

Dispute Settlement Update October 24, 2008

I. WTO

A. Proceedings in which the United States is a plaintiff

1. *EC – Measures concerning meat and meat products (hormones) (WT/DS26, 48)*

The United States and Canada challenged the EC ban on imports of meat from animals to which any of six hormones for growth promotional purposes had been administered. On July 2, 1996, the following panelists were selected, with the consent of the parties, to review the U.S. claims: Mr. Thomas Cottier, Chairman; Mr. Jun Yokota and Mr. Peter Palecka, Members. The panel found that the EC ban is inconsistent with the EC's obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"), and that the ban is not based on science, a risk assessment, or relevant international standards. Upon appeal, the Appellate Body affirmed the panel's findings that the EC ban fails to satisfy the requirements of the SPS Agreement. The Appellate Body also found that while a country has broad discretion in electing what level of protection it wishes to implement, in doing so it must fulfill the requirements of the SPS Agreement. In this case the ban imposed is not rationally related to the conclusions of the risk assessments the EC had performed.

Because the EC did not comply with the recommendations and rulings of the DSB by May 13, 1999, the final date of its compliance period as set by arbitration, the United States sought WTO authorization to suspend concessions with respect to certain products of the EC, the value of which represents an estimate of the annual harm to U.S. exports resulting from the EC's failure to lift its ban on imports of U.S. meat. The EC exercised its right to request arbitration concerning the amount of the suspension. On July 12, 1999, the arbitrators determined the level of suspension to be \$116.8 million. On July 26, 1999, the DSB authorized the United States to suspend such concessions and the United States proceeded to impose 100 percent *ad valorem* duties on a list of EC products with an annual trade value of \$116.8 million. On May 26, 2000, USTR announced that it was considering changes to that list of EC products. While discussions with the EC to resolve this matter are continuing, no resolution has been achieved yet. On November 3, 2003, the EC notified the WTO of its plans to make permanent the ban on one hormone, oestradiol. As discussed in more detail below (DS320), on November 8, 2004, the European Communities requested consultations and a panel with respect to "the United States' continued suspension of concessions and other obligations under the covered agreements" in the *EC – Hormones* dispute.

2. *EC – Protection of trademarks and geographical indications for agricultural products and foodstuffs (WT/DS174)*

The United States first requested consultations regarding this matter on June 1, 1999 and, on April 4, 2003, requested consultations on the additional issue of the EC's national treatment obligations under the GATT 1994. Australia also requested consultations with respect to this

measure. When consultations failed to resolve the dispute, the United States requested the establishment of a panel on August 18, 2003. The DSB established a panel on October 2, 2003, to consider the complaints of the United States and Australia. On February 23, 2004, the Director General composed the panel as follows: Mr. Miguel Rodriguez Mendoza, Chair, and Mr. Seung Wha Chang and Mr. Peter Kam-fai Cheung, Members. On April 20, 2005, the DSB adopted the panel report, which found that the EC's regulation on food-related geographical indications (GIs), EC Regulation 2081/92, is inconsistent with the EC's obligations under the TRIPS Agreement and the GATT 1994. This finding results from the long-standing U.S. complaint that the EC GI system discriminates against foreign products and persons – notably by requiring that EC trading partners adopt an “EC-style” system of GI protection – and provides insufficient protections to trademark owners. The WTO panel agreed that the EC's GI regulation impermissibly discriminates against non-EC products and persons. The panel also agreed with the United States that Europe could not, consistent with WTO rules, deny U.S. trademark owners their rights; it found that, under the regulation, any exceptions to trademark rights for the use of registered GIs were narrow, and limited to the actual GI name as registered. The panel recommended that the EC amend its GI regulation to come into compliance with its WTO obligations. The EC, the United States, and Australia (which filed a parallel case) agreed that the EC would have until April 3, 2006, to implement the recommendations and rulings. On April 10, 2006, the EC announced that it had issued a new regulation, which came into force on March 31, 2006, that implements the DSB's recommendations and rulings. The United States is reviewing the EC's implementation of that regulation.

3. *EC – Measures affecting the approval and marketing of biotech products (WT/DS291)*

On May 13, 2003, the United States filed a consultation request with respect to the EC's moratorium on all new biotech approvals, and bans of six member states (Austria, France, Germany, Greece, Italy and Luxembourg) on imports of certain biotech products previously approved by the EC. The moratorium was not supported by scientific evidence, and the EC's refusal even to consider any biotech applications for final approval constituted “undue delay.” The national import bans of previously EC-approved products appeared not to be based on sufficient scientific evidence. Consultations were held June 19, 2003. The United States requested the establishment of a panel on August 7, 2003, and the DSB established a panel on August 29, 2003. On March 4, 2003, the Director General composed the panel as follows: Mr. Christian Häberli, Chairman, and Mr. Mohan Kumar and Mr. Akio Shimizu, Members. The same Panel considered similar claims brought by co-complainants Argentina and Canada.

The Panel issued its report on September 29, 2006. The Panel agreed with the United States, Argentina, and Canada that the disputed measures of the EC, Austria, France, Germany, Greece, Italy, and Luxembourg are inconsistent with the obligations set out in the SPS Agreement. In particular:

- The Panel found that the EC adopted a de facto, across-the-board moratorium on the final approval of biotech products, starting in 1999 up through the time the panel was established in August 2003.
- The Panel found that the EC had presented no scientific or regulatory justification for the moratorium, and thus that the moratorium resulted in “undue delays” in violation of the EC’s obligations under the SPS Agreement.
- The Panel identified specific, WTO-inconsistent “undue delays” with regard to 24 of the 27 pending product applications that were listed in the U.S. panel request.
- The Panel upheld the United States’ claims that, in light of positive safety assessments issued by the EC’s own scientists, the bans adopted by six EC member States on products approved in the EC prior to the moratorium were not supported by scientific evidence and were thus inconsistent with WTO rules.

The DSB adopted the panel report on November 21, 2006.

At the meeting of the DSB held on December 19, 2006, the EC notified the DSB that the EC intends to implement the recommendations and rulings of the DSB in these disputes, and stated that it would need a reasonable period of time for implementation. The United States, Argentina, and Canada agreed with the EC on a one-year period of time for implementation, ending on November 21, 2007, and the parties subsequently agreed to extend the time period for implementation to January 11, 2008. On February 6, 2008, the EC requested a panel under Article 22.6 of the DSU, claiming that the level of suspension proposed by the United States was not equivalent to the level of nullification or impairment. The EC and the United States mutually agreed to suspend the 22.6 arbitration proceedings as of February 18, 2008. The United States may request their resumption following a finding by the DSB that the EC has not complied with the recommendations and rulings of the DSB.

4. *European Communities – Selected customs matters (WT/DS315)*

On September 21, 2004, the United States requested consultations with the EC with respect to (1) lack of uniformity in the administration by EC member States of EC customs laws and regulations and (2) lack of an EC forum for prompt review and correction of member State customs determinations. On September 29, 2004, the EC accepted the U.S. request for consultations, and consultations were subsequently held on November 16, 2004. The panel was established on March 21, 2005. On May 27, 2005, the Director General composed the panel as follows: Mr. Nacer Benjelloun-Touimi, Chair, and Mr. Mateo Diego-Fernandez and Mr. Hanspeter Tschani, Members.

On June 16, 2006, the panel circulated its report. The panel found that an “as such” claim regarding the design and structure of the EC system of customs administration was beyond its terms of reference. However, it did find that in particular instances the EC administers its customs law in a non-uniform manner – in particular, with respect to the classification of certain liquid crystal display (LCD) monitors, the classification of blackout drapery lining, and the application of the “successive sales” rule for customs valuation. The panel also denied the U.S. claim regarding prompt review and correction of customs administrative decisions.

On August 14, 2006, the United States filed a notice of appeal. On August 28, 2006, the EC filed a notice of other appeal. On November 13, 2006, the Appellate Body issued its report. The Appellate Body reversed the panel’s finding that the U.S. claim regarding the EC system of customs administration as a whole was outside its terms of reference. The Appellate Body also reversed the panel’s finding that the measure at issue was the “manner of administration” of EC customs laws, rather than the laws themselves. The Appellate Body upheld the panel’s finding of non-uniform administration with respect to the classification of LCD monitors. However, it reversed the panel’s findings of other instances of non-uniform administration. The Appellate Body upheld the panel’s finding regarding prompt review and correction of customs administrative decisions.

The Appellate Body report and the panel report as modified by the Appellate Body report were adopted at the December 11, 2006 meeting of the DSB. At that meeting, the EC stated that it is already in compliance with respect to the finding concerning the classification of LCD monitors. The EC reiterated this statement at the December 19, 2006 meeting of the DSB, when the United States questioned whether the EC had provided its statement of intentions with respect to the recommendations and rulings adopted by the DSB.

5. *European Communities – Subsidies on large civil aircraft (WT/DS316)*

On October 6, 2004, the United States requested consultations with the EC, as well as with Germany, France, the United Kingdom, and Spain, with respect to subsidies provided to Airbus, a manufacturer of large civil aircraft. The United States alleged that such subsidies violated various provisions of the SCM Agreement, as well as Article XVI:1 of the GATT 1994. Consultations were held on November 4, 2004. On January 11, 2005, the United States and the EC agreed to a framework for the negotiation of a new agreement to end subsidies for large civil aircraft. The parties set a three-month time frame for the negotiations and agreed that, during negotiations, they would not request panel proceedings.

The United States and the EC were unable to reach an agreement within the 90-day time frame. Therefore, the United States filed a request for a panel on May 31, 2005. The Panel was established on July 20, 2005. The U.S. request challenges several types of EC subsidies that

appear to be prohibited, or actionable, or both. On February 13, 2006, the Deputy Director General composed the panel as follows: Mr. Carlos Pérez del Castillo, Chair, and Mr. John Adank and Mr. Thinus Jacobsz, Members.

The panel is expected to issue its report in 2008.

6. *Turkey – Measures affecting the importation of rice (WT/DS334)*

On November 2, 2005, the United States requested consultations regarding Turkey's import licensing system and domestic purchase requirement with respect to the importation of rice. The United States challenged Turkey under several WTO agreements, including the Agreement on Trade-Related Investment Measures (TRIMS), the General Agreement on Tariffs and Trade 1994, the Agreement on Agriculture, and the Agreement on Import Licensing Procedures for: (1) conditioning the issuance of import licenses to import at preferential tariff levels upon the purchase of domestic rice; (2) not permitting imports at the bound rate; and (3) implementing a de facto ban on rice imports during the Turkish rice harvest. Consultations were held on December 1, 2005, but failed to resolve the dispute. The United States requested the establishment of a panel on February 6, 2006, and the DSB established a panel on March 17, 2006. The panel was composed by the Deputy Director General on July 31, 2006 as follows: Ms Marie-Gabrielle Ineichen-Fleisch, Chair, and Messrs. Johann Frederick Kirsten and Yoichi Suzuki, Members.

The final report of the panel was circulated on September 21, 2007. The panel sided with the United States on all major claims. The panel found, *inter alia*, that: Turkey's import licensing regime for rice constitutes a quantitative import restriction and discretionary import licensing in contravention of Article 4.2 of the Agreement on Agriculture; and Turkey's requirement that importers purchase large quantities of domestic paddy rice as a condition to import rice under a TRQ accords less favorable treatment to imported rice, thereby breaching Article III:4 of the GATT 1994. The report was adopted by the DSB on October 22, 2007.

Thereafter, Turkey notified its intention to comply with its WTO obligations and indicated that it would need a reasonable period of time to do so. The United States and Turkey came to an agreement that the reasonable period of time would be six months, expiring on April 22, 2008. On May 7, 2008, the United States and Turkey entered into a sequencing agreement with respect to the procedures that will apply if the United States seeks to establish a compliance panel or seeks to suspend concessions or other obligations to Turkey in connection with this dispute.

7. *China – Measures affecting imports of automobile parts (WT/DS340)*

On March 30, 2006, the United States requested consultations with China regarding China's treatment of motor vehicle parts, components, and accessories ("auto parts") imported from the United States. Although China's WTO commitments limit its tariffs on imported auto parts to rates that are significantly below China's tariffs on finished vehicles, China implemented

regulations that impose a charge on imported auto parts equal to the tariff on complete automobiles, if the final assembled vehicle in which the parts are incorporated fails to meet certain local content requirements. These regulations appear inconsistent with several WTO provisions including Articles II and III of the GATT 1994 and Article 2 of the *Agreement on Trade-Related Investment Measures*, as well as specific commitments made by China in its WTO accession agreement.

The EC (WT/DS339) and Canada (WT/DS442) also initiated disputes regarding the same matter. The EC, Canada, and the United States requested the establishment of a panel on September 28, 2006, and a single panel was established on October 26, 2006 to examine the complaints. On January 29, 2007, the Director General composed the panel as follows: Mr. Julio Lacarte-Muró, Chair, and Mr. Ujal Singh Bhatia and Mr. Wilhelm Meier, Members.

The panel report was circulated to WTO Members and the public on July 18, 2008. The report upheld U.S. claims that China's regulations were inconsistent with China's WTO obligations. In particular, it found that China's regulations impose discriminatory internal charges and administrative procedures on imported auto parts resulting in violation of Articles III:2 and III:4 of the General Agreement on Tariffs and Trade 1994, and that certain aspects of the regulations are inconsistent with specific commitments made by China in its WTO accession agreement.

China has appealed the panel findings to the WTO Appellate Body, and the Appellate Body is scheduled to issue its report by the end of 2008.

8. China – Prohibited subsidies (WT/DS358)

On February 2, 2007, the United States requested consultations with China regarding subsidies provided in the form of refunds, reductions, or exemptions from income taxes or other payments. Because they were offered on the condition that enterprises purchase domestic over imported goods, or on the condition that enterprises meet certain export performance criteria, these subsidies appeared to be inconsistent with several provisions of the WTO Agreement, including Article 3 of the *Agreement on Subsidies and Countervailing Measures*, Article III:4 of the *General Agreement on Tariffs and Trade 1994*, and Article 2 of the *Agreement on Trade-Related Investment Measures*, as well as specific commitments made by China in its WTO accession agreement. Mexico also initiated a dispute (WT/DS359) regarding the same matter. Following consultations held on March 20 and June 22, the United States requested the establishment of a panel on July 24, and the WTO Dispute Settlement Body established a panel on August 31, 2007.

In November 2007, China agreed to settle the case by ceasing all the prohibited subsidies no later than January 1, 2008, and by making the necessary technical changes to permanently remove a related legal measure by January 1, 2009.

9. *India – Alcohol Tariffs (WT/DS360)*

On March 6, 2007, the United States requested consultations with the Government of India, regarding India's additional customs duty (AD) and extra-additional customs duty (EAD) on imports from the United States. The dispute involves alcoholic beverages as well as a number of other products for which India imposes customs duties in excess of bound rates set forth in its Schedule to the GATT 1994 (WTO Schedule). Specifically, in its WTO Schedule, India committed to maintaining ordinary customs duties of 150 percent *ad valorem* or less, and that it would not impose other duties or charges on imports of alcoholic beverages. India, however, has imposed ordinary customs duties on imports of alcoholic beverages from the United States that result in ordinary customs duties on these imports as high as 550 percent. The United States considers these duties inconsistent with India's obligation under Article II:1(a) and (b) of the GATT 1994 not to apply ordinary customs duties or other duties or charges in excess of those set forth in its WTO Schedule or to accord less favorable treatment to imports than set forth in its WTO Schedule. The United States also considers the EAD inconsistent with Article II:1(a) and (b) of the GATT 1994 as it likewise results in imposition of customs duties that exceed those set forth in India's WTO Schedule. The U.S. challenged the EAD with respect to alcoholic beverages as well as other products for which application of the EAD results in duties in excess of those in India's WTO Schedule (e.g., milk, raisins and orange juice and a number of industrial products).

The United States and India held consultations on April 13, 2007 in Geneva. The European Communities ("EC") were joined in the consultations. These consultations failed to result in a mutually satisfactory resolution to this dispute and on May 24, 2007, the United States requested the establishment of a panel. The DSB considered this request at its meetings of June 4 and June 20, 2007, and established the Panel on June 20 with standard terms of reference. Australia, Chile, the EC, Japan, and Vietnam have reserved third party rights in the dispute. On July 3, 2007, the parties agreed on the panelists, as follows: Luzius Wasescha, Chair, Mateo Diego-Fernandez, and Bruce McRae.

The establishment of the Panel in this dispute (WT/DS360) followed the establishment of a panel on April 24, 2007 to consider similar claims raised by the EC against the AD and the EAD on imports of wine and distilled spirits (WT/DS352). On July 3, 2007, the United States along with the EC and India agreed to have the same panelists, working procedures and schedule for both disputes, but to have separate panel reports. However, on July 13, 2007, the EC requested, pursuant to DSU Article 12.12, that the panel in DS352 suspend its work and the panel granted that request on July 16, 2007. This did not affect the work of the panel requested by the United States.

On June 9, 2008, the panel circulated its report. The panel found that the United States had not established that India's AD and EAD were inconsistent with Article II:1(a) or (b) of the GATT 1994. Specifically, the panel found that for duty or charge to fall within the scope of those articles, it must be "inherently discriminatory" and that an essential but insufficient criteria for

establishing that a duty is inherently discriminatory, is establishing that the duty is not a charge equivalent to an internal tax. Because the panel considered the United States to have failed to establish that the AD and EAD were not charges equivalent to an internal tax within the meaning of GATT Article III:2, the United States could not establish that the duties fell within the scope of Article II:1(a) or (b).

On August 1, 2008, the United States appealed the report of the panel to the Appellate Body.

10. *China – Measures affecting the protection and enforcement of intellectual property rights (WT/DS362)*

On April 10, 2007, the United States requested consultations with China regarding certain measures pertaining to the protection and enforcement of intellectual property rights in China. The issues of concern included: (1) the thresholds that must be met in order for certain acts of trademark counterfeiting and copyright piracy to be subject to criminal procedures and penalties; (2) the disposal by Chinese customs authorities of goods that infringe intellectual property rights and that have been confiscated by those authorities; (3) the denial of copyright and related rights protection and enforcement to creative works of authorship, sound recordings, and performances that have not been authorized for publication or distribution within China; and (4) the scope of coverage of criminal procedures and penalties for unauthorized reproduction or unauthorized distribution of copyrighted works.

The United States and China held consultations on June 7-8, 2007, but they did not resolve the dispute. On August 13, 2007, the United States requested the establishment of a panel with respect to issues (1) through (3) in the consultation request. The DSB established the Panel on September 25, 2007. Argentina, Australia, Brazil, Canada, the EC, India, Japan, Korea, Mexico, Chinese Taipei, Thailand, and Turkey have reserved third party rights in the dispute. On December 13, 2007, the Director General composed the panel as follows: Mr. Adrian Macey, Chair, and Mr. Marino Porzio and Mr. Sivakant Tiwari, Members. The Chinese measures at issue appear to be inconsistent with China's obligations under several provisions of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the TRIPS Agreement).

11. *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (United States) (WT/DS363)*

On April 10, 2007, the United States requested consultations with China regarding certain measures related to the import and/or distribution of imported films for theatrical release, audiovisual home entertainment products (e.g., video cassettes and DVDs), sound recordings, and publications (e.g., books, magazines, newspapers, and electronic publications). On July 10, 2007, the United States requested supplemental consultations with China regarding certain measures pertaining to the distribution of imported films for theatrical release and sound recordings.

Specifically, the United States is concerned that certain Chinese measures: (1) restrict trading rights (such as the right to import goods into China) with respect to imported films for theatrical release, audiovisual home entertainment products, sound recordings, and publications; and (2) restrict market access for, or discriminate against, publications, imported films for theatrical release and sound recordings in physical form, and foreign service providers seeking to engage in the distribution of publications, audiovisual home entertainment products, and sound recordings.

The United States and China held consultations on June 5-6, 2007 and July 31, 2007. The DSB established the Panel on November 27, 2007. Australia, the EC, Japan, Korea, and Chinese Taipei have reserved third party rights in the dispute. On March 27, 2008, the Director-General composed the Panel as follows: Mr. Florentino P. Feliciano, Chair, and Mr. Juan Antonio Dorantes and Mr. Christian Haerberli, Members. The Chinese measures at issue appear to be inconsistent with several WTO provisions, including provisions in the *General Agreement on Tariffs and Trade 1994* (GATT 1994) and *General Agreement on Trade in Services* (GATS), as well as specific commitments made by China in its WTO accession agreement.

12. *European Communities – Regime for the importation, sale and distribution of bananas – Recourse to Article 21.5 of the DSU by the United States (WT/DS27)*

On June 29, 2007, the United States requested the establishment of a panel under to Article 21.5 of the DSU to review whether the European Communities (EC) has failed to bring its import regime for bananas into compliance with its WTO obligations and the DSB recommendations and rulings adopted on September 25, 1997. The request relates to the EC's apparent failure to implement the WTO rulings in a proceeding initiated by Ecuador, Guatemala, Honduras, Mexico and the United States. That proceeding resulted in findings that the EC's banana regime discriminates against bananas originating in Latin American countries and against distributors of such bananas, including a number of U.S. companies. The EC was under obligation to bring its banana regime into compliance with its WTO obligations by January 1999. Ecuador and the United States have been authorized by the WTO once before to take action against the EC for its failure to implement the DSB rulings. The United States terminated that action after the EC committed to shift to a tariff-only regime for bananas no later than January 1, 2006. Despite these commitments, the banana regime implemented by the EC on January 1, 2006 includes a zero-duty tariff rate quota allocated exclusively to bananas from African, Caribbean, and Pacific countries (ACP countries). All other bananas do not have access to this duty-free tariff rate quota and are subject to a 176 euro per ton duty. The United States believes that the 2006 regime is in violation of GATT Articles I:1 and XIII.

Ecuador requested the establishment of a similar compliance panel on February 23, 2007, and a panel was composed in response to that request on June 15. The panel in response to the United States request was established on July 12, 2007. On August 13, 2007, the Director General composed the panel as follows: Mr. Christian Häberli, Chair, and Mr. Kym Anderson and Mr. Yuqing Zhang, Members. Mr. Häberli and Mr. Anderson were members of the original panel in this dispute.

The panel issued its report on May 19, 2008. The panel agreed with the United States that the EC's regime is inconsistent with the EC's obligations and that the EC had failed to implement the recommendations and rulings of the DSB. In particular:

- The panel found that the preference granted by the EC to an annual duty-free tariff rate quota allocated exclusively to bananas originating in the ACP countries constitutes an advantage which is not accorded to like bananas originating in non-ACP WTO Members and is therefore inconsistent with Article I:1 of the GATT 1994. The Panel also found that with the expiration of the GATT Article I waiver on January 1, 2006 as it applied to bananas, the EC had failed to demonstrate the existence of a waiver from Article I:1 of the GATT 1994 to cover the preference granted to the ACP countries.
- The panel found that the EC's 2006 banana import regime, in particular its preferential tariff-rate quota reserved for ACP countries, is also inconsistent with Article XIII:1 and Article XIII:2 of the GATT 1994.

The Ecuador panel issued a similar report on April 7, 2008. On June 24, 2008, the DSB agreed to a joint request by the United States and the EC to extend the period for adoption of the panel report by negative consensus through August 29, 2008. On June 2, 2008, the DSB had agreed to a similar request in the Ecuador dispute. On August 28, 2008, the EC filed a notice of appeal. The report of the Appellate Body is expected later this year.

13. China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers (WT/DS373)

On March 3, 2008, the United States requested WTO dispute settlement consultations with China concerning China's treatment of foreign financial information suppliers. China's regulatory regime requires foreign financial information suppliers to operate through a government-designated distributor and prohibits them from establishing local operations to provide their services. In addition, the agency designated by China to regulate these services appears to have a conflict of interest, as it is closely connected to a commercial operator in China. This regime appears inconsistent with several WTO provisions, including Articles XVI, XVII, and XVIII of the *General Agreement on Trade in Services*, as well as specific commitments made by China in its WTO accession protocol.

The EC also requested WTO consultations with China on the same measures. The United States, the EC, and China held joint consultations on April 22-23, 2008. On June 20, 2008, Canada requested consultations with China regarding the same measures.

14. EC – Tariff Treatment of Certain Information Technology Products (WT/DS375)

On May 28, 2008, the United States requested consultations with the EC and its member States regarding the tariff treatment accorded to set-top boxes with a communication function, flat panel displays, “input or output units,” and facsimile machines. The United States is concerned that certain EC measures appear to have resulted in the imposition of duties on these products. As a result of the Information Technology Agreement (ITA), the EC and its member States, in their Schedules of Concessions to the GATT 1994, committed to provide duty-free treatment for these products.

The measures in question appear to be inconsistent with the obligations of the EC and its member States under Articles II:1(a) and II:1(b) of the GATT 1994. In addition, certain of the actions taken by the EC with respect to set-top boxes appear to be inconsistent with the EC’s obligations under GATT 1994 Articles X:1 and X:2.

Japan and Chinese Taipei (on May 28 and June 12, respectively) also filed requests for consultations with the EC and its member States on these measures. On August 18, the United States, Japan and Chinese Taipei jointly requested the establishment of a panel. A panel was established at the meeting of the DSB on September 23, 2008.

B. Proceedings in which the United States is a defendant

1. *United States – Subsidies on upland cotton (WT/DS267)*

On September 27, 2002, the United States received from Brazil a request for consultations pursuant to Articles 4.1, 7.1 and 30 of the *Agreement on Subsidies and Countervailing Measures*, Article 19 of the *Agreement on Agriculture*, Article XXII of the *General Agreement on Tariffs and Trade 1994*, and Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*. Brazil requested consultations pertaining to “prohibited and actionable subsidies provided to U.S. producers, users and/or exporters of upland cotton, as well as legislation, regulations, statutory instruments and amendments thereto providing such subsidies (including export credits), grants, and any other assistance to the U.S. producers, users and exporters of upland cotton [footnote omitted].” Brazil claimed that these alleged subsidies and measures were inconsistent with U.S. commitments and obligations under the *Agreement on Subsidies and Countervailing Measures*, the *Agreement on Agriculture*, and the *General Agreement on Tariffs and Trade 1994*. Consultations were held December 3-4, 2002. A second round of consultations was held January 17, 2003. Brazil requested the establishment of a panel on February 6, 2003. The DSB established a panel on March 18, 2003.

On September 8, 2004, the panel circulated its report to all WTO Members and the public. The panel made some findings in favor of Brazil on certain of its claims and other findings in favor of the United States:

- The panel found that the “Peace Clause” in the WTO Agreement on Agriculture did not apply to a number of U.S. measures, including (1) domestic support measures and (2) export credit guarantees for “unscheduled commodities” and rice (a “scheduled commodity”). Therefore, Brazil could proceed with certain of its challenges.
- The panel found that export credit guarantees for “unscheduled commodities” (such as cotton and soybeans) and for rice were prohibited export subsidies. However, the panel also found that Brazil had not demonstrated that the guarantees for other “scheduled commodities” exceeded U.S. WTO reduction commitments and therefore breached the Peace Clause. Further, Brazil had not demonstrated that the programs threaten to lead to circumvention of U.S. WTO reduction commitments for other “scheduled commodities” and for “unscheduled commodities” not currently receiving guarantees.
- Some U.S. domestic support payments (i.e., marketing loan, counter-cyclical, market loss assistance, and Step 2 payments) were found to cause significant suppression of cotton prices in the world market in marketing years 1999-2002, causing serious prejudice to Brazil’s interests. However, the panel found that other U.S. domestic support payments (i.e., production flexibility contract payments, direct payments, and crop insurance payments) did not cause serious prejudice to Brazil’s interests because Brazil failed to show that they caused significant price suppression. The panel also found that Brazil failed to show that any U.S. payments caused an increase in U.S. world market share for upland cotton constituting serious prejudice.
- The panel did not reach Brazil’s claim that U.S. domestic support payments or programs threatened to cause serious prejudice to Brazil’s interests in marketing years 2003-2007.
- The panel also found that Brazil had failed to establish that FSC/ETI tax benefits for cotton exporters were prohibited export subsidies.
- Finally, the panel found that Step 2 payments to exporters of cotton were prohibited export subsidies, not protected by the Peace Clause, and Step 2 payments to domestic users were prohibited import substitution subsidies because they were only made for U.S. cotton.

On October 18, 2004, the United States filed a notice of appeal with the Appellate Body; Brazil then cross-appealed. The Appellate Body circulated its report on March 3, 2005. The Appellate Body upheld the panel’s findings appealed by the United States. The Appellate Body also rejected or declined to rule on most of Brazil’s appeal issues. On March 21, 2005, the DSB adopted the panel and Appellate Body reports and, on April 20, 2005, the United States advised the DSB that it intended to bring its measures into compliance.

On June 30, 2005, the United States announced certain administrative changes relating to its export credit guarantee programs. Further, on July 5, 2005, the United States proposed

legislation relating to the export credit guarantee and Step 2 programs. On July 5, 2005, Brazil requested authorization to impose countermeasures and suspend concessions in the amount of \$3 billion. On July 14, 2005, the United States objected to the request, thereby referring the matter to arbitration. On August 17, 2005, the United States and Brazil agreed to suspend the arbitration. On October 6, 2005, Brazil made a separate request for authorization to impose countermeasures and suspend concessions in the amount of \$1.04 billion per year in connection with the “serious prejudice” findings. The United States objected to Brazil’s request on October 17, 2005, and that matter was also referred to arbitration. On November 21, 2005, the United States and Brazil agreed to suspend the arbitration. On February 8, 2006, the President signed into law the Deficit Reduction Act of 2005. That Act included a provision repealing the Step 2 program as of August 2006.

On August 18, 2006, Brazil requested the establishment of an Article 21.5 panel. At its meeting of September 1, 2006, the DSB deferred the establishment of the Article 21.5 panel. Further to a second request, the DSB on September 28, 2006, agreed, if possible, to refer the matter raised by Brazil to the original panel. Argentina, Australia, Canada, China, the European Communities, India, Japan and New Zealand reserved their third party rights. Subsequently, Chad and Thailand reserved their third party rights.

On October 18 and 20, 2006, Brazil and the United States respectively requested the Director-General to compose the Article 21.5 panel. On October 25, 2006, the Director-General composed the compliance panel.

On January 9, 2007, the Chairman of the compliance panel informed the DSB that given the particular circumstances of this case and the schedule adopted after consultations with parties to this dispute, it was not possible for the compliance panel to complete its work within the 90-day period as foreseen in Article 21.5.

The compliance panel met with the parties to the dispute on February 27-28, 2007, and with third parties on February 28, 2007. The compliance panel’s final report was circulated to WTO Members on December 18, 2007.

The compliance panel found that:

- export credit guarantees issued under the GSM 102 program with respect to unscheduled and certain scheduled (rice, pig and poultry meat) commodities constituted prohibited export subsidies, despite the substantial changes that the United States made to the GSM 102 program;
- U.S. marketing loan and counter-cyclical payments for upland cotton were continuing to cause serious prejudice to Brazil by significantly suppressing world upland cotton prices.

- Brazil's claims as to marketing loan and counter-cyclical payments made after September 21, 2005, and Brazil's claims as to GSM 102 guarantees for exports of pig meat and poultry meat, were within the scope of the compliance proceeding.

The compliance panel sided with the United States on other claims made by Brazil:

- The compliance panel rejected Brazil's argument that the original WTO findings and recommendations applied with respect to the marketing loan and counter-cyclical payment programs and accepted the United States' argument that they applied only to payments made in marketing years 1999-2002.
- The compliance panel rejected Brazil's claim that payments under the marketing loan and counter-cyclical payment programs were responsible for an increase in U.S. market share in marketing year 2005 and thereby caused serious prejudice to Brazil's interests.
- The compliance panel agreed that the United States was not required to have refused to perform on export credit guarantees that were issued prior to the deadline for the implementation of the DSB's rulings and recommendations (July 1, 2005) and that were still outstanding as of that date.

The United States appealed the compliance panel's adverse findings on February 12, 2008. Brazil filed its notice of other appeal on February 25, 2008. The Appellate Body held a hearing with the parties and third parties on April 14-15, 2008. The Appellate Body issued its report on June 2, 2008.

The Appellate Body:

- upheld the compliance panel's finding that U.S. marketing loan and counter-cyclical payments cause significant price suppression in the market for upland cotton, thereby constituting present serious prejudice to Brazil.
- while agreeing with the United States that the compliance panel erred in dismissing U.S. Government budgetary data showing that U.S. export credit guarantee programs operate at a profit, nonetheless upheld the compliance panel's ultimate finding that GSM 102 export credit guarantees with respect to unscheduled products and certain scheduled products (rice, pig meat, poultry meat) were prohibited export subsidies.
- upheld the compliance panel's finding that Brazil's claims as to marketing loan and counter-cyclical payments made after September 21, 2005, and Brazil's claims as to GSM 102 guarantees for exports of pig meat and poultry meat, were within the scope of the compliance proceeding.

- did not reach Brazil's claims on cross-appeal because these claims were contingent on the Appellate Body rejecting the compliance panel's preliminary rulings.

The DSB adopted the Appellate Body report, and the panel report, as modified by the Appellate Body report, on June 20, 2008. Brazil requested resumption of the arbitration process on August 25, 2008.

2. *United States – Sunset review of anti-dumping measures on oil country tubular goods from Argentina (WT/DS268)*

On October 7, 2002, Argentina requested consultations regarding DOC and ITC determinations in the sunset review of the antidumping duty order on oil country tubular goods from Argentina, as well as the DOC's determination to continue the order. Argentina also identifies as measures sections 751(c) and 752 of the Tariff Act of 1930, the URAA Statement of Administrative Action, the sunset review regulations of the DOC and the ITC, and the DOC Sunset Policy Bulletin. The specific concerns raised by Argentina are: (1) the DOC's evidentiary standard for initiating a sunset review; (2) the DOC's use of a 0.5 percent *de minimis* standard, as opposed to the 2 percent standard for investigations; (3) the DOC's application of the "likelihood" standard; (4) the U.S. standard for determining whether continued or recurring injury is "likely"; (5) the alleged failure by the ITC to conduct an "objective examination"; and (6) the statutory provisions addressing the time period within which the ITC is to assess the likelihood of continued or recurring injury. Argentina alleges violations of various provisions of the Antidumping Agreement, GATT 1994 and Article XVI:4 of the WTO Agreement. Consultations were held November 14, 2002.

Argentina requested the establishment of a panel on April 3, 2003. The DSB established a panel on May 19, 2003. On September 4, 2003, the Director General composed the panel as follows: Mr. Paul O'Connor, Chairman, and Mr. Bruce Cullen and Mr. Faizullah Khilji, Members. In its report circulated July 16, 2004, the panel agreed with Argentina that the waiver provisions prevent the DOC from making a determination as required by Article 11.3 and that the DOC's Sunset Policy Bulletin is inconsistent with Article 11.3. The panel rejected Argentina's claims that the ITC did not correctly apply the "likely" standard and did not conduct an objective examination. Further, the panel concluded that statutes providing for cumulation and the time-frame for continuation or recurrence of injury were not inconsistent with Article 11.3.

On August 31, 2004, the United States filed a notice of appeal. The Appellate Body issued its report on November 29, 2004. The Appellate Body reversed the panel's finding against the Sunset Policy Bulletin and upheld the other findings described above. The DSB adopted the panel and Appellate Body reports on December 17, 2004.

Argentina requested arbitration in order to determine the reasonable period of time for the United States to implement the recommendations and rulings of the DSB. The arbitrator awarded the United States 12 months, until December 17, 2005. On August 15, 2005, Commerce published

proposed regulations to implement the finding that the waiver provisions were inconsistent with Article 11.3. Commerce published the final regulations on October 28, 2005, effective October 31, 2005. On December 16, 2005, Commerce issued the redetermination of the sunset review in question, thus bringing the United States into compliance with the recommendations and rulings of the DSB. On March 6, 2006, Argentina requested the establishment of a panel to evaluate whether the United States complied with the recommendations and rulings of the DSB, and a panel was established on March 17, 2006. The original panelists were appointed to the compliance panel.

In its report circulated May 21, 2007, the panel agreed with Argentina that the waiver provisions remained inconsistent with Article 11.3 and that the redetermination was also inconsistent with a number of articles in the Antidumping Agreement. The panel agreed with the United States that the redetermination was not inconsistent with other articles in the Antidumping Agreement.

June 12, 2007, the United States filed a notice of appeal, challenging the panel's findings concerning the waiver provisions, as well as a procedural question. On April 12, 2007, the Appellate Body issued its report, agreeing with the United States that we had brought the waiver provisions into compliance. The Appellate Body disagreed with the United States regarding the procedural question.

On May 21, 2007, Argentina filed a request for authorization to suspend concessions under Article 22.2 of the DSU. On June 1, 2007, the United States objected to Argentina's request, referring the matter arbitration under Article 22 of the DSU. The original panelists agreed to serve as arbitrator.

As a result of the second sunset review on oil country tubular goods, the order was revoked. Therefore, on June 21, 2007, the United States and Argentina filed a joint request to suspend the arbitration proceeding, and on June 26, 2007, the arbitrator suspended the proceedings.

3. United States – Anti-dumping measures on oil country tubular goods (OCTG) from Mexico (WT/DS282)

On February 18, 2003, Mexico requested consultations regarding several administrative determinations made in connection with the antidumping duty order on oil country tubular goods from Mexico, including the sunset review determinations of Commerce and the ITC. Mexico also challenges certain provisions and procedures contained in the Tariff Act of 1930, the regulations of Commerce and the ITC, and Commerce's Sunset Policy Bulletin, as well as the URAA Statement of Administrative Action. The focus of this case appears to be on the analytical standards used by Commerce and the ITC in sunset reviews, although Mexico also challenges certain aspects of Commerce's antidumping methodology. Consultations were held April 2-4, 2003. Mexico requested the establishment of a panel on July 29, 2003, and the DSB established a panel on August 29, 2003. On February 11, 2003, the following panelists were

selected, with the consent of the parties, to review Mexico's claims: Mr. Christer Manhusen, Chairman; Mr. Alistair James Stewart and Ms. Stephanie Sin Far Man, Members.

On June 20, 2005, the panel circulated its report. The panel rejected Mexico's claim that certain aspects of the U.S. administrative review procedures are inconsistent with U.S. WTO obligations, as well as Mexico's claims regarding the USITC's laws and regulations regarding the determination of likelihood of injury and the likelihood determination itself. The panel did find that the Sunset Policy Bulletin and Commerce's likelihood determination itself were inconsistent with Article 11.3.

On August 4, 2005, Mexico filed a notice of appeal regarding the panel's findings on likelihood of injury. The United States appealed the panel's findings regarding the Sunset Policy Bulletin. On November 2, 2005, the Appellate Body issued its report. The report upheld the panel's findings rejecting Mexico's claims regarding likelihood of injury. In addition, the Appellate Body reversed the panel's findings that the Sunset Policy Bulletin breaches U.S. obligations. The DSB adopted the panel and Appellate Body reports on November 28, 2005. The United States and Mexico agreed to a reasonable period of time of six months.

To comply with the recommendations and rulings of the DSB, Commerce conducted a redetermination and concluded that dumping was likely to continue or recur. On August 21, 2006, Mexico filed a request seeking consultations with respect to the redetermination. On August 31, 2006, Mexico and the United States held consultations. On 2006, Mexico filed a request for the establishment of a panel.

As a result of the second sunset review on oil country tubular goods, the order was revoked. On July 5, 2007, Mexico filed a request pursuant to Article 12.12 of the DSU, in conjunction with Article 21.5 of the DSU, to suspend the proceedings, and on July 11, 2007, the panel suspended the proceedings. On July 6, 2008, pursuant to Article 12.12 of the DSU, the authority for the establishment of the panel lapsed.

4. *United States – Measures affecting the cross-border supply of gambling and betting services (WT/DS285)*

On March 13, 2003, the United States received from Antigua & Barbuda a request for consultations regarding its claim that U.S. federal, state and territorial laws on gambling violate U.S. specific commitments under the GATS, as well as Articles VI, XI, XVI, and XVII of the GATS, to the extent that such laws prevent or can prevent operators from Antigua and Barbuda from lawfully offering gambling and betting services in the United States. Antigua & Barbuda revised its request for consultations on April 1, 2003. Consultations were held on April 30, 2003.

Antigua & Barbuda requested the establishment of a panel on June 12, 2003. The DSB established a panel on July 21, 2003. On August 25, 2003, the Director General composed the

panel as follows: Mr. B. K. Zutshi, Chairman, and Mr. Virachai Plasai and Mr. Richard Plender, Members. The panel's final report, circulated on November 10, 2004, found that the United States breached Article XVI (Market Access) of the GATS by maintaining three U.S. federal laws (18 U.S.C. §§ 1084, 1952, and 1955) and certain statutes of Louisiana, Massachusetts, South Dakota, and Utah. It also found that these measures were not justified under exceptions in Article XIV of the GATS.

The United States filed a notice of appeal on January 7, 2005. The Appellate Body issued its report on April 7, 2005, in which it reversed and/or modified several panel findings. The Appellate Body found that the three U.S. federal gambling laws at issue "fall within the scope of 'public morals' and/or 'public order'" under Article XIV. To meet the requirements of the Article XIV chapeau, the Appellate Body found that the United States needs to clarify an issue concerning Internet gambling on horse racing.

The DSB adopted the panel and Appellate Body reports on April 20, 2005. The United States stated its intention to implement the DSB recommendations and rulings on May 19, 2005. On August 19, 2005, an Article 21.3(c) arbitrator determined that the reasonable period of time for implementation will expire on April 3, 2006.

At the DSB meeting of April 21, 2006, the United States informed the DSB that the United States was now able to show that relevant U.S. law did not discriminate against foreign suppliers of remote gambling on horse racing, and thus that the United States was in compliance with the recommendations and rulings of the DSB in this dispute. On June 8, 2006, Antigua requested consultations with the United States regarding U.S. compliance with the DSB recommendations and rulings. The parties held consultations on June 26, 2006. On July 5, 2006, Antigua requested the DSB to establish a panel pursuant to Article 21.5 of the DSU, and a panel was established on July 19, 2006. The Chairperson of the original panel and one of the panelists were unavailable to serve. The parties agreed on their replacements, and the panel was composed as follows: Mr. Lars Anell, Chairperson, and Mr. Mathias Francke and Mr. Virachai Plasai, Members.

The report of the Article 21.5 panel, which was circulated on March 30, 2007, found that the United States had not complied with the recommendations and rulings of the DSB in this dispute. The DSB adopted the report of the Article 21.5 panel on May 22, 2007.

On June 21, 2007, Antigua & Barbuda submitted a request, pursuant to Article 22.2 of the DSU, for authorization from the DSB to suspend the application to the United States of concessions and related obligations of Antigua and Barbuda under the GATS and the TRIPS. On July 23, 2007, the United States referred this matter to arbitration under Article 22.6 of the DSU. The arbitration was carried out by the three panelists who served on the Article 21.5 panel. The arbitrators circulated their report on December 21, 2007, which found that Antigua & Barbuda was entitled to suspend the application of concessions previously made under the TRIPS.

5. *United States – Laws, regulations and methodology for calculating dumping margins (“zeroing”) (WT/DS294)*

On June 12, 2003, the European Communities requested consultations regarding the use of "zeroing" in the calculation of dumping margins. Consultations were held July 17, 2003. The EC requested further consultations on September 8, 2003. Consultations were held October 6, 2003. The EC requested the establishment of a panel on February 5, 2004, and the DSB established a panel on March 19, 2004. On October 27, 2004, the panel was composed as follows: Mr. Crawford Falconer, Chair, and Mr. Hans-Friedrich Beseler and Mr. William Davey, Members. The panel issued its report on October 31, 2005, finding that Commerce's use of "zeroing" in antidumping investigations is inconsistent with U.S. obligations, but rejecting the EC's claims that zeroing in other phases of antidumping proceedings is also inconsistent. On January 17, 2006, the EC appealed the panel report.

On April 18, 2006, the Appellate Body circulated its report, finding that zeroing in other phases of antidumping proceedings is inconsistent with the Antidumping Agreement. The United States and the EC agreed to a reasonable period of time of 11 months. To comply, the Department of Commerce announced that it would no longer engage in zeroing in average-to-average comparisons in investigations. The Department of Commerce also issued revised determinations in the specific investigations that were part of this dispute.

On July 9, 2007, the EC requested consultations with the United States concerning its compliance with the recommendations and rulings of the DSB. The EC and the United States held consultations on July 30, 2007. On September 13, 2007, the EC requested the establishment of a panel. On November 30, 2007, the Director-General selected the following persons to serve as panelists: Mr. Felipe Jaramillo, Chairperson, and Ms. Usha Dwarka-Canabady and Mr. Scott Gallacher, Members.

The panel's meeting with the parties occurred on April 9-10, 2008, and the panel's report is expected later this year.

6. *United States – Subsidies on large civil aircraft (WT/DS317)*

On October 6, 2004, the European Communities requested consultations with respect to "prohibited and actionable subsidies provided to U.S. producers of large civil aircraft." The EC alleged that such subsidies violated several provisions of the SCM Agreement, as well as Article III:4 of the GATT. Consultations were held on November 5, 2004. On January 11, 2005, the United States and the EC agreed to a framework for the negotiation of a new agreement to end subsidies for large civil aircraft. The parties set a three-month time frame for the negotiations and agreed that, during negotiations, they would not request panel proceedings. These discussions did not produce an agreement. On May 31, 2005, the EC requested the establishment of a panel to consider its claims. The EC filed a second request for consultations regarding large civil aircraft subsidies on June 27, 2005. This request covered many of the measures covered in

the initial consultations, as well as many additional measures that were not covered. A panel was established with regard to the October claims on July 20, 2005. On October 17, 2005, the Deputy Director General established the panel as follows: Ms. Marta Lucía Ramírez de Rincón, Chair, and Ms. Gloria Peña and Mr. David Unterhalter, Members. The EC requested establishment of a panel with regard to its second panel request on January 20, 2006. That panel was established on February 17, 2006. That panel was established on February 17, 2006. Its proceedings were labeled “*United States – Subsidies on large civil aircraft (Second Complaint) (WT/DS353)*,” and are discussed in further detail under that heading.

7. *United States – Continued suspension of obligations in the EC – Hormones dispute (WT/DS320)*

As noted above (DS26, 48), on November 8, 2004, the European Communities requested consultations with respect to “the United States’ continued suspension of concessions and other obligations under the covered agreements” despite the adoption of a directive on September 22, 2003 that the EC claims implements the recommendations and rulings of the DSB in the *EC – Hormones* dispute. Consultations were held on December 16, 2004. The EC requested the establishment of a panel on January 13, 2005, and the panel was established on February 17, 2005. Australia, Brazil, Canada, China, India, Mexico, New Zealand, Norway, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu reserved their third-party rights. On June 6, 2005, the Director General composed the panel as follows: Mr. Mr Tae-yul Cho, Chairman, and Ms. Claudia Orozco and Mr. William Ehlers, Members.

The panel, in a communication dated August 1, 2005, granted the parties’ request to open the substantive meetings with the parties to the public via a closed-circuit television broadcast. The panel’s meetings with the parties took place September 12-15, 2005 and the meeting with third parties, which was closed, took place on September 14, 2005. On October 20, 2005, the panel announced that it would seek the advice of experts in its deliberations. The identities of the selected experts were announced on March 24, 2006 and later amended by the panel on April 12, 2006. A meeting between the panel and the experts, which was open to the public, took place in the presence of the parties on September 27-28, 2006 and the second substantive meeting between the panel and the parties took place October 2-3, 2006.

The panel circulated its final report on March 31, 2008. In its report, the panel found that the United States breached Articles 23.2(a) and 23.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) by making certain statements at the meetings of the Dispute Settlement Body held in November and December 2003 that the United States “did not see” or “did not understand” how the EC’s revised ban rectified the inconsistencies of its original ban and by maintaining the suspension of concessions after the EC had announced compliance. The EC also claimed that the United States was required to terminate the suspension of concessions because the EC’s revised ban had brought it into compliance. In response to this claim, however, the panel found that because the EC’s revised ban was not consistent with the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the

SPS Agreement) and had not been brought into compliance, the United States had not breached Article 22.8 of the DSU.

The EC filed its notice of appeal in this dispute on May 29, 2008. The United States filed a notice of other appeal on June 10, 2008. As in the panel proceeding, the parties requested that the Appellate Body open its oral hearing with the parties to the public. The Appellate Body granted the parties' open hearing request is forthcoming. The oral hearing took place on July 28-29, 2008; it was the first Appellate Body hearing ever to be open to the public.

On October 16, 2008, the Appellate Body issued its report. The Appellate Body reversed the panel's findings that the United States had breached Articles 23.2(a) and 23.1 of the DSU. The Appellate Body also reversed several of the Panel's findings relating to the SPS Agreement issues concerning the EU's amended ban. The Appellate Body found that it could not conclude whether or not the EU's amended ban is WTO-consistent.

8. *United States – Measures relating to zeroing and sunset reviews (WT/DS322)*

On November 24, 2004, Japan requested consultations with respect to: (1) the Department of Commerce's alleged practice of "zeroing" in antidumping investigations, administrative reviews, sunset reviews, and in assessing the final antidumping duty liability on entries upon liquidation; (2) in sunset reviews of antidumping duty orders, Commerce's alleged irrefutable presumption of the likelihood of continuation or recurrence of dumping in certain factual situations; and (3) in sunset reviews, the waiver provisions of U.S. law. Japan claimed that these alleged measures breach various provisions of the AD Agreement and Article VI of the GATT 1994. Consultations were held on December 20, 2004. On April 15, 2005, the Director-General composed the panel as follows: David Unterhalter, Chair, and Simon Farberbloom and Jose Antonio Buencamino, Members.

The panel circulated its report on September 20, 2006. The panel found zeroing in average-to-average comparisons in investigations to be inconsistent with the Antidumping Agreement, but found zeroing to be permissible in administrative reviews. On October 11, 2006, Japan appealed the panel's findings regarding administrative reviews. In a report circulated January 9, 2007, the Appellate Body reversed the panel's finding regarding zeroing in administrative reviews. The DSB adopted the Appellate Body report, and the panel report, as modified by the Appellate Body report, on January 23, 2007.

Although Japan requested arbitration to determine the reasonable period of time for compliance, the United States and Japan subsequently agreed to a reasonable period of time of 11 months, expiring on December 24, 2007. As a result of a separate proceeding, the Department of Commerce announced that it would no longer engage in zeroing in average-to-average comparisons in investigations. Commerce, in a Section 129 proceeding, also recalculated the margin of dumping for the investigation of cut-to-length carbon-quality steel plate products from Japan.

On January 10, 2008, Japan requested DSB authorization to suspend concessions on the grounds that the United States had failed to implement the DSB's recommendations and rulings. On January 18, 2008, the United States objected to the level of suspension and accordingly requested that the matter be referred to arbitration. At its January 21, 2008 meeting, the DSB agreed that the matter had been referred to arbitration as required under Article 22.6 of the DSU.

On March 10, 2008, the United States and Japan informed the DSB that they had reached a sequencing agreement to suspend arbitration pending the completion of compliance proceedings. On April 7, 2008, Japan requested the establishment of an Article 21.5 panel. At its meeting of April 18, 2008, the DSB agreed to refer to the original panel, if possible, the question of whether the United States had complied with the DSB's recommendations and rulings. Due to the unavailability of the chairman of the original panel, the parties on May 23, 2008 agreed on a replacement panelist, and the compliance panel was constituted as follows: Mr. José Antonio Buencamino, Chairperson, and Mr. Simon Farberbloom and Mr. Raúl León-Thorne, Members. China; the European Communities; Hong Kong, China; Korea; Mexico; Norway; Chinese Taipei and Thailand reserved their rights to participate in the panel proceedings as third parties.

Pursuant to a joint request from the United States and Japan, the arbitration under Article 22.6 of the DSB was suspended on June 9, 2008.

The final report of the compliance panel is expected in 2009.

9. *United States – Shrimp Bonding (Thailand) (WT/DS343)*

On April 24, 2006, Thailand requested consultations with respect to certain issues relating to the imposition of antidumping measures on shrimp from Thailand. Thailand has alleged that the Department of Commerce's use of "zeroing" in the antidumping investigation of shrimp from Thailand is inconsistent with various provisions of the AD Agreement. Furthermore, Thailand has alleged that the United States has imposed on importers a requirement to maintain a continuous entry bond in the amount of the anti-dumping duty margin multiplied by the value of imports of subject shrimp imported by the importer in the preceding year, and that this action breached several provisions of the GATT 1994 and the AD Agreement. Consultations were held August 1, 2006. Thailand requested the establishment of a panel on September 15, 2006, and the DSB established a panel on October 26, 2006. On January 26, 2007, the panel was composed as follows: Mr. Michael Cartland, Chair, and Mr. Graham Sampson and Ms. Enie Neri de Ross, Members.

The panel circulated its report on February 29, 2008. The panel found the use of zeroing in the investigation of shrimp from Thailand to have breached the Antidumping Agreement, and that the additional bond requirement as applied to importers of shrimp from Thailand was a "specific action against dumping" inconsistent with Article 18.1 of the AD Agreement and was inconsistent with the Ad Note to paragraphs 2 and 3 of GATT 1994 Article VI because it did not

constitute “reasonable” security. It rejected or declined to make findings with respect to Thailand’s claims on other provisions of the GATT 1994 and the AD Agreement.

On April 17, Thailand appealed the findings of the panel with respect to the additional bond requirement. The United States cross-appealed one aspect of those findings on April 29. The Appellate Body hearing was held on May 28-29, 2008. The Appellate Body report was issued on July 16, 2008. The Appellate Body found that the Panel properly concluded that the additional bond requirement as applied to importers of shrimp from Thailand did not constitute reasonable security. It rejected Thailand’s other claims regarding the Panel’s interpretation of the Ad Note. The Panel and Appellate Body reports were adopted on August 1, 2008.

10. United States – Final antidumping measures on stainless steel from Mexico (WT/DS344)

On May 26, 2006, Mexico requested consultations with respect to the Department of Commerce’s alleged use of “zeroing” in an antidumping investigation and five administrative reviews involving stainless steel sheet and strip coils from Mexico. Mexico claims that these alleged measures are “as such” and “as applied” inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9, and 18 of the AD Agreement, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the WTO Agreement. On October 12, 2006, Mexico requested the establishment of a panel, which was established on October 26, 2006. On December 15, 2006, the Director General composed the panel as follows: Mr. Alberto Juan Dumont, Chair, and Mr. Bruce Cullen and Ms. Leora Blumberg, Members.

The panel issued its final report on December 20, 2007. The panel found that:

- Zeroing in investigations “as such” is inconsistent with Article 2.4.2 of the AD Agreement. In addition, by using zeroing in the subject investigation the Department of Commerce acted inconsistently with Article 2.4.2 of the AD Agreement.
- Zeroing in administrative reviews is “as such” not inconsistent with Article VI:1 and VI:2 of the GATT 1994 and Articles. 2.1, 9.3, and 2.4 of the AD Agreement. Therefore, the Department of Commerce did not act inconsistently in the five administrative reviews when using zeroing.
- The Department of Commerce had stopped using zeroing in investigations during the course of the dispute settlement proceedings, therefore it made no recommendation regarding the “as such” claim regarding investigations.

The panel exercised judicial economy with regard to the other claims.

On January 31, 2008 Mexico appealed the panel report with respect to the “as such” and “as applied” claims related to zeroing in administrative review. The Appellate Body issued its report on April 30, 2008. The Appellate Body reversed the panel’s findings with respect to administrative reviews, finding that zeroing in administrative reviews is “as such”, and “as applied” to the subject administrative reviews, inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement.

The DSB adopted the Appellate Body report, and the panel report, as modified by the Appellate Body report, on May 20, 2008. At the DSB meeting held on June 2, 2008, the United States notified its intention to comply with its WTO obligations and indicated it would need a reasonable period of time to do so.

11. United States – Shrimp Bonding (India) (WT/DS345)

On June 6, 2006, India requested consultations with respect to certain issues relating to Customs Bond Directive 99-3510-004, as amended by the Amendment to Bond Directive 99-3510-004 (July 9, 2004) and clarifications and amendments thereof. India has alleged that the United States has imposed on importers a requirement to maintain a continuous entry bond in the amount of the anti-dumping duty margin multiplied by the value of imports of subject shrimp imported by the importer in the preceding year, and that this action breached several provisions of the GATT 1994, the AD Agreement, and the SCM Agreement. Consultations were held July 31, 2006 and September 18, 2006. India requested the establishment of a panel on October 13, 2006, and the DSB established a panel on November 21, 2006. On January 26, 2007, the panel was composed as follows: Mr. Michael Cartland, Chair, and Mr. Graham Sampson and Ms. Enie Neri de Ross, Members.

The panel circulated its report on February 29, 2008. The panel found that the additional bond requirement as applied to importers of shrimp from India was a “specific action against dumping” inconsistent with Article 18.1 of the AD Agreement and was inconsistent with the Ad Note to paragraphs 2 and 3 of GATT 1994 Article VI because it did not constitute “reasonable” security. It rejected or declined to make findings with respect to India’s claims on other provisions of the GATT 1994, the AD Agreement, and the SCM Agreement.

On April 17, India appealed the findings of the panel with respect to the additional bond requirement. The United States cross-appealed one aspect of those findings on April 29. The Appellate Body hearing was held on May 28-29, 2008. The Appellate Body report was issued on July 16, 2008. The Appellate Body found that the Panel properly concluded that the additional bond requirement as applied to importers of shrimp from India did not constitute reasonable security. It rejected India’s other claims regarding the Panel’s interpretation of the Ad Note. The Panel and Appellate Body reports were adopted on August 1, 2008.

12. United States – Acindar AD (Argentina) (WT/DS346)

On June 20, 2006, Argentina requested consultations with the United States concerning an administrative review of oil country tubular goods. Specifically, Argentina challenged the Department of Commerce’s consideration of one company’s home sales, the calculation of constructed normal value, and other particular aspects of the review. Argentina also challenged certain procedural aspects of the review, as well as the amount of the duties assessed.

13. United States – Zeroing II (EC) (WT/DS350)

On October 2, 2006, the European Communities requested consultations regarding the continued use of “zeroing” in original investigations, administrative reviews, and sunset reviews in the calculation of dumping margins. On October 9, 2006, the European Communities, in a further request for consultations, identified additional administrative reviews in which the U.S. Department of Commerce applied the “zeroing” methodology in calculating the margin of dumping, and requested that those cases be added to the list.

On October 10, 2006, Japan requested to join the consultations, on October 12, 2006, Thailand requested to join the consultations, and on 13 October 2006, Brazil and India requested to join the consultations. The United States and EC held consultations on November 14, 2006 and February 28, 2007 without third-party participation. On May 10, 2007, the European Communities requested the establishment of a panel. At its meeting on June 4, 2007, the DSB established a panel. Chinese Taipei, India, and Japan reserved their third-party rights. Subsequently, Brazil, China, Egypt, Korea, Norway and Thailand reserved their third-party rights. On June 29, 2007, the European Communities requested the Director-General to compose the Panel, and on July 6, 2007, the Director-General composed the Panel as follows: Mr. Faizullah Khilji, Chairperson, and Mr. Michael Mulgrew and Ms. Lilia Bautista, Members.

Following the resignation on November 8, 2007 of one of the panelists, the parties agreed on the appointment of a new panelist on November 27, 2007. The panel was therefore composed as follows: Mr. Faizullah Khilji, Chairperson, and Mr. Michael Mulgrew and Ms. Andrea Marie Brown, Members.

The panel met with the parties on January 29-30, 2008 and on April 22, 2008. The meetings with the parties were opened for public observation. The panel met with the parties and third parties on 30 January 2008. A portion of this third-party session of the first meeting was open for public observation. Chinese Taipei, Norway, and Japan delivered statements at the public session of the meeting with third parties.

The panel circulated its final report on October 1, 2008. The panel agreed with the United States that the EC had improperly tried to challenge the continued application, or application, of antidumping duties in 18 cases; in addition the panel agreed that the EC had improperly tried to challenge four measures that were not final at the time of panel establishment. The panel also

found that the EC had not proved the use of zeroing in seven of 37 administrative reviews, and excluded those reviews from its findings. In addition, although the panel said it tended to agree with the United States and prior panel reports finding zeroing permissible in administrative reviews, and that it found that the U.S. interpretation was “permissible,” the panel nevertheless concluded that the United States acted inconsistently with the Antidumping Agreement and the GATT 1994 by using zeroing in 29 administrative reviews, eight sunset reviews, and four original investigations. In doing so, the panel said it felt constrained to follow prior Appellate Body reasoning, even though it expressed doubts about that reasoning.

14. *United States – Subsidies on large civil aircraft (Second Complaint) (WT/DS353)*

The steps leading to the establishment of this panel are discussed under the heading “*United States – Subsidies on large civil aircraft (WT/DS317)*”. On November 23, 2006, the Deputy Director General constituted the panel as follows: Mr. Crawford Falconer, Chair, and Mr. Francisco Orrego Vicuña and Mr. Virachai Plasai, Members. The panel granted the parties’ request to open the substantive meetings with the parties to the public via a screening of a videotape of the public session. The session of the panel meeting that involves business confidential information and the panel’s meeting with third parties are closed.

15. *United States – Agriculture Subsidies (Canada) (WT/DS357)*

On January 8, 2007, Canada requested consultations with the United States alleging (1) serious prejudice to the interests of Canada within the meaning of Articles 5 and 6 of the SCM Agreement in that subsidies to U.S. corn producers had caused price suppression for corn in Canada; (2) that certain U.S. export credit guarantee programs confer export subsidies in contravention of the SCM Agreement and the Agreement on Agriculture, and (3) that the U.S. exceeded its commitments regarding the Total Aggregate Measurement of Support in favor of domestic producers of agricultural products in several years from 1999 to 2005. Consultations were held on February 7, 2007. Canada requested a panel with respect to points (2) and (3) on June 7, 2007.

On November 8, 2007, Canada resubmitted its panel request, limiting its request to point (3) of its original consultations request, and withdrawing its earlier panel request. The DSB established a single panel for this dispute and the *United States – Agriculture Subsidies (Brazil)* dispute (WT/DS365, below) on December 17, 2007. The panel has not been composed.

16. *United States – Agriculture Subsidies (Brazil) (WT/DS365)*

On July 11, 2007, Brazil requested consultations with the United States alleging (1) that the U.S. exceeded its commitments regarding the Total Aggregate Measurement of Support in favor of domestic producers of agricultural products in several years from 1999 to 2005 and (2) that certain U.S. export credit guarantee programs confer export subsidies in contravention of the SCM Agreement and the Agreement on Agriculture. Consultations were held on August 22,

2007. Brazil requested the establishment of a panel with respect to point (1) of its consultations request on November 8, 2007. The DSB established a single panel for this dispute and the *United States – Agriculture Subsidies (Canada)* dispute (WT/DS357, above) on December 17, 2007. The panel has not been composed.

17. *United States - Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China (China) (WT/DS368)*

On September 14, 2007, the Government of China requested WTO consultations concerning preliminary antidumping and countervailing duty determinations by the Department of Commerce in the coated free sheet paper investigations. China claimed that the preliminary determinations were inconsistent with the obligations of the United States under Article VI of the GATT 1994 and several provisions of the SCM Agreement and the AD Agreement. Consultations were held on October 12, 2007, in Geneva.

18. *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (China) (WT/DS379)*

On September 19, 2008, the United States received from China a request for consultations pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994*, Article 30 of the *Agreement on Subsidies and Countervailing Measures*, and Article 17 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*. The Chinese letter requested consultations pertaining to definitive anti-dumping and countervailing duties imposed by the United States pursuant to final anti-dumping and countervailing duty determinations and orders issued by the U.S. Department of Commerce (DOC) in investigations on circular welded carbon quality steel pipe, certain pneumatic off-the-road tires, light-walled rectangular pipe and tube, and laminated woven sacks. China claimed that these measures were inconsistent with U.S. commitments and obligations under Articles I and VI of the *General Agreement on Tariffs and Trade 1994*, Articles 1, 2, 10, 12, 13, 14, 19, and 32 of the *Agreement on Subsidies and Countervailing Measures*, Articles 1, 2, 6, 9, and 18 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, and Article 15 of the *Protocol on the Accession of the People's Republic of China*. Specifically, China claimed that DOC erred by finding a subsidy based on DOC's view that certain State-owned enterprises are "public bodies;" by finding the existence of a "benefit" because DOC used an inappropriate benchmark; and by finding that certain subsidies were "specific" to a particular industry. China also challenged DOC's use of a non-market economy methodology in the anti-dumping investigations simultaneously with the determination of subsidization and imposition of countervailing duties on the same subject merchandise. Finally, China alleged that DOC committed multiple procedural errors in the course of the anti-dumping and countervailing duty investigations, including its use of "facts available" on the basis of alleged shortcomings in

information provided by respondents. On September 29, 2008, the United States accepted China's request for consultations. Consultations have not yet been held.

www.ustr.gov/enforcement/update.pdf