietnam, and Tonga. World Trade Organization, Understanding the WTO: The Organization: Members and Observers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Feb. 27, 2006).

3. The WTO General Council approved Saudi Arabia's accession on November 11, 2005. Accession negotiations had been in session since July 1993. Press Release, World Trade Organization, WTO General Council Successfully Adopts Saudi Arabia's Terms of Accession (Nov. 11, 2005), *available at* http://www.wto.org/english/news_e/pres05_e/pr420_e.htm. Tonga first applied for accession to the WTO in June 1995, and its accession was approved December 15, 2005. Press, Release, World Trade Organization, WTO Minister Successfully Approve Tonga's Membership at Hong Kong Conference (Dec. 15, 2005), *available at* http://www.wto.org/english/news_e/pres05_e/pr431_e.htm.

4. Although Russia's efforts to obtain accession by December 2005 did not materialize, it sought to conclude country-specific negotiations by year-end. Daniel Pruzin, *Russian Negotiator Hopes to Finish WTO Accession Deals by End of 2005*, WTO Reporter, Nov. 15, 2005. The key outstanding issues that needed to be addressed in the negotiations relate generally to a lack of transparency in Russia's regulations as well as to an overall high level of corruption in the government. *Russia Told to Speed Up Pace of Reform to Enter WTO This Year*, Inside U.S. Trade, July 1, 2005. Vietnam also lowered its expectations for 2005 accession and focused its effects on

2. *Doha Development Agenda*

Although Doha Round negotiations had been in progress for more than four years, the talks moved at a slow pace during the first part of 2005 and began in earnest in July—first at a mini-ministerial in Dalian, China, and then in a series of intensive meetings in Geneva that same month. These negotiations, however, did not produce the anticipated first approximations, and as negotiators returned from an August recess, WTO Members and the business community expressed renewed urgency for an ambitious Doha Round agenda that would result in defined modalities by the December Hong Kong Ministerial.

By early October 2005, leaders were calling for urgent attention, noting that the negotiations were in crisis mode and that rapid progress was needed if the original goals were to be met.[5] At that time, WTO members remained far apart on several key issues. With regard to agriculture, the negotiators had not agreed on formulas for the future reduction and phase-out of domestic and export subsidies, two of the key goals that had been part of the original framework. The same types of obstacles occurred in the non-agriculture market access (NAMA) talks, where negotiators could not agree on formulas for tariff reduction. And negotiations over services were particularly acrimonious, as there was strong disagreement over issues such as immigration (movement of natural persons), government procurement, and general market access.[6] Soon it became clear that none of the talks could move forward until there was a breakthrough in at least one area. In particular, movement on agriculture was needed, as the stability of the Doha Round as a whole centered on those negotiations.

In mid-October, key WTO members tabled their first concrete offers on agriculture. The United States first put forth proposals on both domestic support and market access, and the European Union (EU) and G-20 nations followed with counterproposals. The U.S. offer showed, for the first time, a willingness to accept reductions in its own domestic subsidies and, as a result, there was new momentum in the talks. At that point, although the negotiators remained far apart on the level and types of reductions, WTO members

passing required legislation and concluding a number of bilateral agreements. World Trade Organization, Working Party Examines First Revision of Membership Report (Sept. 20, 2005), http://www.wto.org/english/news_e/news05_e/vietnam_15sep05_e.htm. As of September 23, 2005, Vietnam had "concluded bilateral market access negotiations with Argentina, Brazil, Bulgaria, Canada, Chile, China, Chinese Taipei, Colombia, Cuba, European Union, El Salvador, Iceland, India, Japan, Republic of Korea, Norway, Paraguay, Singapore, Switzerland, Turkey and Uruguay." *Id.* But The United States and Vietnam had yet to conclude a bilateral agreement due to differences on various issues, such as trading rights for foreign business entities and the status of state trading enterprises (STEs). While Vietnam pledged to offer full trading rights to foreign businesses by January 1, 2007, the United States had previously requested that Vietnam eliminate any such restrictions prior to or immediately upon accession. *Vietnam Edges Toward Accession; STES, Trading Rights Still in Play*, Inside U.S. Trade, Sept. 23, 2005.

5. *See, e.g.*, Daniel Pruzin, *Chair of NAMA Talks Warns of Crisis, Cites Wide Gaps on Tariff-Cutting Formula*, WTO Reporter, Oct. 27, 2005; The International Centre for Trade and Sustainable Development, Bridges Weekly Trade News Digest, Oct. 19, 2005, *available at* http://www.ictsd.org/weekly/05-10-19/BRIDGES Weekly9-35.pdf; Jason Subler, *World Leaders Urge Successful Talks At Hong Kong Ministerial in December*, WTO Reporter, Oct. 18, 2005; Press Release, The European Round Table of Industrialists, World Business Leaders Express Deep Concern Over Status of WTO Negotiations (Sept. 6, 2005), *available at* http://www.ert.be/doc/0121.pdf.

6. Indeed, by July 2005, many countries had not even submitted initial offers on the services negotiations, which was the prerequisite for the negotiations. *Developing Countries Voice Opposition to 'Benchmarking' in WTO Services Talks*, WTO Reporter, July 6, 2005.

saw the possibility of ultimate agreement on the key questions of domestic and export subsidies.[7] Still, despite a spike in enthusiasm over agriculture, Members continued to diverge on positions related to NAMA and services.[8]

Due to the lack of progress, the EU and the United States were both criticized, for a "lack of ambition" on the part of the EU, and for an aggressive, unyielding stance on the part of the United States.[9] Soon developing countries and least-developed countries (LDCs) expressed further dissatisfaction after the EU linked its offer on agriculture to significant reductions in industrial tariffs from other WTO Members, as well as to market access commitments in a vast number of services sectors.[10] As a stalemate re-emerged on agriculture, it became clear that negotiations on the other three areas could not move forward until the contentious issues over agriculture were resolved.[11] Indeed, the only area that had seemingly progressed on track—trade facilitation—also broke down in early November when the chair of the negotiations suggested concrete deadlines for a draft text.[12]

As the talks began to falter, it was necessary to recalibrate the goals for the Hong Kong Ministerial in an attempt to avoid a failure of the Doha Round altogether.[13] Further, with the U.S. fast-track negotiating authority set to expire in July 2007, it became clear that negotiators needed to focus on manageable goals or risk ultimate lack of engagement by

7. *See* The International Centre for Trade and Sustainable Development (ICTSD) and the International Institute for Sustainable Development (IISD), Doha Round Briefing Series: Hong Kong Update 1 (Nov. 2005), *available at* http://www.iisd.org/pdf/2005/trade_doha_hk_update.pdf [hereinafter Doha Round Briefing Series]; see also Christopher S. Rugaber, *U.S. Praised for Doha Farm Proposal*, WTO Reporter, Nov. 22, 2005.

8. Doha Round Briefing Series, *supra* note 7.

9. *Id.*

10. *See id.*; Christopher S. Rugaber, *APEC Leaders Call on EU to Show Flexibility and Initiative in WTO Talks*, WTO Reporter, Nov. 21, 2005. Becoming more incensed at what they referred to as disproportionate demands by the EU, developing countries accused rich countries of trying to seek "a round for free" and to "sow division among developing countries." The International Centre for Trade and Sustainable Development, Rich Countries Seeking "Round for Free," Say Nine Developing Countries, Bridges Weekly Trade News Digest, Nov. 30, 2005, at 3, 4, *available at* http://www.ictsd.org/weekly/05-11-30/BRIDGESWeekly9-41.pdf; *see also Daniel Pruzin, Developing Countries Accuse Rich WTO Members of Seeking 'Round for Free'*, WTO Reporter, Nov. 29, 2005.

11. *See* Doha Round Briefing Series, *supra* note 7; Daniel Pruzin, *WTO Chair Seeks Consensus on Services, Despite No Agreements in Ag Talks, NAMA*, WTO Reporter, Nov. 21, 2005.

12. *See* Esther Lam, *WTO Talks on Trade Facilitation Falter On Draft's Mention of Deadlines for Action*, WTO Reporter, Nov. 15, 2005. The lack of progress on the agriculture negotiations and the consequent breakdown of the Doha talks generally has also hindered discussions in other regional and bilateral free trade initiatives. For example, with agriculture as a key element in the FTAA negotiations, some have argued that the FTAA negotiations cannot realistically move forward until the political climate in the Doha round improves. *See, e.g.*, Rossella Brevetti, *Future of FTAA Turns on Unblocking Doha Agriculture Talks, OAS Head Says*, WTO Reporter, Nov. 17, 2005. Where there are divisions in Doha, those divisions arise in regional negotiations as well. *Id.*

13. *See* The International Centre for Trade and Sustainable Development, Members 'Recalibrating' Expectations for Hong Kong and Beyond, Bridges Weekly Trade News Digest, Nov. 16, 2005, *available at* http://www.ictsd.org/weekly/05-11-16/BRIDGESWeekly9-39.pdf; Gary G. Yerkey, *United States 'Ratchets Down' Expectations for WTO Ministerial Meeting in December*, WTO Reporter, Nov. 16, 2005; Daniel Pruzin, *Talks on WTO Ministerial in Disarray As EU, G-20 Members Clash Over Ag, NAMA*, WTO Reporter, Nov. 16, 2005; *U.S., EU Officials Acknowledge They Will Miss Goals at Hong Kong*, Inside U.S. Trade, Nov. 11, 2005; The International Centre for Trade and Sustainable Development, Members Scale Back Expectations for Hong Kong, Bridges Weekly Trade News Digest, Nov. 9, 2005, *available at* http://www.ictsd.org/weekly/05-11-09/BRIDGESWeekly9-38.pdf; Daniel Pruzin, *WTO Talks in Confusion as Lamy Urges Recalibration of Hong Kong Goals*, WTO Reporter, Nov. 9, 2005; see also ICTSD Doha Round Briefing Series, *supra* note 7, at 1.

the United States.[14] Consequently, in the weeks leading up to the Hong Kong Ministerial, the goal was simply to outline the work to be done in order to conclude the Doha Round successfully in 2006.

On November 26, 2005, Pascal Lamy, the WTO Director-General, issued a draft declaration outlining the minimum goals to be achieved at the Hong Kong Ministerial.[15] Most notably, the draft declaration requested that WTO Members establish new dates for completing full modalities in the areas of agriculture and NAMA.[16] While some WTO Members expressed disappointment over the lack of operational content in the draft, others referred to the document as realistic.[17] In general, most WTO members agreed that the declaration was essentially a status report and that, if the Doha Round is to have any success, the Hong Kong Ministerial must result in a defined calendar and framework for completion of the necessary work in the year 2006.[18]

As expected, negotiators in Hong Kong remained deadlocked on agriculture and NAMA issues and did not agree on any specific commitments.[19] Instead, negotiators set a new deadline of April 30, 2006 as the target date for agreement on the structure and percentages of tariff and subsidy cuts in both agricultural and industrial sectors.[20] In addition, negotiators established a deadline of July 31, 2006 for submission of draft schedules of commitments.[21] Many believed that the April deadline was not realistic, and that a real package would not emerge until the July deadline.[22]

Despite the failure to reach a formal agreement in Hong Kong, negotiators did make progress on a few key issues. In agriculture, the negotiators agreed that: (1) all forms of export subsidies would be eliminated by 2013; (2) domestic subsidies would be reduced according to a "3-tier" (or "band") structure, with the EU in the first tier (committing to the largest reductions), the United States and Japan in the second tier (at the next level of

14. Pascal Lamy, Director-General, Speech at the Hong Kong Foreign Correspondents Club (Oct. 16, 2005), *available at* http://www.wto.org/english/news_e/sppl_e/sppl08_e.htm.

> Like it or not, the timetable for these negotiations is set on Capitol Hill in Washington, D.C. Uniquely, the United States of America has a legal structure in which the legislature holds constitutional authority to conduct trade and must transfer that authority to the President and his team of negotiators. That authority expires at the end of June 2007.

Id.

15. World Trade Organization, Doha Work Programme: Preparations for the Sixth Session of the Ministerial Conference, Draft Ministerial Text, JOB(05)/298 (Nov. 26, 2005) [hereinafter WTO Draft Ministerial Text]; see also Daniel Pruzin, *WTO Chief Issues Minimalist Text of Achievable Goals for Hong Kong*, WTO Reporter, Nov. 29, 2005.

16. WTO Draft Ministerial Text, *supra* note 15.

17. *See id.*; Daniel Pruzin, *EU Trade Chief Mandelson Lodges Harsh Criticism of WTO Chair Texts*, WTO Reporter, Nov. 28, 2005; *Lamy Effort for Detailed Hong Kong Text Falters Over Opposition*, Inside U.S. Trade, Nov. 18, 2005.

18. *See* Daniel Pruzin, *WTO's Agriculture, NAMA Chairs Issue Draft Inputs for Hong Kong Declaration*, WTO Reporter, Nov. 23, 2005; Daniel Pruzin, *Trade Ministers to Identify Areas of Agreement for Hong Kong*, WTO Reporter, Nov. 23, 2005 [hereinafter Pruzin, *Trade Ministers*]; *Lamy Effort for Detailed*, *supra* note 17; Christopher S. Rugabar, *APEC Trade Ministers Seek to Boost Doha*, WTO Reporter, Nov. 16, 2005.

19. *See* The International Centre for Trade and Sustainable Development, Can London Deliver What Hong Kong Couldn't?, Bridges (Jan.-Feb. 2006), *available at* http://www.ictsd.org/monthly/bridges/BRIDGES10-1.pdf [hereinafter *Can London Deliver*].

20. *Id.*

21. *Id.* at 2.

22. *Id.*

reductions), and all other WTO members in the third tier (requiring the lowest reductions); and (3) market access commitments would fall within four "bands," though specific reductions for each tier were not defined.[23] In the NAMA negotiations, ministers agreed in Hong Kong that tariffs would be reduced according to the "Swiss Formula," which cuts high tariffs more steeply than low tariffs.[24] There are, however, variations on the Swiss Formula, and the specific "coefficients" to be applied in the formula remained a divisive issue.[25]

Following the Hong Kong meeting, administration officials reiterated in the press that the July 2007 expiration of fast track authority was a firm deadline, as the President did not seem prepared to seek an extension of that authority.[26] The next formal meeting of the trade ministers was tentatively scheduled for March 2006 and was expected to be an intensive negotiating session.[27]

B. Organisation for Economic Co-Operation and Development Steel Negotiations

The Organisation for Economic Co-Operation and Development (OECD) steel negotiations on curbing global steel subsidies ceased in 2005. After two years of talks, steel-producing countries were unable to bridge differences on permissible subsidies. While the United States, the EU, Brazil, and India agreed on prohibiting subsidies that created or maintained unviable steel capacity, these countries could not agree on the acceptable amount and type of subsidies, the use of trade remedies, the countries that should be permitted special and differential treatment, and the type of treatment that such countries should receive.[28] As a replacement to the negotiations, the OECD is proposing a steel committee to collect steel market data and review national steel policies.[29] In addition, the OECD will create a global forum to hold annual or biannual meetings for major steel-producing countries not on the steel committee.[30]

C. Bilateral and Regional Negotiations

As of January 1, 2005, the United States had implemented seven bilateral and regional FTAs: the Israel FTA, the North American Free Trade Agreement (NAFTA), the Jordan FTA, the Chile FTA, the Singapore FTA, the Morocco FTA, and the Australia FTA. In addition, the United States had completed negotiations on the Bahrain FTA and the CAFTA-DR, which includes Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua, and was seeking U.S. implementing legislation on each.

The United States also was in the process of negotiating five other FTAs: the Free Trade of the Americas Agreement (FTAA); the South African Customs Union (SACU) with Botswana, Lesotho, Namibia, South Africa, and Swaziland; the Andean FTA with Colombia,

23. *Id.* at 7.
24. *Id.* at 9.
25. *Can London Deliver*, *supra* note 19, at 9.
26. Jerry Hagstrom, *U.S. Officials Firm on '06 Deadline for Doha Negotiations*, Congress Daily, Jan. 10, 2006.
27. Pruzin, *Trade Ministers*, *supra* note 18.
28. *See OECD Attempts to Extend Life of Steel Subsidy Agreement Talks*, Inside U.S. Trade, Mar. 25, 2005; *Future of OECD Steel Subsidy Talks Hinge on U.S. Commitment*, Inside U.S. Trade, July 22, 2005.
29. *See OECD Calls Off Deadlocked Multilateral Steel Subsidy Negotiations*, Inside U.S. Trade, Oct. 7, 2005.
30. *See id.*

Peru, and Ecuador; the Thailand FTA; and the Panama FTA. The United States also initiated FTA negotiations in 2005 with Oman and the United Arab Emirates (UAE). FTA negotiations with these two countries are part of the Bush Administration's plan to create a Middle East FTA, with several countries in the region, by 2013.[31]

By the end of 2005, the United States completed FTA negotiations with only two countries—Oman and Peru. The Oman FTA, announced in October 2005, provides for duty-free industrial and consumer goods upon implementation with a ten-year phase-out for tariffs on agricultural products.[32] Negotiations on the U.S.-Peru Trade Promotion Agreement concluded in December 2005 as a precursor to the broader effort to sign the Andean FTA with Peru, Columbia, and Ecuador.[33]

In 2005, most U.S. negotiations failed to progress quickly until Congress passed the CAFTA-DR implementing legislation, a high priority for the Bush Administration. The legislation passed on July 29, 2005, clearing the path for other countries' FTA negotiations to move forward.[34]

The United States centered its negotiations toward the latter half of the year with the hope of making major progress before the December 2005 Hong Kong Ministerial. The United States continued negotiations on the FTAA, the Andean FTA, the Panama FTA, the SACU, the Thailand FTA, and the UAE FTA, but none were concluded by the end of the year. The FTAA, in particular, remained stalled on such issues as intellectual property rights and domestic farm subsidies.[35] U.S. negotiations with Andean countries Columbia and Ecuador also remained stuck on differences over agriculture and intellectual property.[36] In addition, U.S. FTA negotiations with Panama have been stalled since February 2005 over a number of sensitive issues, including agriculture products, government procurement rules for contracts related to projects on the Panama Canal Authority, Panama's constitutional ban on foreign firms engaging in retail trade, and textile rules of origin.[37]

After a year-long standoff, SACU negotiations resumed in September 2005. Difficulties remained, however, particularly in intellectual property, government procurement, agriculture, and textiles. Parties hope to conclude an FTA by December 2006.[38] Meanwhile, the United States and Thailand made significant progress in their FTA negotiations on services, investment, and technical barriers to trade. The two countries, however, still need

31. *See* George W. Bush, Message to the Congress of the United States (Oct. 17, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/10/20051017-9.html.

32. *See* Press Release, Office of the U.S. Trade Representative, United States and Oman Conclude Free Trade Agreement (Oct. 3, 2005), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2005/October/United_States_Oman_Conclude_Free_Trade_Agreement.html.

33. Press Release, Office of the U.S. Trade Representative, United States and Peru Conclude Free Trade Agreement (Dec. 7, 2005), *available at* http://www.ustr.gov/assets/Document_Library/Press_Releases/2005/December/asset_upload_file744_8518.pdf?ht=.

34. *See infra* Part VI.A for further details regarding the implementation legislation for CAFTA-DR and the Bahrain FTA.

35. *See FTAA Likely Stalled through 2006 After Contentious Talks in Argentina*, Inside U.S. Trade, Nov. 11, 2005.

36. *See Andean FTA talks 'On Hold'*, Wash. Trade Daily, Nov. 24, 2005.

37. *See U.S., Panama Again Fail to End FTA Talks, No Date Set for Next Round*, Inside U.S. Trade, Feb. 11, 2005; *Panama Seeks What It Sees as Final Round of FTA Negotiations with U.S.*, Inside U.S. Trade, Aug. 26, 2005.

38. *See A Halting US-SACU FTA Negotiation*, Inside U.S. Trade, Oct. 4, 2005.

to resolve key differences on financial services and tariffs on foreign pick-up trucks.[39] Lastly, the United States expected that a few more rounds of talks with UAE negotiators were necessary to resolve outstanding issues by the end of 2005.[40]

On the global front, bilateral and regional negotiations moved forward for a number of countries in 2005. The Association of Southeast Asian Nations was especially active in FTA negotiations with China, Japan, South Korea, Australia, and New Zealand.[41] Likewise, Australia undertook bilateral trade negotiations with the UAE, Malaysia, and China.[42] Other countries in FTA negotiations in 2005 included the EU with Mercosur and Canada with South Korea.[43]

III. WTO Dispute Settlement Activity

The dispute settlement proceedings in 2005 continued to focus largely on claims under the Agreement on Implementation of article VI of the General Agreement 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). In general, the number of complaints brought in 2005 dropped from prior years, down to eleven complaints in the year, compared with nineteen the prior year and a ten-year average of thirty-three cases per year.[44] But despite the decline in new complaints, the Dispute Settlement Body (DSB) handled a large number of complex cases in 2005 with the issuance of 20 panel decisions, nine Appellate Body reports, and six arbitration awards.[45] Most notably,

39. *See U.S., Thailand Finish Another FTA Round*, WASH. TRADE DAILY, Oct. 4, 2005, at 3.

40. *See U.S., Oman Complete FTA Negotiations*, WASH. TRADE DAILY, Oct. 5, 2005, at 1.

41. *See* Association of Southeast Asian Nations, *10th ASEAN Summit: Asean Takes Bold Steps to Accelerate Integration of Priority Sectors, FTA Negotiations*, ASEANONE, Jan. 17, 2005, *available at* http://www.aseansec.org/aseanone/article211.pdf.

42. *See* Online Guide to Australia's Free Trade Agreements, Free Trade Agreements Under Discussion, http://www.fta.gov.au/Default.aspx?ArticleID=190 (last visited Feb. 27, 2006).

43. *See* Associated Press, EU, Mercosur Agree to Relaunch Talks, BVOM.COM, Sept. 2, 2005, http://www.bvom.com/news/english/news/index.asp?.sequence=34285&.this=58; Press Release, Department of Foreign Affairs and International Trade, *Canada to Consult Canadians on Free Trade Talks with South Korea* (Jan. 31, 2005), *available at* http://w01.international.gc.ca/minpub/Publication.asp?publication_id=382107&Language=E.

44. World Trade Organization, Chronological List of Dispute Cases, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Feb. 27, 2006). The number of complaints in 2005 include two challenges that were newly filed in November 2005. On November 15, 2005, Ecuador requested consultations challenging the U.S. practice of zeroing as was applied in its antidumping investigation against shrimp from Ecuador. *See* Request for Consultations by Ecuador, *United States—Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/1 (Nov. 21, 2005). The EC, India, Brazil, and Thailand have all joined the request for consultations. Request to Join Consultations by the European Communities, *United States—Anti-dumping Measure on Shrimp from Ecuador*, WT/DS335/2 (Nov. 28, 2005); Request to Join Consultations by Brazil, *United States—Anti-dumping Measure on Shrimp from Ecuador*, WT/DS335/4 (Nov. 30, 2005); Request to Join Consultations by India, *United States—Anti-dumping Measure on Shrimp from Ecuador*, WT/DS335/3 (Nov. 30, 2005); Request to Join Consultations by Thailand, *United States—Anti-dumping Measure on Shrimp from Ecuador*, WT/DS335/5 (Dec. 2, 2005). On November 21, 2005, the EU filed a request for the establishment of a panel to consider import restrictions on retreaded tires imposed by Brazil. *See* Request for the Establishment of a Panel by the European Communities, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/4 (Nov. 18, 2005).

45. *See* WTO Panel and Appellate Body Reports & WTO Arbitrations, *available at* http://www.worldtradelaw.net.

given the complexity of the disputes before the DSB, disagreements over implementation of panel and appellate body decisions became common in 2005.

A. Panel and Appellate Body Decisions

1. *European Communities—Export Subsidies on Sugar*

In late 2004, a WTO Panel found that the European Communities (EC) had violated the WTO Agreement on Agriculture because it exceeded its scheduled commitments on sugar exports every year since 1995 and provided export subsidies in excess of the negotiated concessions.[46] The Panel also determined that, as a result of the violations of the Agriculture Agreement, the EC had nullified or impaired the benefits accruing to its trading partners, also in violation of article 3.8 of the Agriculture Agreement.[47] The Panel declined to make parallel findings under the SCM Agreement based on judicial economy.[48]

In January 2005, EC members Australia, Brazil, and Thailand filed notices of appeal.[49] The Appellate Body issued its report on April 28, 2005, upholding all of the Panel's findings.[50] The Appellate Body, however, disagreed with the Panel's decision not to rule on the SCM Agreement claims.[51] The Appellate Body stated that, in declining to rule on the claims, the Panel failed to discharge its duties under article 11 of the Dispute Settlement Understanding (DSU) because the remedies available under the SCM Agreement were different from the Agriculture Agreement.[52] But the Appellate Body determined that it could not complete the analysis because the Panel had not made any factual findings with regard to the SCM Agreement claims.[53]

The EC agreed to implement the recommendations of the Panel. On October 28, 2005, an arbitration panel decided that the reasonable period of time for implementation should be just over one year, until May 22, 2006.[54]

2. *United States—Subsidies on Upland Cotton*

On March 3, 2005, the Appellate Body issued its report in *United States—Subsidies on Upland Cotton*.[55] The dispute, brought by Brazil challenging U.S. subsidy programs on upland cotton, is significant because it was the first subsidy dispute in which violations were

46. Panel Report, *European Communities—Export Subsidies on Sugar*, ¶¶ 7.235-.238, WT/DS265/R,WT/DS266/R, WT/DS283/R (Oct. 15, 2004). The Panel issued a separate report for each complaint brought by Australia, Brazil, and Thailand. Aside from the noted complainants and case numbers, the three Panel reports are identical.

47. *Id.* ¶¶ 7.373-.374.

48. *See id.* The Panel based its conclusion on its finding that the EC had focused its arguments on the Agriculture Agreement claims and had not thoroughly set forth the SCM Agreement claims. *Id.*

49. Notification of an Appeal by the European Communities, *European Communities—Export Subsidies on Sugar*, WT/DS265/25, WT/DS266/25, WT/DS283/6 (Jan. 13, 2005).

50. Appellate Body Report, *European Communities—Export Subsidies on Sugar*, ¶¶ 284-286, 290, 300, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (Apr. 28, 2005).

51. *Id.* ¶¶ 329-341.

52. *Id.*

53. *Id.*

54. Award of the Arbitrator, *European Communities—Export Subsidies on Sugar*, ¶ 106, ARB-2005-3/20 (Oct. 28, 2005).

55. Panel Report, *United States—Subsidies on Upland Cotton*, ¶¶ 7.388, 7.413-.414, 7.608, WT/DS267/R (Sept. 8, 2004).

found under both the Agriculture Agreement and the SCM Agreement. Thus, the case paved the way for future disputes under the SCM Agreement over agriculture subsidies.[56]

Prior to 2004, WTO member countries were obligated to refrain from bringing challenges to agricultural subsidies under the SCM Agreement in accordance with the Peace Clause contained in article 13 of the Agriculture Agreement. Although the Peace Clause still applied in the *Upland Cotton* dispute, the Panel found that the United States had violated the provisions of the Peace Clause, and therefore it was not immune from claims under the SCM Agreement.[57] Specifically, the Panel found that certain U.S. domestic support programs were not "green box" and thus were not exempted from the domestic support reduction commitments under the Agriculture Agreement—in other words, by improperly treating the subsidies as exempt, the United States exceeded its reduction commitments.[58] Because the programs were not protected by the Peace Clause, the Panel also determined that the domestic support programs constituted actionable subsidies under the SCM Agreement because they caused serious prejudice to Brazilian producers.[59] The Panel also found that the United States provided prohibited export subsidies in violation of both the Agriculture and SCM Agreements.[60]

On appeal, the Appellate Body upheld the Panel decision on nearly all findings.[61] The United States was required to bring its measures into conformity with the Agriculture and SCM Agreements by July 1, 2005 (regarding prohibited export subsidies) and by September 21, 2005 (regarding domestic programs).[62] But after expressing criticism of the Appellate Body decision, the United States allowed both deadlines to pass with no action.[63] Brazil sought authorization to retaliate in the amount of US$1 billion annually or a suspension of market access concessions.[64] On November 21, 2005, the United States and Brazil announced that they had reached an agreement in principle to suspend the ongoing arbitration proceedings and any retaliation in return for a U.S. commitment to bring its cotton subsidy programs into compliance.[65] At the time of this writing, the details of the agreement had not yet been announced.

3. *U.S. and EC Countervailing Duty Investigations on Dynamic Random Access Memory Semiconductors from Korea*

In 2005, disputes over Dynamic Random Access Memory semiconductrors (DRAMs) from Korea resulted in two WTO Panel decisions and an Appellate Body report. In *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors from Korea*, Korea challenged the U.S. determination that a major Korean exporter of

56. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, annex 1A, Agreement on Agricutlrue, at art. 13 (Peace Clause) (1994), *available at* http://www.wto.org/english/docs_e/legal_e/14-ag.pdf.

57. Panel Report, WT/DS267/R, *supra* note 55.

58. *Id.*

59. *Id.*

60. *Id.* ¶¶ 7.748-.749, 7.752-.761.

61. Appellate Body Report, *United States—Subsidies on Upland Cotton*, ¶¶ 262-329, WT/DS267/AB/R (Mar. 3, 2005).

62. Daniel Pruzin, *U.S., Brazil to Suspend Arbitration Proceedings on Cotton Retaliation*, WTO Reporter, Nov. 22, 2005.

63. *Id.*

64. *Id.*

65. *Id.*

semiconductors, Hynix Semiconductor, Inc., was subsidized by the Korean government as part of various restructuring initiatives. In its countervailing duty investigation, the U.S. Department of Commerce (DOC) found that, although the loans and restructuring initiatives were provided by private banks, they constituted government financial contributions because, according to the DOC, the private financial institutions were entrusted or directed by the government to provide subsidies to Hynix, as defined in article 1.1(a)(1)(iv) of the SCM Agreement.[66]

Korea challenged the determination, arguing that the United States improperly presumed entrustment or direction.[67] Korea also challenged the U.S. findings of benefit, specificity, and various aspects of the injury determination.[68]

In February 2005, the Panel circulated its report holding that the U.S. finding of entrustment or direction was inconsistent with article 1.1(a)(1)(iv) of the SCM Agreement.[69] Although the DOC had established that the Korean government had the means to entrust or direct the private banks, the Panel ruled that the DOC had not established, as a factual matter, that entrustment or direction actually occurred.[70] As a result of the flawed reasoning on financial contribution, the Panel determined that the DOC's determinations regarding benefit and specificity were also inconsistent with the SCM Agreement.[71] The Panel also found that the U.S. International Trade Commission (ITC) had failed to abide by the requirement under article 15.5 of the SCM Agreement to ensure that the effects of other causes were not attributed to imports.

On an appeal brought by the United States, limited to the subsidy (i.e., non-injury) issues, the Appellate Body reversed the Panel's findings regarding entrustment or direction, ruling that the Panel improperly considered whether "the individual pieces of evidence" were "sufficient to establish entrustment or direction" and "*erred* in failing to examine the . . . evidence in its totality."[72] The Appellate Body explained, however, that "[e]ven though we reverse the Panel's findings, we offer no view as to the consistency of the [DOC's] underlying determinations of benefit and specificity."[73] The Appellate Body report was adopted July 20, 2005.[74] The United States has agreed to implement the remainder of the Panel decision (i.e., the flaws in the ITC's injury determination) by March 8, 2006.[75]

Just prior to adoption of the *U.S. – DRAMs* Appellate Body decision, in June 2005, a separate Panel issued a determination in *European Communities—DRAMs from Korea* concerning the same Hynix restructuring.[76] The Panel's decision was mixed, finding that the

66. Panel Report, *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, ¶¶ 2.1-2.5, WT/DS296/R (Feb. 21, 2005).

67. *Id.* ¶¶ 7.43-.44.

68. *Id.* ¶¶ 7.9, 7.220-.405.

69. *Id.* ¶ 7.10.

70. *Id.* ¶¶ 7.175-.176.

71. *Id.* ¶¶ 7.190, 7.206.

72. Appellate Body Report, *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, ¶¶ 157-58, WT/DS296/AB/R (June 27, 2005).

73. *Id.* ¶ 208.

74. Dispute Settlement Body, *Minutes of Meeting*, WT/DSB/M/194, at 16 (Aug. 26, 2005).

75. Agreement Under Article 21.3(b) of the DSU, *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, WT/DS296/11 (Nov. 8, 2005). *See also Esther Lam, U.S. to Implement WTO Ruling to Settle Korean DRAM Complaint*, WTO Reporter, Nov. 17, 2005.

76. Panel Report, *European Communities—Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R (June 17, 2005).

EC improperly determined financial contribution and benefit with respect to certain restructuring programs while upholding the determination with regard to other programs.[77] Specifically, the Panel determined that the evidence relied upon by the EC was insufficient to find entrustment or direction by private banks to provide subsidies under a May 2001 restructuring program and that, in finding a benefit under the Syndicated Loan Program, the EC failed to properly consider the fact that several private banks extended loans under similar terms; thus, such loans may have been made on a commercial basis.[78] The Panel also found that the injury determination was flawed with respect to the finding of causation but upheld various other aspects of the injury finding.[79]

The *EC—DRAMs* decision was not appealed, and the report was adopted August 3, 2005.[80] On October 12, 2005, the EC notified the DSB that the agreed upon reasonable period of time for implementation in accordance with article 21.3 of the DSU would be eight months, expiring April 3, 2006.[81]

4. *United States—Laws, Regulations and Methodology for Calculating Dumping Margins*

On October 31, 2005, a WTO panel issued the latest report in the ongoing challenges against the U.S. practice of zeroing in antidumping investigations. In *United States—Laws, Regulations and Methodology for Calculating Dumping Margins*, the Panel addressed the question, posed by the EC complaint, of whether the U.S. practice of zeroing negative margins in its antidumping calculations was a violation of articles 2.4 and 2.4.2 of the AD Agreement.

This dispute was unique from prior cases on zeroing because the EC not only challenged the practice in investigations but also in administrative reviews, sunset reviews, new shipper reviews, and changed circumstances reviews.[82] The case also sought to utilize Appellate Body jurisprudence finding that a Member may challenge "a well-established and well-defined norm" (in this case, the U.S. practice of zeroing negative margins, which is written into the standard antidumping margin program and has been invariably applied in all cases) even if that norm is not codified in law.[83]

With regard to zeroing in investigations, the Panel reiterated the prior statements by the Appellate Body in European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India and United States—Final Dumping Determination on Softwood Lumber from Canada (U.S.—Lumber AD Final), explaining that zeroing of margins in antidumping investigations violates article 2.4.2 of the AD Agreement that requires a comparison of the weighted average of the normal value with the weighted average of all

77. *Id.* ¶¶ 7.103-.109, 7.181-.186.

78. *Id.* ¶¶ 7.181-.186.

79. *Id.* ¶¶ 7.349, 7.359-.362.

80. *See* Action by the Dispute Settlement Body, *European Communities—Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/6 (Aug. 5, 2005).

81. Agreement Under Article 21.3(b) of the DSU, *European Communities—Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/7 (Oct. 17, 2005).

82. In addition to the direct challenges of the U.S. statutes, regulations, programs, and procedures, the EC challenged fifteen final determinations in investigations and sixteen final results in administrative reviews conducted by the United States. Panel Report, United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), ¶¶ 2.1-.12, WT/DS294/R (Oct. 31, 2005).

83. *Id.* ¶¶ 7.92-.104 (applying the Appellate Body's findings concerning such practice-based challenges in *United States—Sunset Review of Anti-Dumping Duties on Corrosion -Resistant Carbon Steel Flat Products from Japan*, ¶ 88, WT/DS244/AB/R (Dec. 15, 2003)).

comparable export transactions.[84] The Panel therefore found the DOC's application of zeroing in the various investigations at issue to violate article 2.4.2. The Panel also concluded that the DOC's consistently applied norm or methodology of zeroing was also in violation of article 2.4.2 of the AD Agreement[85]—a finding that has important implications. Because zeroing is not explicitly required in U.S. statutes or regulations, without a finding against the basic methodology, WTO Members would need to bring repeated cases against each instance of zeroing. Instead, the Panel's finding that the methodology is in itself a violation requires a general change to the methodology as applied in all future cases.

A majority of the Panel came to a different conclusion with regard to zeroing in administrative reviews.[86] Two panelists found that the requirement to use all comparable export transactions[87] applies only to the investigation phase as is articulated in article 2.4.2 of the AD Agreement.[88] Thus, the Panel found that the U.S. practice of zeroing in administrative reviews, changed circumstances reviews, sunset proceedings, and new shipper reviews did not offend article 2.4.2. One of the three panelists dissented on this issue, finding that the U.S. practice of zeroing in reviews was in violation of the fair comparison requirement in article 2.4 of the AD Agreement.[89] Should the decision be appealed, the proper interpretation of article 2.4 may be determined by the Appellate Body.[90]

Meanwhile, the issue of zeroing has been further complicated by U.S. implementation efforts following the Appellate Body's rulings in *U.S.—Lumber AD Final*. Although the Appellate Body had determined that zeroing applied in the lumber investigation was inconsistent with article 2.4.2 of the AD Agreement, section 129 implementation determination on April 15, 2005, the DOC changed its fair value comparison methodology but continued to apply zeroing.[91] Specifically, the DOC used a transaction-to-transaction comparison rather than its traditional weighted average-to-weighted average comparison, and continued to zero negative margins that resulted from the fair value comparisons claiming that the Panel and Appellate Body decisions precluded zeroing when using weighted-average to weighted-average comparisons but that they were silent on zeroing when apply-

84. *Id.* ¶ 7.27. In contrast, the U.S. practice of zeroing entails comparing the weighted-average normal value with the weighted-average dumping margins for only those export transactions in which the export price is lower than the normal value. Where the export price exceeds the normal value (i.e., there is a negative dumping margin), the United States zeroes that margin by ignoring the amount of export price in excess of normal value.

85. *Id.* ¶¶ 7.105-.106

86. *Id.* ¶¶ 7.221-.222.

87. *Id.* ¶ 7.284.

88. Panel Report, WT/DS294/R, *supra* note 74, ¶¶ 7.221-.222.

89. *Id.* ¶¶ 9.6-.62.

90. There is an ongoing dispute brought by Japan involving the U.S. practice of zeroing but alleging additional violations outside article 2.4 of the AD Agreement. *See* Request for the Establishment of a Panel by Japan, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/8 (Feb. 7, 2005). Thus, in contrast to the decision in *U.S.—Zeroing, the Panel in the Japan zeroing dispute could find a violation as to zeroing in antidumping reviews. The Panel in the Japan challenge is expected to issue its report in March 2006. Communication from the Chairman of the Panel, United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/10 (Nov. 17, 2005).

91. Establishment of a Panel by Japan, WT/DS322/8, *supra* note 90; Communication from the Chairman, WT/DS322/10, *supra* note 90; *see also* Anti-dumping Measures Concerning Softwood Lumber Products From Canada, 70 Fed. Reg. 22,636 (Dep't of Commerce May 2, 2005) (notice of determination under section 129 of the Uruguay Round Agreements Act).

ing a transaction-to-transaction comparison.[92] Canada is seeking recourse under article 21.5, challenging the United States' failure to comply.[93] The article 21.5 Panel is scheduled to issue its ruling in February 2006.[94]

5. *Other Disputes*

A number of other Panel and Appellate Body decisions were issued in 2005, relating primarily to claims under the DSU and the GATT. In *Mexico—Tax Measures on Soft Drinks and Other Beverages*, the Panel determined that certain taxes disadvantaged sugar producers in violation of GATT articles III:2 and III:4.[95] In *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, the Appellate Body upheld the Panel's conclusions that a tax stamp requirement was in violation of GATT article III:4 (requiring that any measure not afford less favorable treatment to imports over domestic goods).[96]

Three additional decisions relate to claims under the AD Agreement. In *United States—Oil Country Tubular Goods from Mexico*, the Appellate Body upheld, in large part, the DOC and ITC determinations in the U.S. antidumping investigation.[97] In *Korea—Antidumping Duties on Imports of Certain Paper from Indonesia*, a Panel issued a mixed ruling, finding that Korea acted consistently with the AD Agreement with regard to certain calculations and procedures but was inconsistent with the Agreement with respect to other findings and procedures (including its failure to inform parties in a manner that would allow them to adequately prepare for the investigation).[98] In *Mexico—Definitive Anti-dumping Measures on Beef and Rice*, the Appellate Body upheld a prior panel decision holding that Mexico's antidumping determination involving rice from the United States was inconsistent with the AD Agreement. The Appellate Body confirmed that Mexico's determination violated the AD Agreement in several respects, including the failure to rely on adequate evidence for purposes of the injury determination, the failure to immediately terminate the investigation with regard to producers who demonstrated de minimis margins, and the use of facts available in a manner that was inconsistent with the AD Agreement.[99]

Finally, in a dispute brought against the United States by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, the Appellate Body upheld a prior Panel decision finding that the United States had violated market access commitments under the General Agreement on Trade in Services by pro-

92. Establishment of a Panel by Japan, WT/DS322/8, *supra* note 90; Communication from the Chairman, WT/DS322/10, *supra* note 90; 70 Fed. Reg. 22,636.

93. *See* Request for the Establishment of a Panel, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/16 (May 20, 2005).

94. *See* Communication from the Chairman of the Panel, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/24 (Sept. 20, 2005).

95. Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005).

96. Appellate Body Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R (Apr. 25, 2005).

97. Appellate Body Report, *United States—Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R (Nov. 2, 2005).

98. Panel Report, *Korea—Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R (Oct. 28, 2005).

99. *See* Appellate Body Report, *Mexico—Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R (Nov. 29, 2005); *see also* Daniel Pruzin, *WTO Appellate Body Upholds U.S. In Complaint Against Mexican Rice Duties*, WTO Reporter (Nov. 30, 2005).

hibiting the cross-border supply of gambling and betting services.[100] In doing so, the Appellate Body rejected U.S. arguments that its restrictions at issue fell within the public morals and public order exception of article XIV(a) of that agreement.

B. Disputes Regarding Implementation

Disputes over the implementation of Panel and Appellate Body decisions continued to be a primary part of the DSB agenda, with parties challenging the time period or method of implementation (or lack thereof) in a number of key disputes.

1. *United States—Continued Dumping and Subsidy Offset Act of 2000*

In late 2004, the complainants in the United States–Continued Dumping and Subsidy Offset Act of 2000 (the Byrd Amendment) dispute—Brazil, Canada, Chile, the EC, India, Japan, Korea, and Mexico—were authorized to suspend concessions against the United States for its failure to implement the decision of the Appellate Body.[101] While several bills have been presented to Congress that would repeal the Byrd Amendment, to date Congress has failed to repeal the legislation.[102] As a result, in early 2005, Canada, the EU, Mexico, and Japan began retaliating against the United States by imposing taxes on imports of a variety of U.S. goods, including live swine, cigarettes, paper, agricultural products, textiles, machinery, oysters, and fish products.[103] And, after years of contention, on February 1, 2006, Congress passed legislation to repeal the Byrd Amendment.[104] However, the repeal does not take effect until October 1, 2007.[105] As a result, the EU Trade Commissioner responded with "regret" that the United States has chosen to include a transition period rather than ending the payments immediately.[106] The EU indicated that it would work in close coordination with the other complainants to determine the implications of the compromise repeal.[107] In the meantime, the retaliation is expected to continue until the legislation is repealed.

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100. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005).

101. Decision by the Arbitrator, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WT/DS234/ARB/CAN (Aug. 31, 2004). In accordance with the Byrd Amendment, the United States redistributes antidumping and countervailing duties to U.S. producers who meet certain criteria. The distributions under the Byrd Amendment amount to hundreds of millions of dollars each year, and the current countervailing duties being held in the U.S. treasury for ultimate distribution in the lumber case alone total more than $5 billion. WTO Panels and the Appellate Body have ruled that these disbursements are in violation of the WTO Agreements. *See* Panel Report, WT/DS294/R, *supra* note 82; Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004).

102. *See infra* Part VI.D accompanying text.

103. *See* International Trade Canada, *Canada's Retaliation Notification to the WTO*, (Apr. 29, 2005), *available at* http://www.dfait-maeci.gc.ca/tna-nac/disp/byrd-lettre-en.asp; European Commission, U.S. Byrd Amendment: Commission Proposes Sanctions on U.S. Products (Mar. 31, 2005), *available at* http://europa.eu.int/comm/trade/issues/respectrules/dispute/pr310305_en.htm.

104. Press Release, Office of the U.S. Trade Representative, Congress Takes Important Action: Byrd Repeal Brings US Into Compliance with WTO Ruling (Feb. 1, 2006), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2006/February/Congress_Takes_Important_Action.html.

105. *Id.*

106. Press Release, European Commission, EU Welcomes Repeal of Byrd Amendment; Regrets Transition Period (Feb. 2, 2006), *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/06/117&format=HTML&aged=0&language=EN&guiLanguage=en.

107. *Id.*

2. *United States–Tax Treatment for "Foreign Sales Corporations"*

In October 2004, the United States enacted the American Jobs Creation Act of 2004 that repealed both the Extraterritorial Income Exclusion and its predecessor, the Foreign Sales Corporation provision, two laws that had been deemed de facto export subsidies to U.S. exporters.[108] As a result, on January 1, 2005, the EC lifted tariffs but then sought consultations on whether the new law complied with the prior decisions and threatened to reimpose the tariffs if a panel agreed that the new law was insufficient. On September 30, 2005, the Panel in the second proceeding, *United States–Tax Treatment for "Foreign Sales Corporations,"* determined that new U.S. law continued to violate the SCM and Agriculture Agreements, given that the new law maintained the same inconsistent subsidy programs through a grandfathering clause.[109] The Panel reauthorized the EC to impose retaliatory tariffs, and the EC was expected to impose such measures as early as January 2006.[110]

3. *Japan–Measures Affecting the Importation of Apples*

In 2003, a WTO panel and the Appellate Body determined that restrictions imposed by Japan to prevent disease (fire blight) in domestic apples were inconsistent with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).[111] In response, Japan made certain modifications to its restrictions, including the lifting of certain import prohibitions if the imports meet specified criteria.[112] The United States then sought recourse to the DSB, complaining that the new measures continued to violate the SPS Agreement and requesting authorization to impose retaliatory measures in the amount of US$143.4 million annually.[113] On June 23, 2005, the Panel issued its report in *Japan–Measures Affecting the Importation of Apples*, agreeing with the United States that Japan's measures continued to violate the Agreement because they were "not supported by sufficient scientific evidence,"[114] and they were "more trade-restrictive than required to achieve Japan's appropriate level of phytosanitary protection."[115] On August 30, 2005, Japan and the United States notified the WTO of a mutually agreed solution in which Japan had amended its legislation, as of August 25, 2005, to bring it into compliance with the SPS Agreement.[116]

4. *European Communities–The ACP-EC Partnership Agreement*

On January 31, 2005, the EC notified the WTO of a proposed new bound tariff for most-favored nation (MFN) countries that would take effect January 1, 2006, while main-

108. *See* Appellate Body Report, *United States—Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/R (Feb. 24, 2000).

109. *See* Panel Report, *United States—Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/RW2 (Sept. 30, 2005).

110. *See id.*; Council Regulation 171/2005, 2005 O.J. (L 28) 32.

111. Appellate Body Report, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/AB/R (Nov. 26, 2003); Panel Report, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/R (July 15, 2003).

112. *Id.*

113. *See* Request for the Establishment of a Panel, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/11 (July 20, 2004); Recourse to Article 22.2 of the DSU by the United States, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/12 (July 20, 2004).

114. Panel Report, *Japan—Measures Affecting the Importation of Apples*, ¶ 8.120 WT/DS245/RW (June 23, 2005); *see also* Recourse to Article 22.2 of the DSU by the United States, WT/DS245/12, *supra* note 113.

115. Panel Report, WT/DS245/RW, *supra* note 114, ¶ 9.1(c).

116. Notification of Mutually Agreed Solution, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/21 (Sept. 2, 2005).

taining an existing preference for African, Caribbean, and Pacific (ACP) countries.[117] Several countries in Latin America contested the new tariff rate, complaining that the new bound rates would disadvantage MFN countries by giving increased market access to the ACP countries (and consequently decreased market access for MFN countries).[118] Upon referring the complaint to arbitration, the arbitrator agreed, noting that the new bound tariff system "would not result in at least maintaining total market access for MFN banana suppliers" as is required under the ACP-EC Partnership Agreement.[119]

In response to the arbitrator's award, the EC further modified its tariff proposal by lowering the new bound rate for MFN countries.[120] At the same time, however, the EC raised the available quota for ACP countries.[121] The interested parties in the arbitration dispute could not agree that the revised tariff system was acceptable, and on September 26, 2005, the EC requested further arbitration over the matter.[122] In its second decision, the arbitrator determined that the EC failed to rectify the matter because MFN banana suppliers would continue to receive diminished market access under the new proposal.[123]

5. *U.S. Softwood Lumber Article 21.5 Challenges*

The U.S. softwood lumber cases led to three separate WTO disputes over implementation in 2005. In *United States—Final Countervailing Duty Determination with Respect to Softwood Lumber from Canada*, *Recourse by Canada to Article 21.5 of the DSU*, Canada challenged U.S. implementation of the Panel and Appellate Body rulings, asserting that the United States failed to conduct a proper pass-through analysis because, although it performed a limited analysis with regard to some transactions, it failed to determine if a pass-through of benefit actually occurred with regard to a majority of transactions between unrelated parties.[124] The Panel agreed with Canada, and on December 5, 2005, the Appellate Body upheld the Panel's decision.[125]

Importantly, Canada not only challenged the U.S. failure to comply with regard to its section 129 redetermination in the original investigation but charged that the U.S. pass-

117. As part of the Doha Ministerial conference in November 2001, WTO members negotiated a waiver (commonly referred to as the Doha Waiver) that allows the EU to give preferential market access to banana exports from ACP countries, with the caveat that third parties, such as countries in Latin and Central America, would have the right to request consultations or arbitration should the EU modify its tariff quota system. *See* International Centre for Trade and Sustainable Development, *WTO Arbitrator Rules Against New EU Tariff Rates for Bananas*, Bridges Weekly Trade News Digest (Aug. 3, 2005), *available at* http://www.ictsd.org/weekly/05-08-03/BRIDGESWeekly9-28.pdf. The requests for arbitration in this case were made under this Doha Waiver. *See* Award of the Arbitrator, *European Communities—The ACP-EC Partnership Agreement—Recourse to the Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/616 (Aug. 1, 2005); Award of the Arbitrator, *European Communities—The ACP-EC Partnership Agreement—Second Recourse to the Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/625 (Oct. 27, 2005).

118. *See* Award of the Arbitrator, WT/L/616, *supra* note 117; Award of the Arbitrator, WT/L/625, *supra* note 117.

119. Award of the Arbitrator, WT/L/616, *supra* note 117, ¶ 94.

120. *See* Notification by the European Communities, *Eurpoean Communities—The ACP-EC Partnership Agreement* (Sept. 13, 2005); Award of the Arbitrator, WT/L/625, *supra* note 117.

121. *Id.*

122. Award of the Arbitrator, WT/L/625, *supra* note 117.

123. *Id.* ¶ 127.

124. *See* Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/RW (Dec. 5, 2005).

125. *Id.*

through methodology as applied in the first administrative review also resulted in a failure to comply with the DSB ruling.[126] The Panel agreed, determining that both the section 129 determination and the administrative review results amounted to a failure to properly implement the rulings of the DSB. In response to the failed implementation, Canada requested authorization from the DSB to retaliate in the amount of C$200 million annually. In a separate article 21.5 dispute involving the U.S. lumber injury determination, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada*, an arbitration panel affirmed the U.S. section 129 implementation determination, finding that the United States' renewed finding of threat of injury was not inconsistent with the AD Agreement.[127] As a result, the WTO determination pertaining to the U.S. finding of injury did not result in revocation of the antidumping and countervailing duty orders. Canada has not yet indicated whether it intends to appeal the *U.S.—Softwood Lumber* Injury Panel decision to the Appellate Body.

Finally, as noted above, Canada is challenging the U.S. section 129 determination in *U.S.—Lumber AD Final*, in which the DOC modified its fair value comparison methodology but continued to zero negative dumping margins.[128] The Panel is scheduled to issue its decision in February 2006.[129]

IV. U.S. Trade Remedy Cases

A. Court of International Trade And Federal Circuit Cases

1. *Judicial Review of Department of Commerce Determinations*

a. SNR Roulements v. United States

In *SNR Roulements v. United States*,[130] the Court of Appeals for the Federal Circuit reviewed the DOC's inclusion of imputed credit and inventory carrying costs in total U.S. expenses used to calculate constructed export price profit.[131] The Court of International Trade (CIT) had held that 19 U.S.C. § 1677a unambiguously required imputed credit and carrying costs to be included in total expenses when they are included in total U.S. expenses, so as to make the comparison between U.S. and total expenses consistent—and fair.[132] Applying the *Chevron* doctrine, the Federal Circuit reversed the CIT, finding 19 U.S.C. § 1677a to be ambiguous, and deferred to the DOC's statutory interpretation of that provision.[133] In so doing, the Federal Circuit held that the DOC may include imputed expenses in its calculation of U.S. expenses while including only actual expenses in calculating total expenses, "provided that [the DOC] affords a respondent . . . the opportunity to make a showing that the amount of imputed expenses is not accurately reflected or embedded in its actual expenses."[134] Accordingly, the Federal Circuit remanded the case to provide re-

126. *Id.*
127. *See* Panel Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/RW (Nov. 15, 2005).
128. *See* 70 Fed. Reg. 22,636.
129. *See* Communication from the Chairman of the Panel, WT/DS264/24, *supra* note 94.
130. SNR Roulements v. United States, 402 F.3d 1358 (Fed. Cir. 2005).
131. *Id.* at 1361.
132. *Id.* at 1361-62.
133. *Id.* at 1361.
134. *Id.*

spondents an opportunity to demonstrate whether its imputed costs were reflected in its actual expenses.[135]

b. SKF USA Inc. v. United States

In *SKF USA Inc. v. United States*,[136] the CIT examined the DOC's use of partial adverse facts available (AFA) in calculating respondent's dumping margin.[137] During the administrative review, the DOC applied partial AFA for respondent's refusal to provide certain documents at verification.[138] The respondent, however, asserted that it attempted to provide such documentation to DOC verifiers.[139] Given the factual nature of the dispute, the CIT conducted a hearing to examine the recollection and the veracity of the parties' assertions.[140] The CIT found the DOC's recollection of the facts erroneous and thereby found application of partial AFA to be unsupported by substantial evidence.[141]

c. Tokyo Kikai Seisakusho, Ltd. and TKS (USA), Inc., v. United States

In *Tokyo Kikai Seisakusho, Ltd. and TKS (USA), Inc. v. United States*,[142] plaintiffs challenged as unlawful the DOC's self-initiation of an antidumping changed circumstance review covering imports of large newspaper printing presses ("LNPP") from Japan. Based on three consecutive zero dumping margins DOC revoked the antidumping duty order in 2002 with respect to all entries of LNPP exported by plaintiffs. Later in that same year DOC revoked the entire antidumping duty order on all entries of LNPP from Japan.[143]

In May 2005, DOC self-initiated the changed circumstance review on LNPP from Japan based on information obtained in a civil trial before the U.S. District Court for the Northern District of Iowa under the Antidumping Act of 1916. At trial information was presented showing that the plaintiffs "provided false information" in one of the administrative reviews before DOC regarding the sale of an LNPP to the Dallas Morning News. The evidence concerned a secret arrangement between the plaintiffs and the Dallas Morning News. The arrangement provided for a "fraudulent increase" in the price of the sale in exchange for secret rebates to the Dallas Morning News with the intent to conceal the fact that the sale was made at dumped prices.[144] In its preliminary determination DOC concluded that it would rescind the revocation of the antidumping duty order covering plaintiffs entries, and reconsider revocation of the overall antidumping duty order under the sunset review provision.

Plaintiffs appealed to the CIT seeking declaratory judgment and an order permanently enjoining DOC from conducted any such review. The CIT found that subject matter jurisdiction did not exist for reviewing preliminary agency determinations, as the Court only has subject mater jurisdiction over final agency determinations under 19 U.S.C. § 1516a.

135. *Id.* at 1362.
136. SKF USA Inc. v. United States, No. 03-00490, slip op. 05-104 (Ct. Int'l Trade Aug. 24, 2005).
137. *Id.* at 18.
138. *Id.* at 3.
139. *Id.* at 7.
140. *Id.* at 4.
141. *See id.* at 8, 10-11, 17.
142. Court No. 05-000348, Slip Op. 05-144 (Ct. Int'l Trade November 7, 2005).
143. *See id.* at 4.
144. *See id.* at 4-6.

Thus, the Court held that plaintiffs' challenge was not fit for judicial review and dismissed the case.[145]

d. Non-Market Economy Cases and Surrogate Valuation Methodology

The increasing number of NME cases have led to a growing number of court appeals addressing the adequacy of the DOC's surrogate valuation methodology. For example, in *Wuhan Bee Healthy Co., Ltd. v. United States*,[146] the CIT held the DOC's rejection of respondent's proposed raw material values as reasonable because sufficient evidence existed to show that the surrogate values used by the DOC was the best information available in accordance with 19 U.S.C. § 1677b(c)(1).[147] For the same reason, the CIT also upheld the DOC's use of the same source data it had previously rejected to calculate the raw material inflation factor.[148] The CIT rejected, however, the DOC's use of coal import values over domestically available non-coking steam coal values because the DOC did not adequately explain why imported coal prices provided the best surrogate value.[149]

e. Hynix Semiconductor Inc. v. United States

In *Hynix Semiconductor Inc. v. United States*,[150] the CIT examined the DOC's countervailing duty analysis of Hynix's financial restructuring between December 2000 and October 2001,[151]—the same analysis that generated the WTO challenge discussed above. The DOC determined that countervailable subsidies were provided to Hynix because the Korean government caused or coerced financial institutions (including private parties) to participate in Hynix's restructuring by making preferential loans and debt-equity swaps.[152] The CIT affirmed the DOC's interpretation that a financial contribution from a private entity to another private entity pursuant to government entrustment or direction is prohibited by 19 U.S.C. § 1677(5)(B)(iii).[153] The CIT also held that the DOC was not required to examine the entrustment of each entity involved in each transaction comprising the single program.[154] Such an obligation, the CIT stated, would open a loophole in the statute and limit the DOC's case-by-case discretion.[155]

The CIT, however, remanded the final determination back to the DOC to consider whether the transactions comprising the alleged subsidy program were formulated by an independent commercial actor, as opposed to the government, and were motivated by commercial considerations.[156] According to the CIT, the DOC did not adequately explain the "influential role of . . . [the independent commercial actor] and the aberrational presence of commercial contingencies in Hynix's restructuring."[157]

145. *See id.* at 19.
146. Wuhan Bee Healthy Co. v. United States, 374 F. Supp. 2d 1299 (Ct. Int'l Trade 2005).
147. *See id.* at 1303-04.
148. *Id.* at 1305.
149. *Id.* at 1310-11.
150. Hynix Semiconductor Inc. v. United States, No. 03-00651, slip op. 05-106 (Ct. Int'l Trade Aug. 26, 2005).
151. *Id.* at 3.
152. *Id.* at 6-7.
153. *Id.* at 15-22.
154. *See id.* at 22-30.
155. *Id.* at 20.
156. *Hynix Semiconductor Inc.*, slip op. 05-106, at 14.
157. *Id.*

2. *Judicial Review of International Trade Commission Determinations*

a. Nucor Corp. v. United States

In *Nucor Corp. v. United States*,[158] the Federal Circuit affirmed the CIT's approval of the ITC's negative injury findings in investigations involving certain cold-rolled steel products from various countries.[159] In those investigations, which overlapped the section 201 safeguard investigation on flat-rolled steel products and the President's subsequent imposition of safeguard measures, the ITC found that the safeguard measures fundamentally altered the market for cold-rolled steel[160] and were the principal reason for the sharp decline in imports and rapid increase in the market prices near the end of the period of investigation.[161]

In affirming the lower court's decision, the Federal Circuit found that the statute allowed the ITC to focus its analysis on the most recent data in the period. The Federal Circuit reasoned that: (1) the purpose of the antidumping and countervailing duty laws are remedial, and recent import data is the most appropriate in determining whether remedial measures are necessary; (2) the most recent import data has the greatest relevance in evaluating the current state of the domestic industry; and (3) the ITC has broad discretion to examine a period that most reasonably allows it to determine whether a domestic industry is injured by subject imports.[162]

b. Nippon Steel Corp. v. United States

Nippon Steel Corp. v. United States involves a long-simmering appeal of the ITC's affirmative injury determination on tin- and chromium-coated steel sheet from Japan.[163] In the initial appeal, the CIT found that the ITC's affirmative determination was not supported by substantial record evidence and remanded to the ITC.[164] On remand, the ITC again made an affirmative material injury determination.[165] The CIT, however, found that the ITC was still unable to support its determination with substantial evidence and ordered the ITC to enter a negative injury determination.[166] The ITC appealed to the Federal Circuit, which vacated the CIT's decision and ruled that the ITC should have been given another opportunity to correct various flaws in its determination.[167]

In its remand determination following the Federal Circuit ruling, the ITC made another affirmative material injury determination.[168] Upon review, the CIT again found the ITC's

158. Nucor Corp. v. United States, 414 F.3d 1331 (Fed. Cir. 2005).
159. *Id.* at 1334-35.
160. *Id.*
161. *Id.* at 1335.
162. *Id.* at 1336-37.
163. Nippon Steel Corp. v. United States, No. 00-09-00479, slip op. 05-38 (Ct. Int'l Trade March 23, 2005).
164. *Id.*
165. *Id.*
166. *Id.*
167. *See id.*

> Thus, to the extent the Court of International Trade engaged in refinding the facts (*e.g.*, by determining witness credibility), or interposing its own determinations on causation and material injury itself, the Court of International Trade, we hold, exceeded its authority. On the present record, the Court of International Trade should have remanded once again for further proceedings rather than instructing entry by the Commission of a negative injury determination.

Nippon Steel Corp. v. Int'l Trade Comm'n, 345 F.3d 1379, 1381-82 (Fed. Cir. 2003).
168. *See Nippon Steel Corp.*, slip op. 05-38, at 2.

remand determination unsupported by substantial evidence and ordered the ITC to enter a negative material injury finding.[169] The CIT also ordered the ITC to examine whether a threat of material injury existed.[170]

In its third remand, the ITC entered negative material injury and threat determinations.[171] The CIT upheld both negative determinations, though it rejected certain subsidiary findings regarding the ITC's negative threat finding.[172] The CIT's latest decision is now pending appeal to the Federal Circuit. Meanwhile, the antidumping order on these products remains in place.

3. *China Textiles Case*

In *U.S. Association of Importers of Textiles and Apparel v. United States*,[173] the Federal Circuit reviewed whether the CIT abused its discretion in enjoining the Committee for the Implementation of Textile Agreements (CITA) "from accepting, considering, or taking any further action on threat-based petitions" when requesting consultations with China under a special safeguards provision regarding the importation of textiles under China's accession agreement to the WTO.[174] The petition requesting consultations was filed just prior to the expiration of the quotas allowed by the WTO Agreement on Textiles and Clothing, the lifting of which petitioners argued would lead—in the future—to a flood of imports from China and, in turn, to market disruption.

The Federal Circuit held that the CIT abused its discretion in enjoining threat-based petitions, finding that the plaintiff failed to demonstrate a likelihood of success that the CITA's interpretation of the statute and procedures were contrary to law.[175] As an initial matter, the Federal Circuit found that a mere novelty in the legal question raised is insufficient to meet the likelihood of success standard applied by the lower court.[176] The Federal Circuit proceeded to find that the CIT lacked jurisdiction because the CITA's action at issue was not a final agency action as set forth in *Federal Trade Commission v. Standard Oil Co.*[177] As to the substantive claims, the Federal Circuit concluded, inter alia, that the language of paragraph 242 of the accession agreement does not require actual current market disruption prior to imposing a safeguard.[178] As a result, the Federal Circuit concluded that the plaintiff was not likely to succeed on the merits and therefore reversed the CIT's preliminary injunction.[179]

B. NAFTA Extraordinary Challenge Committee Decisions

In *Certain Softwood Lumber Products from Canada*, the NAFTA Extraordinary Challenge Committee (ECC) expressly recognized a reviewing court's ability to reverse the ITC's

169. *See id.* at 2-3.
170. *Id.*
171. *Id.* at 3. The CIT's decision ordering the ITC to enter a negative material injury finding was appealed to the Federal Circuit. *See* Nippon Steel Corp. v. United States, No. 01-00103, slip op. 05-72 (Ct. Int'l Trade 2005).
172. *See Nippon Steel Corp.*, slip op. 05-38, at 14.
173. U.S. Ass'n of Importers of Textiles and Apparel v. United States, 413 F.3d 1344 (Fed. Cir. 2005).
174. *Id.* at 1345-46.
175. *Id.* at 1346.
176. *Id.* at 1347.
177. *Id.* at 1349-50.
178. *Id.* at 1350-53.
179. *U.S. Ass'n of Importers of Textiles and Apparel*, 413 F.3d at 1352-53.

determination. In this case, the ECC reviewed the ITC's continued affirmative threat determinations after two remands for reconsideration.[180] The reviewing panel in that case found that the ITC's second remand determination "provided neither new evidence from the record nor further analysis to support the [ITC]'s findings on the issues remanded to it."[181] As a result, the panel remanded the matter to the ITC for redetermination in a manner consistent with its analysis (i.e., that there was no substantial evidence supporting the ITC's affirmative threat findings).[182]

In reviewing the panel's determination, the ECC recognized that NAFTA panels have the ability to reverse ITC determinations when not supported by substantial evidence.[183] The ECC supported the CIT's analysis in *Nippon* that the reviewing court's powers cannot be viewed "so narrowly as to give rise to endlessly futile remands" (i.e., converting judicial review of agency action into a ping-pong game).[184]

C. Department of Commerce and International Trade Commission Determinations

1. *Frozen Warmwater Shrimp and Prawns From India and Thailand*

Following the DOC's affirmative final antidumping determination in 2004,[185] the ITC issued an affirmative material injury determination for frozen warmwater shrimp and prawns from Brazil, Ecuador, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam.[186] According to the ITC, the large increase in the volume of subject imports caused domestic prices to decline, in turn causing material injury to the domestic industry.[187] An antidumping order was therefore imposed on February 1, 2005.[188]

180. Extraordinary Challenge Committee, Opinion and Order: In the Matter of Certain Softwood Lumber Products from Canada, ECC-2004-1904-01USA (Aug. 10, 2005).

181. *Id.* at ¶ 10.

182. *See id.* at ¶ 4.

183. In NAFTA proceedings, the panel's power is similar to that of the CIT, which is normally limited to remanding an agency's decision for reconsideration in a manner not inconsistent with its decision, and only allows the CIT to reverse the agency's determination under rare circumstances. Endlessly futile remands is one of those rare circumstances.

184. *See* ECC-2004-1904-01USA, *supra* note 180, at ¶¶ 45-46.

185. Certain Frozen and Canned Warmwater Shrimp from India, 69 Fed. Reg. 76,916 (Dep't of Commerce Dec. 23, 2004) (notice of final determination of sales at less than fair value and negative final determination of critical circumstances); Certain Frozen and Canned Warmwater Shrimp from Thailand, 69 Fed. Reg. 76,918 (Dep't of Commerce Dec. 23, 2004) (notice of final determination of sales at less than fair value and negative final determination of critical circumstances).

186. U.S. International Trade Commission, *Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil*, *China*, *Equador*, *India*, *Thailand*, *and Vietnam*, Pub. 3748, Inv. Nos. 731-TA-1063-1068 (Final) (Jan. 2005).

187. *See id.* at 35.

188. Certain Frozen Warmwater Shrimp from Brazil, 70 Fed. Reg. 5,143 (Dep't of Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order); Certain Frozen Warmwater Shrimp from Ecuador, 70 Fed. Reg. 5,156 (Dep't of Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order); Certain Frozen Warmwater Shrimp from India, 70 Fed. Reg. 5,147 (Dep't of Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order); Certain Frozen Warmwater Shrimp from the People's Republic of China, 70 Fed. Reg. 5,149 (Dep't of Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order); Certain Frozen

On April 25, 2005, the ITC determined that changed circumstances, sufficient to warrant a review of the orders, existed in light of the potential impact that the December 26, 2004, tsunami had on the shrimp industries of India and Thailand.[189] On November 2, 2005, a unanimous ITC found that the revocation of the order as to India and Thailand would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Thus, the order remained in place as to those countries. Nevertheless, the ITC's decision to conduct a changed circumstances review was significant, as it was the first time in which the ITC instituted such a review based on circumstances arising in a foreign country rather than in the United States.

2. *Outboard Engines from Japan*

The DOC issued an affirmative final determination for imports of outboard engines from Japan.[190] For its part, however, the ITC issued a final negative determination of material injury.[191] The ITC's determination relied heavily upon a finding that the conditions of competition, particularly the domestic industry's inability to manufacture certain types of subject imports, mitigated any apparent adverse volume and price effects on the domestic industry.[192] Therefore, the ITC found that the domestic outboard engines industry was not materially injured by reason of subject imports.[193]

3. *Live Swine from Canada*

The DOC issued affirmative final antidumping determinations[194] and a negative final countervailing duty determination[195] for imports of live swine from Canada.[196] As part of its negative countervailing determination, the DOC addressed novel affiliation issues, as many of the companies investigated by the DOC were characterized by complex cross-ownerships and/or were involved in acquisitions during the period of investigation.[197] A unanimous ITC subsequently issued a final negative material injury determination given the modest volume increases of subject imports, the absence of any price depression in the U.S. market, and the robust health of the domestic industry.[198]

Warmwater Shrimp from Thailand, 70 Fed. Reg. 5,145 (Dep't of Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order); Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, 70 Fed. Reg. 5,152 (Dep't of Commerce Feb. 1, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order).

189. Certain Frozen Warmwater Shrimp and Prawns from India and Thailand, 70 Fed. Reg. 23,884 (Dep't of Commerce May 5, 2005) (institution and scheduling of changed circumstances review).

190. Outboard Engines from Japan, 70 Fed. Reg. 326, 328 (Dep't of Commerce Jan. 4, 2005) (notice of final determination of sales at less than fair value) (finding a weighted-average dumping margin of 18.98% for all respondents).

191. U.S. International Trade Commission, *Outboard Engines from Japan*, Pub. 3752, at 1, Inv. No. 731-TA-1069 (Final) (Feb. 2005).

192. *See id.* at 11-22, 25-31.

193. *Id.* at 1.

194. Live Swine from Canada, 70 Fed. Reg. 12,181 (Dep't of Commerce Mar. 11, 2005) (notice of final determination of sales at less than fair value).

195. *Id.* at 12,186 (final negative countervailing duty determination).

196. *Id.* at 12,185 (finding dumping margins from de minimis to 12.68%).

197. Accompanying decision and issues memorandum (unpublished).

198. U.S. International Trade Commission, *Live Swine from Canada*, Pub. 3766, at 16-24, Inv. No. 731-TA-1076 (Final) (Apr. 2005).

4. *Magnesium Metal from the People's Republic of China and the Russian Federation*

The DOC issued affirmative final antidumping determinations on magnesium metal from the People's Republic of China[199] and the Russian Federation.[200] For Russia, the DOC, for the first time, used actual values provided by responding companies (as opposed to surrogate values) since that country's graduation to market economy status in 2002. In doing so, however, the DOC addressed the issue of adjusting the responding companies' electricity costs given the alleged involvement of the Russian government in the electricity sector.[201] The issue is significant because any refusal by the DOC to accept prices and costs on the grounds of government involvement in particular sectors of the economy would limit the benefits of being identified as a market economy. Although the DOC found that Russia's electricity sector did not operate based on market principles and is still in the early stages of reform, it nevertheless relied on the actual costs provided by the responding companies because it was unable to reliably discern the effect of government distortion.[202] Notably, the DOC stated its willingness to adjust costs in future investigations where "evidence of continuing significant distortions . . . is accompanied by sufficient evidence or analysis with respect to the impact of such distortions on energy prices paid by respondent firms."[203]

5. *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan*

In *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan*,[204] the DOC conducted a changed circumstances review of respondent Tokyo Kikai Seisakusho, Ltd. (TKS), the antidumping order which had been revoked in January 2002 after receiving zero dumping margins in three consecutive administrative reviews.[205] The changed circumstances review was self-initiated based on an unrelated judicial proceeding in federal court that uncovered information that TKS provided to the DOC regarding a sale that was the subject of one of the DOC's administrative reviews.[206] Upon review of the information submitted in that administrative review, as well as documents from the federal court proceeding, the DOC found that TKS provided false information regarding discounts and rebates extended to its customer.[207] Specifically, TKS's

199. Magnesium Metal from the People's Republic of China, 70 Fed. Reg. 9,037 (Dep't of Commerce Feb. 24, 2005) (final determination of sales at less than fair value and affirmative critical circumstances) (finding dumping margins for Chinese producers/exporters of 49.66%).

200. Magnesium Metal from the Russian Federation, 70 Fed. Reg. 9,041 (Dep't of Commerce Feb. 24, 2005) (notice of final determination of sales at less than fair value) (finding dumping margins for Russian producers/exporters ranging from 18.65 to 21.71%).

201. *See id.* at 9,042-44.

202. *See id.* at 9,043-44.

203. *Id.* at 9,044. A unanimous ITC likewise issued an affirmative final determination of material injury based on its finding that the volume and price of subject imports had a significantly adverse impact on the domestic industry. U.S. International Trade Commission, *Magnesium from China and Russia*, Pub. 3763, at 18, 20-21, Inv. Nos. 731-TA-1071 and 1072 (Final) (Apr. 2005).

204. Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan, 70 Fed. Reg. 54,019 (Dep't of Commerce Sept. 13, 2005) (preliminary results of changed circumstances review).

205. *Id.* at 54,020.

206. *Id.* The judicial proceeding involved a claim under the Antidumping Act of 1916. *See* Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd., 321 F. Supp. 2d 1039 (N.D. Iowa 2004).

207. 70 Fed. Reg. 54,019, 54,021.

response in the administrative review stated that it did not extend any rebates or discounts, although the federal court proceeding uncovered information contradicting that claim.[208] The DOC preliminarily determined that application of facts available was warranted under 19 U.S.C. § 1677e(a)(2) for withholding information requested by the DOC, resulting in a dumping margin of 56.97 percent,[209] and paving the way for reinstatement of the antidumping order for TKS.

V. Agency Policy Initiatives

A. New Continuous Bonding Requirements for Agri/Aquaculture Products Subject to AD/CVD Duties

Effective July 9, 2004, the U.S. Bureau of Customs and Border Protection (CBP) announced new guidelines for determining continuous bond requirements for importers of agriculture/aquaculture merchandise subject to antidumping and countervailing duty cases.[210] Although issued in 2004, the new policy was not implemented in earnest until 2005, upon imposition of the antidumping order on frozen warmwater shrimp. The new guidelines concern the continuous bond that all importers must carry to cover uncollected customs duties or fees that CBP might later determine are due. Under normal circumstances, the amount of bond held by CBP is relatively modest (in most cases $50,000) and would typically cover only a fraction of the total antidumping and/or countervailing duties ultimately due. Indeed, the continuous bond was never meant to cover such increased antidumping and countervailing duties. CBP, however, announced an increase in the amount of the bond for imports of agriculture and aquaculture products subject to antidumping and countervailing duty orders given its experience with various orders on Chinese food products for which several importers neglected to pay CBP when their final liability exceeded the initial cash deposits. The amount of bond posted for such imports must now cover the entire amount of antidumping and/or countervailing duties that are expected to be due for a given year. At least one appeal to the CIT challenging the new rule and its application to shrimp imports was pending at the time of this writing.

B. Non-Market Economy Country Antidumping Proceedings

In 2005, the DOC announced several new policies for NME country antidumping proceedings. The first policy involves the DOC's change to its separate rate practice, effective April 5, 2005.[211] As part of that policy change, rather than requiring non-mandatory respondents to complete a Section A questionnaire, the DOC will require such respondents

208. *Id.* at 54,021.

209. *Id.* at 54,019.

210. *See* Amendment to Bond Directive 99-3510-004 for Certain Merchandise Subject to Antidumping/Countervailing Duty Cases, U.S. Customs and Border Protection (July 9, 2004), *available at* http://www.cbp.gov/xp/cgov/import/add_cvd/bonds/07082004.xml.

211. *See* Separate Rates and Combination Rates in Antidumping Investigations involving Non-Market Economy Countries, 70 Fed. Reg. 17,233 (Dep't of Commerce Apr. 5, 2005) (announcement of change in practice); *see also* U.S. Dep't of Commerce, Import Administration Policy Bulletin 05.1, *Separate Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries* (Apr. 5, 2005), *available at* http://ia.ita.doc.gov/policy/bull05-1.pdf.

to complete an application that streamlines the necessary information but limits the DOC's acceptance of deficient responses. Also, as part of the change, the DOC's cash deposit rates assigned to exporters will apply to producer-exporter combinations in NME countries as opposed to just exporters. According to the DOC, the application of exporter-specific rates to both exporters and a producer would prevent producers from sending subject merchandise through exporters with the lowest rates.

The DOC also requested comments concerning changes in its practice for valuing market economy inputs in NME cases.[212] The DOC had normally accepted market economy purchase prices in place of surrogate values even if such purchases represented a small percentage of overall purchases of an input. Now, the DOC has proposed to use respondents' market economy purchase prices to value the input (provided the DOC's four traditional requirements are met) only when the majority of each input by volume is sourced from market economy countries. If respondents source less than a majority of the total volume of an input from market economy countries, but still meet the DOC's four other requirements,[213] the DOC proposed weight-averaging the prices paid by respondents on their purchases from market economy countries with the surrogate value for products purchased domestically (or from unaccepted market economies). At the time of this writing, the DOC was still considering comments on this issue.

Another proposal for consideration in 2005 concerned the DOC's policy on calculating wages in NME proceedings.[214] Currently, the DOC uses a regression-based wage rate analysis to calculate NME wages by taking hourly wages from certain market economy countries and charting the data against an NME country's gross national income. The DOC has requested comments on its methodology. At the time of this writing, the DOC's wage policy was still under consideration.

C. Duty Drawback in Antidumping Proceedings

On June 30, 2005, the DOC also requested comments on possible changes to its practice on duty drawback adjustments in antidumping proceedings.[215] The DOC traditionally has granted a duty drawback adjustment to export prices when respondents establish that the import duty and the rebate payment are directly linked to each other, and sufficient imports of the imported raw material occurred to account for the drawback received upon export. As part of its request for comments, the DOC considered whether: (1) parties seeking a duty drawback adjustment should be required to demonstrate that they actually paid import duties on some raw material inputs that were not rebated; (2) how the amount of the adjustment should be determined when some of the domestically-sourced and imported

212. *See* Market Economy Inputs Practice in Antidumping Proceedings involving Non-Market Economy Countries, 70 Fed. Reg. 30,418 (Dep't of Commerce May 26, 2005) (request for comments); Market Economy Inputs Practice in Antidumping Proceedings involving Non-Market Economy Countries, 70 Fed. Reg. 46,816 (Dep't of Commerce Aug. 11, 2005) (request for comments).

213. DOC's four requirements are that the purchases (1) reflect bona fide sales; (2) were made in market economy currency; (3) constitute a meaningful quantity; and (4) could have been used in the production of the subject merchandise. *See* 70 Fed. Reg. 46,816 (request for comments).

214. *See* Expected Non-Market Economy Wages, 70 Fed. Reg. 37,761 (Dep't of Commerce June 30, 2005) (request for comments on calculation methodology).

215. *See* Duty Drawback Practice in Antidumping Proceedings, 70 Fed. Reg. 37,764 (Dep't of Commerce June 30, 2005) (request for comments).

materials were used; and (3) how to determine duty drawback amounts when it is claimed on some, but not all, exports incorporating the material input at issue. As of the time of this writing, the DOC was still considering comments on this issue.[216]

VI. Legislative Activity

In 2005, the first session of the 109th Congress witnessed a flurry of trade legislation on a number of substantive issues. Congress introduced several new bills for consideration on implementing legislation for the CAFTA-DR and the Bahrain FTA; China; trade enforcement; the Byrd Amendment; the imposition of countervailing duties on NME imports; new shipper reviews; trade preferences' U.S. sanctions laws; and country-of-origin labeling. While lawmakers introduced numerous bills, however, Congress passed only a few, including the CAFTA-DR implementing legislation, country-of-origin labeling, and sanctions on Burma, Iran, and Syria. Notably, Congress failed to introduce or pass any legislation on the Export Administration Act and Russian Permanent Normal Trade Relations (PNTR).

A. Free Trade Agreements

Having signed a FTA with the six Central American countries of Costa Rica, El Salvador, Nicaragua, Honduras, Guatemala, and the Dominican Republic in mid-2004, the Bush Administration spent the first half of 2005 pressing for congressional passage of CAFTA–DR's implementing legislation. The CAFTA–DR was one of the most controversial trade agreements negotiated by the Bush Administration. Organized labor, the sugar industry, and certain textile industry associations strongly opposed the CAFTA–DR. While Democratic opponents claimed that the CAFTA–DR would lead to job losses in the United States, Republican supporters viewed the agreement as a way to promote democracy in the region.[217]

After receiving commitments by the Bush Administration to a cap on sugar imports and a promise of additional funds for U.S. workers, the U.S. Senate approved the measure 54 to 55 on June 30, 2005.[218] After several additional weeks of intense debate, the House of Representatives finally passed the bill on July 28, 2005, by a two-vote margin of 217 to 215.[219] The Bush Administration had made assurances on the CAFTA–DR's textile provisions and commitments on China trade to wavering lawmakers in its push for final passage.[220] The U.S. Senate then approved the House-passed version of the bill on July 29, 2005. On August

216. The DOC also issued its final rule governing the Steel Import Monitoring and Analysis System (SIMA). *See* Steel Import Monitoring and Analysis System, RIN: 0625-AA64, (Dec. 2005), http://ia.ita.doc.gov/steel/license/index.html. The SIMA final rule extends and expands the steel import licensing regime until March 21, 2009. The DOC expanded the licensing requirement to include all basic steel mill products but removed certain downstream products. The SIMA system was originally established in the President's March 5, 2002, Steel Safeguard Proclamation.

217. *See Business Groups Hail CAFTA-DR Passage in House, but Frustrated Opponents Cry Foul*, 22 Int'l Trade Rep. (BNA) 31, Aug. 42005, at 1290.

218. *See* United States Senate, U.S. Senate Roll Call Votes 109th Congress–1st Session, *available at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00170 (reporting on S. 1307 action as of June 30, 2005).

219. *See* United States House of Representatives, Final Vote Results for Roll Call 443, *available at* http://clerk.house.gov/evs/2005/roll443.xml (reporting on H.R. 3045 action as of July 28, 2005).

220. *See Business Groups Hail CAFTA-DR*, *supra* note 217, at 1289.

2, 2005, President Bush signed the Dominican Republic–Central America-United State Free Trade Agreement Implementation Act into law.[221] The CAFTA–DR was to go into effect on January 1, 2006. However, due to a delay by the Central American countries in passing requisite domestic laws to implement the agreement, the United States announced a delay in CAFTA-DR implementation.[222]

Once Congress passed the CAFTA-DR, the Bush Administration focused on congressional approval of the Bahrain FTA implementing legislation. Unlike the CAFTA–DR, the implementing legislation for a Bahrain FTA had more support in the House and Senate. The Bahrain government had made commitments to the United States that it would begin efforts to dismantle its participation in the Arab League's primary economic boycott of Israel.[223] The Senate Finance Committee unanimously approved a bill on November 18, 2005, after including language that the United States would monitor Bahrain's commitment to dismantle its boycott.[224] While not as contentious as the CAFTA–DR debates, U.S. lawmakers in the House did raise concerns on Bahrain's labor laws.[225] After receiving certain assurances from the Bahrain government related to the treatment of unions, the House Ways and Means Committee passed final implementing legislation on November 18, 2005.[226] The full House passed the implementing legislation on December 7, 2005 the Senate following suit on December 13, 2005.[227]

Lastly, on March 30, 2005, President Bush formally asked Congress to extend Trade Promotion Authority (TPA).[228] The TPA allows the Administration to negotiate trade agreements that Congress may not amend after the introduction of implementing legislation. Under procedures in the 2002 Trade Act, the President's TPA authority was to expire on July 1, 2005. But since Congress did not adopt a disapproval resolution before that date, TPA was extended until July 1, 2007.

B. China

Congress focused on several outstanding U.S.-China trade issues including Chinese currency and trade enforcement. On February 3, 2005, Senators Charles Schumer (D-NY) and Lindsey Graham (R-SC) introduced a bill that would impose a 27.5 percent tariff on China's exports to the United States six months after the bill comes into law unless the

221. Dominican Republic-Central America-United States Free Trade Agreement Implementation Act, Pub. L. No. 109-53, 119 Stat. 462 (2005).

222. Press Release, Office of the U.S. Trade Representative. Statement of USTR Spokesman Stephen Norton regarding CAFTA—DR Implementation (Dec. 30, 2005), *available at* http://www.ustr.gov.

223. *See Ways & Means Presses on Labor Issues in Hearing on Bahrain FTA*, Inside U.S. Trade, Sept. 30, 2005.

224. *See House, Senate Committees Approve Bahrain FTA Unanimously*, Inside U.S. Trade, Nov. 25, 2005.

225. *See Ways & Means Presses on Labor Issues in Hearing on Bahrain FTA*, *supra* note 223.

226. *See* Press Release, Committee on Ways and Means, Thomas Announces Committee Action on H.R. 4340, the "United States–Bahrain Free Trade Agreement Implementation Act" (Nov. 21, 2005), *available at* http://waysandmeans.house.gov/hearings.asp?formmode=view&id=4478&keywords=bahrain+free+trade.

227. *See* Press Release, Office of the U.S. Trade Representative, Statement of USTR Rob Portman on House Passage of Bahrain Full Trade Agreement (Dec. 7, 2005), *available at* http://www.ustr.gov; Press Release, Office of the U.S. Trade Representative, Statement of USTR Rob Portman on Senate Passage of Bahrain Free Trade Agreement, (Dec. 14, 2005), *available at* http://www.ustr.gov.

228. *See* Press Release, Office of the U.S. Trade Representative, Administration Requests Extension of Trade Promotion Authority (Mar. 30, 2005), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2005/March/Administration_Requests_Extension_of_Trade_Promotion_Authority.html.

President certifies that China is no longer manipulating its currency.[229] Critics allege that China's currency, aligned to the dollar, is significantly undervalued, thereby making its exports cheaper. In November 2005, Senators Schumer and Graham announced a delay in the vote until March 31, 2006, at the latest, in the hopes that China may still take steps to revalue its currency.[230]

On the House side, several lawmakers introduced China currency bills. Representatives Duncan Hunter (R-CA) and Tim Ryan (D-OH) introduced legislation (H.R. 1498) on April 6, 2005 that would make China's currency actionable under U.S. countervailing duty laws as an export subsidy and would define market disruption under the China specific section 421 safeguard to include exchange rate manipulation.[231] In addition, Representative Phil English (R-PA) introduced a bill (H.R. 3004) on June 21, 2005, that that would require the U.S. Department of Treasury to report on China's exchange rate policies and impose additional tariffs on Chinese imports based on the rate of exchange rate manipulation.[232] Congress took no further action on either of these bills in 2005.

On the trade enforcement side, Republican lawmakers English and Bill Thomas (R-CA) introduced a bill on July 14, 2005, entitled United States Trade Rights Enforcement Act (H.R. 3283), aimed at addressing a myriad of U.S.-China trade issues.[233] The legislation creates a comprehensive monitoring program of China's commitments under the Joint Commission on Commerce and Trade with respect to its trade obligations on intellectual property and market access. It requires the Bush Administration to issue semiannual reports to Congress on whether China is taking the requisite steps to fulfill its trade commitments and what steps the Administration would take if China fails to meet them. In cases where China has specifically promised action by the end of the year, the bill requires monthly reports.

While not specifically mentioning China, the bill requires the U.S. Department of Treasury to issue a report defining currency manipulation. In addition, the legislation authorizes $6 million annually in trade enforcement funds for the U.S. Trade Representative's (USTR) office. The bill also includes specific provisions on changes to U.S. trade remedy laws.

Separately, the House Democrats introduced the Fair Trade with China Act of 2005 (H.R. 3306) on July 14, 2005, which includes many similar provisions as Representative English's bill. Additionally, it includes a provision to strengthen U.S. law on China safeguard measures and requires the Administration to file a WTO dispute settlement case against China over its currency policy within ninety days.

On July 27, 2005, the House approved the Republican-sponsored bill, H.R. 3283, with a vote of 255 to 168.[234] As noted above, the bill helped to ensure additional votes on the CAFTA–DR implementing legislation in the House. On the Senate side, Senator Susan

229. S. 295, 109th Cong. (2005) (to authorize appropriate action if the negotiations with the People's Republic of China regarding China's undervalued currency are not successful).

230. *See* Wash. Trade Daily, Nov. 17, 2005.

231. *See* Chinese Currency Act of 2005, H.R. 1498, 109th Cong. (2005).

232. *See* Currency Harmonization Initiative Through Neutralizing Action Act of 2005, H.R. 3004, 109th Cong. (2005).

233. *See* United States Trade Rights Enforcement Act, H.R. 3283, 109th Cong. (2005).

234. *See* United States House of Representatives, Final Vote Results for Roll Call 437, *available at* http://clerk.house.gov/evs/2005/roll437.xml (reporting on H.R. 3283 action as of July 27, 2005) [hereinafter Final Vote Results for Roll Call 437].

Collins (R-ME) introduced a similar bill on July 19, 2005.[235] As of the time of this writing, Congress took no further action on either the House or Senate bill.

C. Trade Preferences

In 2005, Congress continued its efforts to grant duty preferences to Africa, Haiti, LDCs, and Ukraine. On June 30, 2005, Representative Jim McDermott (D-WA) introduced a bill titled Answer Africa's Call Act (H.R. 3175) that seeks to remove trade barriers impeding economic growth in sub-Saharan Africa. The bill modifies preferential trade treatment for imports from the region by extending a third-country fabric provision granted under the African Growth and Opportunity Act (AGOA) until September 20, 2015. AGOA's current third-country fabric provisions expire in September 2007. In addition, the legislation eliminates high over-quota tariffs the United States imposes on all agriculture imports from sub-Saharan Africa subject to tariff rate quotas. Certain imports, however, entering above quota still could be subject to tariffs if their price is lower than a trigger price equal to the product's average import price. Congress took no further action on this bill.

In 2005, supporters of trade preferences for Haiti reportedly were developing a compromise bill for reconsideration before the 109th Congress.[236] Senate and House members, however, decided to introduce their own legislation identical to a Senate bill introduced in 2004 (S. 2261) that failed to pass the House. On October 28, Senator Mike DeWine (R-OH) introduced S. 1927 that would grant duty-free access for certain Haitian apparel products.[237] Representative Kendrick Meek (D-FL) introduced a companion bill on November 6, 2005.[238] Congress, however, took no further action on these bills.

On February 17, 2005, Representative Jim Kolbe (R-AZ) introduced a bill (H.R. 886) titled the Tariff Relief Assistance for Developing Economic Act of 2005 (TRADE Act) to extend certain trade preferences to fourteen LDCs in the Asian, Middle East, and Pacific regions. Under the bill, eligible beneficiary countries would receive duty-free treatment on certain articles, particularly textiles and apparel, not currently covered by other trade preferences programs. The TRADE Act's benefits are similar to those provided under the AGOA. Senator Gordon Smith (R-OR) introduced a similar bill in the Senate (S. 191). At the end of the year, both bills remained in congressional committee.

Several bills by different lawmakers sought to extend PNTR treatment to Ukraine. While House members introduced three separate bills, Congress took no action on them in 2005.[239] On the Senate side, Senators Carl Levin (D-MI), John McCain (R-AZ), and Richard Lugar (R-IN) introduced legislation on the same issue. In addition to extending PNTR treatment to Ukraine, Senator Levin's bill (S. 46) also established market access terms between the two countries and allowed bilateral safeguard measures in response to import surges. The Bush Administration, however, expressed concern that these issues were better

235. *See* United States Trade Rights Enforcement Act, S. 1421, 109th Cong. (2005).

236. *See DeWine, Thomas work on Haiti Textile Bill Despite NCTO Opposition*, Inside U.S. Trade, May 20, 2005.

237. *See* Haiti Economic Recovery Opportunity Act, S. 1937, 109th Cong. (2005).

238. *See* Haiti Economic Recovery Opportunity Act, H.R. 4211, 109th Cong. (2005).

239. *See* H.R. 885, 109th Cong. (2005) (legislation introduced by Representative Hyde (R-IL) on February 17, 2005); H.R. 1053, 109th Cong. (2005) (legislation introduced by Representative Gerlach (R-PA) on March 2, 2005); H.R. 1170, 109th Cong. (2005) (legislation introduced by Representative Levin (D-MI) on March 8, 2005).

addressed in the context of WTO negotiations.[240] By the end of the year, the Senate had passed only Senator Lugar's bill (S. 632) on November 18, 2005.[241] Lastly, Congress introduced no bills in 2005 granting PNTR status to Russia.

D. Antidumping and Countervailing Duty Laws

Congress introduced several important pieces of legislation in 2005 concerning U.S. trade remedy laws. On March 10, 2005, Representative English introduced legislation (H.R. 1216) that would provide for the imposition of countervailing duties on imports from NME countries. Currently, the DOC does not apply countervailing duty law to NMEs, in part due to the difficulty in calculating subsidies in such markets and in part because of a fear that such action might contravene existing law.[242] Senator Collins sponsored a companion bill (S. 593) on the same day. Both lawmakers had introduced similar bills in 2004 that made little progress. Once again, Congress took no action on these bills.

The U.S. Trade Rights Enforcement Act (H. R. 3283) described above includes general trade remedy provisions that, while aimed at China, extend to other countries as well. The bill also authorizes the application of U.S. countervailing duty law to imports from NMEs such as China and Vietnam. In addition, the legislation would suspend for three years the availability of bonds for new shippers during the pendency of their antidumping reviews, requiring instead cash deposits. The bill addresses cases in which new shippers have failed to meet their antidumping duty payment obligations in instances where, for example, they posted bonds and then went out of business before the duties were collected. On July 27, 2005, the House approved the Republican-sponsored bill with a vote of 255 to 168.[243] As noted above, the bill helped to ensure additional votes on the CAFTA-DR implementing legislation in the House. On the Senate side, Senator Collins introduced a similar bill on July 19, 2005.[244] But Congress took no further action on these bills.

In an effort to address increased imports from new countries after the imposition of an antidumping duty order, Senator Blanche Lincoln (D-AR) introduced legislation to provide for an expedited antidumping investigation.[245] Specifically, the bill requires that the DOC initiate an expedited antidumping investigation if it finds that imports from a new supplier country have increased by 15 percent or more over the amount of imports from a comparable period preceding the initiation of the investigation of imports subject to the order. By the end of 2005, the bill had been referred to the Senate Finance Committee.

On March 3, 2005, Representatives Jim Ramstad (R-MN) and Clay Shaw (R-FL) introduced legislation (H.R. 1121) seeking to repeal the Byrd Amendment. Under the Byrd Amendment, duties collected from antidumping and countervailing duty orders are given to petitioners in trade remedy cases. In January 2003, the WTO ruled these payments illegal. In 2004, a WTO arbitrator granted the co-complainants the right to suspend trade

240. *See USTR Says Ukraine Bill Needs to Be Revised to address Administration Concerns*, 22 Int'l Trade Rep. (BNA) 8, Feb. 24, 2005, at 294.

241. *See* Memorandum from Senator Chuck Grassley on Senate Passage of Jackson-Vanik Repeal for Ukraine (Nov. 18, 2005), *available at* http://www.senate.gov/~finance/press/Gpress/2005/prg111805a.pdf.

242. *See* Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986).

243. *See* Final Vote Results for Roll Call 437, *supra*, note 234.

244. *See* United States Trade Rights Enforcement Act, S. 1421, 109th Cong. (2005).

245. *See* Expedited Remedy for Persistent Dumping Act of 2005, S. 1050, 109th Cong. (2005).

concessions with the United States. Thus far, Canada, the EU, Japan, and Mexico have imposed tariffs on certain U.S. imports.[246] The Bush Administration has called for the repeal of the Byrd Amendment in its 2006 budget proposal to Congress. The Byrd Amendment, however, continued to have strong support in the Senate.[247] H.R. 1121 was contained in a House version of the 2006 budget reconciliation bill (H.R. 4241) but not in the Senate version of the bill (S. 1932). On November 3, 2005, the U.S. Senate passed S. 1932, while the House approved H.R. 4241 on November 18, 2005.[248] However, since the Senate bill did not contain the Byrd repeal, a House-Senate conference committee had to work on the final provisions through the end of 2005 during which no final action was taken.[249]

Lastly, on November 16, 2005, the Senate unanimously approved S. 695, which strengthens Department of Commerce regulations on collecting antidumping and countervailing duties from 'new shippers' in current orders.[250]

E. Miscellaneous Trade Legislation

On January 24, 2005, Senate Democrats introduced a bill, S. 14, the Fair Wage, Competition and Investment Act of 2005. With respect to trade issues, the legislation requires the USTR's office to conduct a meeting of the Trade Policy Group to develop a plan of action if the U.S. trade deficit rises to more than 5 percent of U.S. gross domestic product over a twelve-month period. Congress, however, took no further action on the proposed measure. Similarly, legislation (S. Con. Res. 12) introduced on February 15, 2005, setting forth minimum environmental, labor, and investment standards in future U.S. trade agreement negotiations languished in the Senate.

Several lawmakers introduced bills creating a chief enforcement negotiator position within the USTR.[251] The prosecutor would be responsible for ensuring that U.S. trading partners meet their obligations under the WTO and bilateral and regional trade agreements with the United States. The bills require that the position assist the USTR in investigating and prosecuting disputes before the WTO and pursuant to other trade agreements to which the United States is party. But Congress failed to take action on any of these bills.

Lastly, Representative Bernard Sanders' (I-VT) bill (H.J. Res. 27) to withdraw the United States from the WTO failed to pass. On June 9, 2005, the House rejected the resolution by a vote of 338 to 86.[252] The Senate never introduced companion legislation.

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246. *See Japan OKs Countervailing Duties on 15 U.S. Products Because of Byrd Amendment*, 22 Int'l Trade Rep. (BNA) 31, Aug. 18, 2005, at 1344; *Mexico Slaps Punitive Duties on U.S. Goods Due to Noncompliance with WTO Byrd Ruling*, 22 Int'l Trade Rep. (BNA) 31, Aug. 25, 2005, at 1386.

247. *See Efforts to Repeal Byrd Challenged Despite Legislation, EU Threats*, Inside U.S. Trade, Mar. 18, 2005.

248. *See* Press Release, House Committee on Ways and Means, House Passes Budget Savings Package (Nov. 18, 2005), *available at* http://waysandmeans.house.gov/news.asp?FormMode=release&id=355&keywords=House+Passes+Budget+Savings.

249. *See* Repealing Byrd—In Two Years, Washington Trade Daily, Dec. 20, 2005.

250. *See* Press Release, Thad Cochran, Cochran Gains Approval for New Shipper Bill (Nov. 16, 2005), *available at* http://cochran.senate.gov.

251. *See* Fair Wage, Competition, and Investment Act of 2005, S. 14, 109th Cong. (2005); S. 1542, 109th Cong. (2005) (to amend the Trade Act of 1974 to create a Chief Trade Prosecutor to ensure compliance with trade agreements, and for other purposes); United States Trade Rights Enforcement Act, H.R. 3283, 109th Cong. (2005); H.R. 4186, 109th Cong. (2005) (to amend the Trade Act of 1974 to create a Chief Trade Prosecutor to ensure compliance with trade agreements).

252. *See USTR Says House WTO Resolution Vote Will Aid DR-CAFTA Support*, Inside U.S. Trade, June 10, 2005.