United States General Accounting Office

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Report to the Ranking Minority Member, Committee on Finance, U.S. Senate

July 2003

WORLD TRADE ORGANIZATION

Standard of Review and Impact of Trade Remedy Rulings

G A O

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GAO-03-824

July 2003

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Standard of Review and Impact of Trade Remedy Rulings

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Highlights

Highlights of GAO-03-824, a report to the Ranking Minority Member, Committee on Finance, U.S. Senate

Why GAO Did This Study

World Trade Organization (WTO) members rely on trade remedies in the form of duties or other import restrictions to protect their industries from injury due to unfair foreign trade practices or unexpected import surges. There is congressional concern that the WTO, created in 1995 to administer trade rules, is interfering with this ability. There is also congressional concern that the WTO is not treating the United States fairly in resolving trade remedy disputes.

A congressional requester asked GAO to identify trends in WTO trade remedy disputes since 1995, including the outcomes of these disputes and how they affected members' ability to impose trade remedies. The requester also asked GAO to discuss the standards of review that the WTO applies when ruling on trade remedy disputes and to present U.S. agencies' and legal experts' views on the WTO's application of these standards and related trade remedy issues.

In their comments on a draft of this report, the Department of Commerce and the U.S. International Trade Commission stated that the report needed to put more emphasis on U.S. agencies' concerns about the potential adverse impact of WTO rulings on the U.S.'s use of trade remedies. The U.S. Trade Representative provided only technical comments on the report. GAO modified the report as appropriate.

www.gao.gov/cgi-bin/getrpt?GAO-03-824.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Loren Yager at (202) 512-4346 or yagerl@gao.gov.

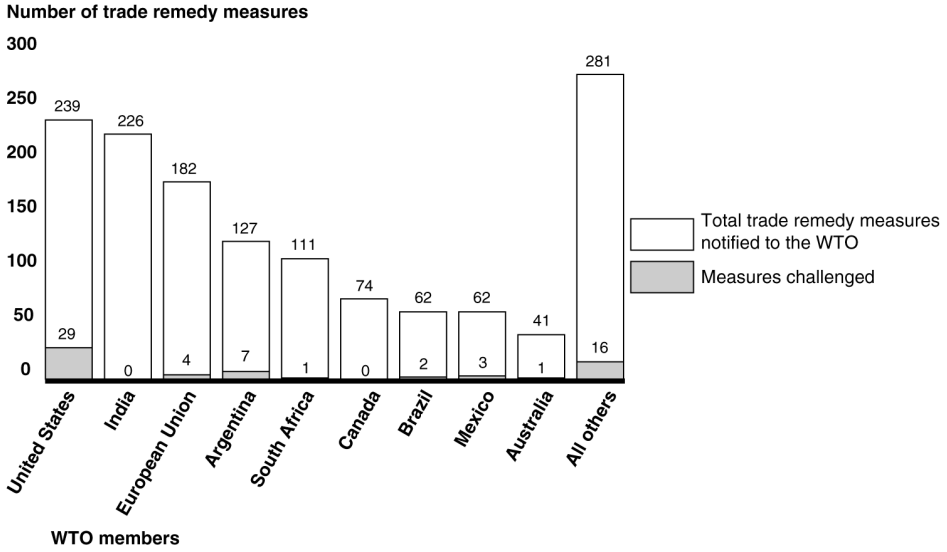
What GAO Found

About a third of the cases filed in the WTO dispute settlement system from 1995 through 2002 challenged members' trade remedies, with the ratio of such cases increasing over time. Although a relatively small proportion of WTO members' trade remedy measures were challenged in the WTO, the United States faced substantially more challenges than other WTO members.

The WTO generally rejected members' decisions to impose trade remedies in the 25 trade remedy disputes resolved from 1995 through 2002. However, GAO found that the WTO ruled for and against the U.S. and other members in roughly the same ratios. Overall, WTO rulings resulted in few changes to members' laws, regulations, and practices but had a relatively greater impact on those of the United States. While U.S. agencies stated that WTO rulings have not yet significantly impaired their ability to impose trade remedies, they had concerns about the potential future adverse impact of WTO rulings.

Of the legal experts GAO consulted, a majority concluded that the WTO has properly applied standards of review and correctly ruled on major trade remedy issues. However, a significant minority strongly disagreed with these conclusions. U.S. agencies also said that the WTO has not always properly applied the standards and has, in some cases, imposed obligations on members that are not found in WTO agreements. Nonetheless, the experts almost unanimously agreed that the WTO was not treating the United States any differently than other members.

Total Number of WTO Trade Remedy Measures Imposed and Number Challenged, by Most Frequent Trade Remedy Users, 1995-2002



Source: GAO analysis of WTO data.

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Abbreviations

ADA	Antidumping Agreement
CVD	countervailing duties
DRAMS	dynamic random access memory semiconductors
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EU	European Union
GATT	General Agreement on Tariffs and Trade
HFCS	high-fructose corn syrup
ITC	International Trade Commission
NAFTA	North American Free Trade Agreement
SAA	Statement of Administrative Action
SCM	Subsidies and Countervailing Measures
URAA	Uruguay Round Agreements Act
USTR	United States Trade Representative
WTO	World Trade Organization

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United States General Accounting Office
Washington, D.C. 20548

July 30, 2003

The Honorable Max Baucus
Ranking Minority Member
Committee on Finance
United States Senate

Dear Senator Baucus:

The World Trade Organization (WTO) provides the institutional framework for the multilateral trading system. Established in January 1995, the WTO administers rules of international trade and provides a forum for conducting trade negotiations. In addition, the WTO has a dispute settlement system with panels and an Appellate Body that provides a multilateral forum for resolving trade disputes among WTO members. A dispute arises when one WTO member believes another member has violated a WTO agreement and initiates a dispute settlement proceeding through the WTO.

Many disputes in recent years have pertained to WTO members' use of trade remedy measures. Members impose trade remedies in the form of duties or import restrictions after determining that a domestic industry has been injured or threatened with injury by imports. Specifically, member governments impose antidumping or countervailing duties[1] when they find that imports are priced at less than normal value,[2] or benefit from a foreign subsidy, and that such imports injure their domestic industry. Similarly, members impose safeguard measures[3] after finding that import surges have seriously injured or threatened serious injury to domestic industry. The WTO permits its 146 members to impose such trade remedy measures but requires them to follow certain rules before doing so, as set forth in various

[1]Antidumping or countervailing measures take the form of increased duties on imports. Dumping is generally considered to be the sale of a commodity in a foreign market at a lower price than its normal value. WTO rules allow for the imposition of antidumping duties, or fees, to offset dumping. Countervailing duties are special customs duties imposed to offset subsidies provided on the manufacture, production, or export of a particular good. Subsidies essentially lower a producer's costs or increase its revenues.

[2]For the purposes of this report, we use the term "normal value" to mean home market value. Normal value is also sometimes referred to as "fair market value."

[3]A safeguard is a temporary import control or other trade restriction that a WTO member imposes to prevent serious injury to domestic industry caused by increased imports.

WTO agreements.[4] Domestic agencies usually make a number of "domestic agency determinations."[5] When a trade measure is challenged in the WTO dispute settlement system and a dispute settlement panel is established, the panel reviews the domestic agency determinations supporting the measure to determine whether they are consistent with the relevant WTO agreements. In addition to cases challenging WTO members' domestic determinations to impose specific trade remedy measures, WTO members sometimes directly challenge other members' trade remedy laws.

Over the past several years, Congress has raised concerns that some WTO panel and Appellate Body rulings have adversely affected the U.S.'s ability to impose trade remedy measures. For example, in the Trade Act of 2002,[6] Congress voiced concern about certain WTO rulings on trade remedies, including how the WTO has applied standard of review—that is, how the WTO evaluates and defers to the factual and legal determinations of WTO members' domestic agencies. In addition, some Members of Congress are concerned that some WTO rulings have created new obligations for WTO members beyond those found in the WTO agreements. For example, a Senate report accompanying the Trade Act of 2002 stated that WTO panels and the Appellate Body have substantially rewritten part of the WTO Agreement on Subsidies and Countervailing Measures in ways that are disadvantageous to the United States.[7]

Accordingly, you asked us to conduct a review of WTO dispute settlement activity during the past 8 years, focusing on trade remedy disputes. Specifically, in this report we (1) identified the major trends in WTO dispute settlement activity concerning trade remedies; (2) analyzed the

[4]The relevant WTO agreements for trade remedy determinations are the Antidumping Agreement, the Agreement on Subsidies and Countervailing Measures, the Safeguards Agreement, and parts of the General Agreement on Tariffs and Trade 1994 (GATT 1994).

[5]Throughout this report, we use the term "domestic agency determination" to refer to a finding by a domestic agency leading to a decision to impose one or more trade remedy measures. An example of this would be a domestic agency finding in a safeguards case that a product is being imported in such increased quantities as to cause or threaten to cause serious injury to a domestic industry.

[6]Public Law No. 107-210, § 2101, 116 Stat. 933, 993.

[7]S. Rep. No. 107-139, at 6-7 (2002).

outcome of WTO rulings in completed trade remedy cases;[8] (3) assessed the major impacts of these rulings on WTO members' laws, regulations, practices, and measures[9] and on members' ability to impose trade remedies; (4) identified the standards of review for trade remedy cases and Appellate Body guidance on how the standards should be applied; and (5) summarized legal experts' views and U.S. agencies' positions on standard of review and other trade remedy issues.

To address these objectives, we created a database using WTO data on dispute settlement complaints filed from 1995 through 2002; reviewed WTO and U.S. government documents; and interviewed U.S., WTO, and European Union (EU) officials. In addition, we reviewed WTO panel and Appellate Body reports in the 25 completed trade remedy cases through 2002. Finally, we interviewed 18 U.S. and foreign legal experts, including practitioners, academics, and advisors on WTO-related trade remedy issues. Appendix I contains a full description of our scope and methodology, and appendix II contains summaries of the 25 completed trade remedy cases. Appendix III contains the names and affiliations of the 18 legal experts we interviewed. Appendixes IV and V contain agency comments and our responses. Appendix VI identifies the major contributors to this report.

Results in Brief

Of the 198 cases filed in the WTO from 1995 through 2002, one-third (64) challenged members' trade remedies, and the ratio of trade remedy cases filed versus other types of cases generally has increased over time. The United States was by far the most frequent defendant in trade remedy cases, acting as defendant in 30 of the 64 challenges, with 17 of those 30 cases filed since January 2000. In contrast, the EU had only 5 trade remedy cases filed against it. On the other hand, the United States was less active in filing complaints against other WTO members. For example, the United States filed only 5 of the 64 trade remedy cases, while the EU filed 16 such cases. Overall, WTO members challenged a small proportion of trade measures imposed. Of the 1,405 trade measures that members notified the

[8]"Completed" refers to those cases in which the WTO Dispute Settlement Body has adopted a panel or Appellate Body report as of December 31, 2002.

[9]We define "measures" broadly to include orders calling for antidumping or countervailing duties or some type of safeguard action. For the purposes of this report, the term "measure" does not include members' laws, regulations, or practices.

WTO that they imposed from 1995 through 2002, WTO members challenged only 63 (4 percent) in the WTO dispute settlement system. The United States imposed the most measures (239) and had the highest proportion of its measures (12 percent) challenged, whereas the next biggest trade remedy users had fewer of their measures challenged. For example, India had none of its 226 measures challenged, while the EU had 4 of its 182 measures challenged. According to U.S. agency officials, one reason that the United States has been a defendant more often than a complainant in trade remedy cases is that the United States has the world's biggest economy and most desirable market.

In the 25 trade remedy cases completed from 1995 through 2002, the WTO generally did not uphold WTO members' domestic determinations to impose trade remedy measures but upheld a higher proportion of members' trade remedy laws that were challenged. In 17 of the 21 cases involving a total of 175 WTO findings[10] on domestic determinations,[11] the WTO rejected 50 percent or more of the agencies' determinations as not complying with WTO agreements, rejecting all determinations in 5 of those cases. Overall, the WTO rejected about the same percentage of the U.S. and non-U.S. agency determinations in the 21 cases, 57 percent and 56 percent,

[10]To analyze WTO findings about domestic determinations, for the most part we reviewed the concluding sections of panel and Appellate Body reports. When several findings were included within a single paragraph in the concluding section, we generally counted each finding separately. In the several instances in which concluding sections of panel reports did not clearly indicate these findings, we obtained our numbers by evaluating the full reports.

[11]Four cases did not involve WTO findings on domestic agency determinations—3 challenged only statutes, and 1 was found to be not properly before the WTO. Although the Appellate Body ruled that another case was not properly before the panel, the panel ruled on a number of antidumping issues involving determinations of a domestic agency.

respectively.[12] In 9 of the 25 cases, there were 13 challenges to trade remedy laws, all of which were U.S. laws. The WTO upheld U.S. trade remedy laws in 11 of the 13 challenges and rejected U.S. laws in 2 challenges.

WTO rulings in the 25 completed cases we examined have not required numerous changes to members' laws, regulations, and practices but have resulted in the revision or removal of a number of trade remedy measures that members imposed. As a result of the 14 cases in which the United States was a defendant, two U.S. laws, one regulation, and three practices were changed or are subject to change. In addition, the rulings in 9 of those cases necessitated the onetime revision to, or removal of, 21 U.S. trade measures. However, WTO trade remedy rulings resulted in fewer changes to the laws, regulations, practices, and measures of other WTO members. Specifically, no foreign laws or regulations were affected, and only one foreign practice was changed, in the 11 cases in which other WTO members were defendants. In addition, only 7 foreign trade measures were subject to revision or removal.[13] U.S. officials told us that the trade remedy rulings have not significantly impaired their ability to impose trade remedies to date. However, they were concerned about the potential for rulings to have a greater adverse impact in the future. For example, these officials cited the possible negative ramifications of WTO rulings in the privatization and EU bed linen cases. U.S. officials also said that some WTO safeguard rulings have been extremely difficult to implement. For instance, some safeguard rulings have placed a greater burden on domestic agencies to establish a clearer link between increased imports and serious injury to domestic industry. In addition, U.S. officials said that the rulings have required U.S. agencies to provide more detailed explanations of their analyses and procedures for applying their methodologies in trade remedy investigations.

[12]These data, however, do not distinguish domestic agency determinations on the basis of their importance. Thus, these determinations ranged in importance from whether domestic agencies established the proper link between dumped imports and injury to domestic industry to whether the agency followed proper procedures in providing public notice of its proceedings. Furthermore, panels and the Appellate Body addressed the same issues in a number of cases. See appendix I for a further discussion of the methodological limitations on these data.

[13]We relied primarily on the WTO and U.S. agencies for information about foreign laws, regulations, practices, and measures. For the most part, we did not obtain information from foreign governments on these matters.

The WTO uses two principal standards of review to evaluate the factual and legal determinations of WTO member domestic agencies in trade remedy cases—article 11 of the WTO Dispute Settlement Understanding and article 17.6 of the WTO Antidumping Agreement. Article 11 applies to all cases brought under the WTO dispute settlement system and requires that panels make an objective assessment of the factual and legal determinations of WTO member domestic agencies. The Appellate Body has found that in applying article 11, panels are not to conduct a new review of domestic agency fact-findings nor totally defer to them. Article 17.6 applies only to antidumping cases and is more specific and deferential than article 11. For factual review, article 17.6 requires panels to determine whether domestic agencies have properly established the facts and evaluated them in an unbiased and objective manner, and, if the agencies have done so, it does not allow panels to overturn the agencies' determinations. For legal review, article 17.6 requires panels to interpret the Antidumping Agreement by applying established international rules for interpreting treaties and international agreements.[14] When a panel finds more than one permissible interpretation of the Antidumping Agreement, and one of them is consistent with a domestic agency's determination, article 17.6 requires the panel to uphold the agency's determination. The Appellate Body has concluded that panels should apply article 17.6 in a certain order: first, apply international rules of interpretation; and then, consider whether to uphold the domestic agency's determination. The Appellate Body has found that panels have generally interpreted and applied both standards of review correctly in the relatively few instances where standard of review was specifically an issue in a case. Finally, the panels and the Appellate Body discussed the standards of review in most of the trade remedy cases, but the extent of that discussion varied by trade remedy area, case, and issue.

The most common concern raised by legal experts with whom we spoke, although a minority view, related to the way in which the WTO has applied article 17.6 to evaluate legal determinations of domestic agencies. For example, some experts believed that Appellate Body guidance to apply international rules of treaty interpretation first has resulted in panels' improperly rejecting domestic agency interpretations because, in the experts' view, these rules necessarily lead to only one interpretation. The experts contended that this tendency to find one interpretation made panels less likely to consider alternative domestic agency interpretations.

[14]Principally, these are articles 31 and 32 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (May 23, 1969).

Some experts also stated that the panels and the Appellate Body have not applied article 17.6 in as deferential a manner as the United States intended. Overall, however, a majority of the experts with whom we spoke indicated that the WTO had not exceeded its authority in applying the standards of review, and that the WTO had treated its members the same in trade remedy cases. A majority of experts also said that the WTO has not added new obligations or diminished WTO members' rights in these cases; however, a significant minority of experts strongly disagreed with these views. Finally, many experts considered some of the WTO rulings on safeguards to be unclear and difficult to implement, particularly regarding how agencies should link increased imports and serious injury to domestic industry.

The U.S. agencies most involved in trade remedy activities said that the WTO has improperly applied article 17.6(ii) in some trade remedy cases, mainly because it has not applied the article in a way that allows for upholding permissible interpretations of WTO members' domestic agencies. These agencies also said that in certain trade remedy cases, the WTO has found obligations and imposed restrictions on WTO members that are not supported by the texts of the WTO trade remedy agreements.

Background

The 1994 Uruguay Round agreements created the WTO dispute settlement system. The new system replaced the one under the General Agreement on Tariffs and Trade (GATT), the predecessor to the WTO. The Uruguay Round created a stronger dispute settlement system that, unlike the system under the GATT, discourages stalemates by not allowing parties to block decisions. In addition, the new system established a standing Appellate Body, with the aim of making decisions more stable and predictable.

The WTO dispute settlement system operates in four major phases: consultation, panel review, Appellate Body review (when a party appeals the panel ruling), and implementation of the ruling. To initiate, or file, a dispute, a WTO member requests consultations with the defending member. If the parties do not settle the case during consultations, the complainant may then request that a panel be established. Nonpermanent, three-person panels issue formal decisions, or reports, for cases that are appealed; three members of a permanent, seven-member Appellate Body—comprised of individuals with recognized standing in the field of law and international trade—review panel findings. The Dispute Settlement Body, which is comprised of representatives of all WTO members, approves all

final reports, and only a consensus of the members can block decisions. Thus, no individual member can block a decision.

When a WTO member challenges a trade remedy measure, the panels and the Appellate Body apply standards of review, outlined in certain WTO agreements, to evaluate members' factual and legal determinations supporting these measures. In the United States, the Department of Commerce and the International Trade Commission (ITC) investigate whether the United States should impose antidumping or countervailing duties to offset unfair foreign trade practices. The ITC also investigates whether the conditions exist for the United States to invoke safeguards in response to import surges.

Trade Remedy Cases Increased Over Time, but Few Measures Were Challenged

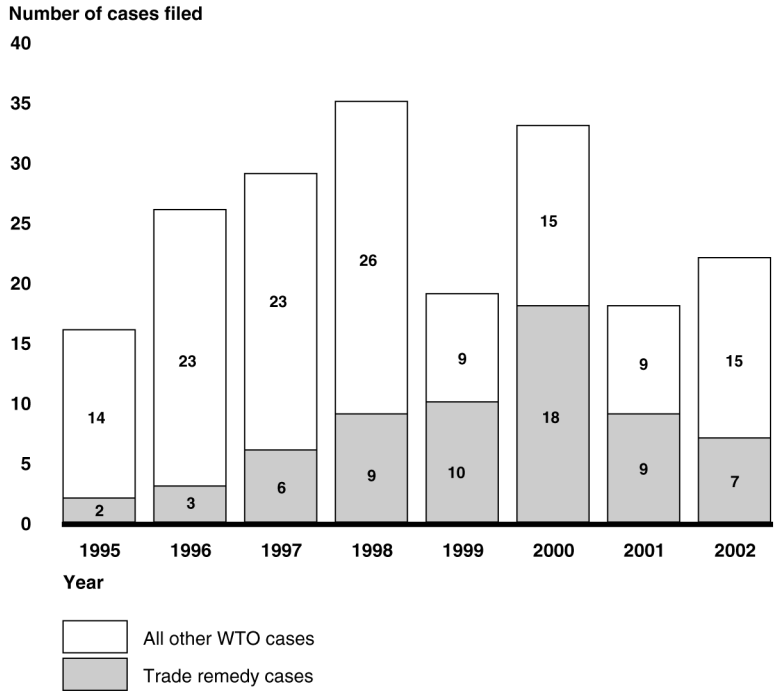
From 1995 through 2002, WTO members brought 198 formal dispute settlement cases against other members.[15] One-third (64 cases) involved members' trade remedies, and the ratio of trade remedy cases filed, versus all other types, generally increased over the time period. Among WTO members, the United States has been by far the most frequent defendant in trade remedy cases but relatively less active in filing complaints. Overall, however, WTO members have challenged a relatively small share of the trade measures that their fellow members imposed, although the proportion of U.S. trade measures challenged was larger.

About One-third of All Cases Involved Trade Remedies, and Ratio Increased Over Time

Overall, about one-third (64) of all WTO cases involved members' trade remedies. From 1995 to 2000, an increasing proportion of the cases filed pertained to trade remedy measures and laws, as shown in figure 1. In 2001 and 2002, there was somewhat of a shift in this trend.

[15]These 198 cases originated from 276 separate requests for consultation or filings—the first of the four phases in the dispute settlement process. For the purposes of our analysis, we combined multiple requests for consultation regarding the same measure or law into a single case. For instance, nine WTO members requested consultations regarding the steel safeguard that the United States imposed in March 2002; we counted this as one case, because all of the requests for consultation pertained to the same measure.

Figure 1: Total Number of WTO Cases Versus Trade Remedy Cases Filed per Year, 1995-2002

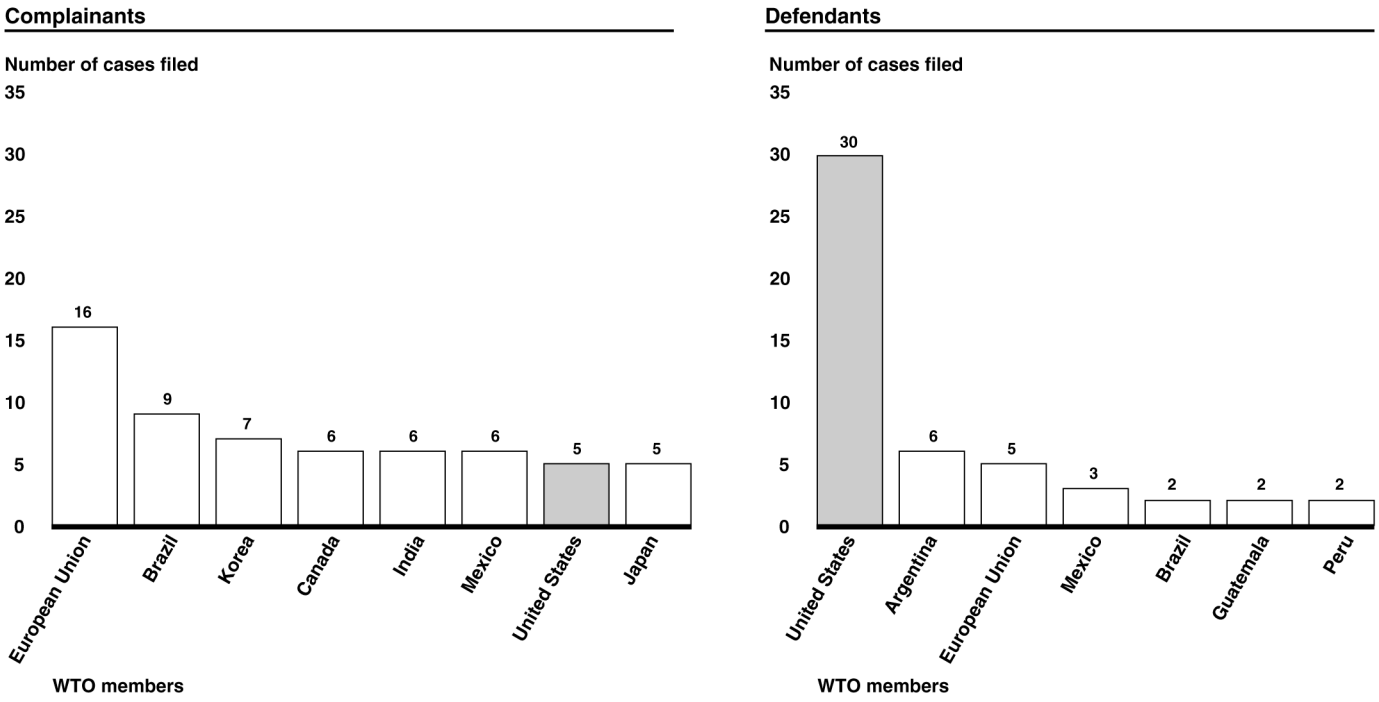


Source: GAO analysis of WTO data.

United States Has Been the Most Frequent Defendant, but Less Active as a Complainant

In comparing WTO members' participation in the trade remedy cases, the United States by far has been the most frequent defendant but less active as a complainant. As shown in figure 2, the United States was a defendant in 30 (47 percent) of the 64 trade remedy cases, a majority of which were filed since January 2000. The next most frequent defendants were Argentina, which defended 6 cases, and the EU, a defendant in 5 cases. On the other hand, the United States was less active than other WTO members in filing trade remedy cases. As figure 2 also shows, the EU was the most frequent complainant in the 64 trade remedy cases, filing 16 complaints. Six WTO members each filed more complaints than the United States.

Figure 2: Most Frequent Complainants and Defendants in WTO Trade Remedy Cases, 1995-2002



Source: GAO analysis of WTO data.

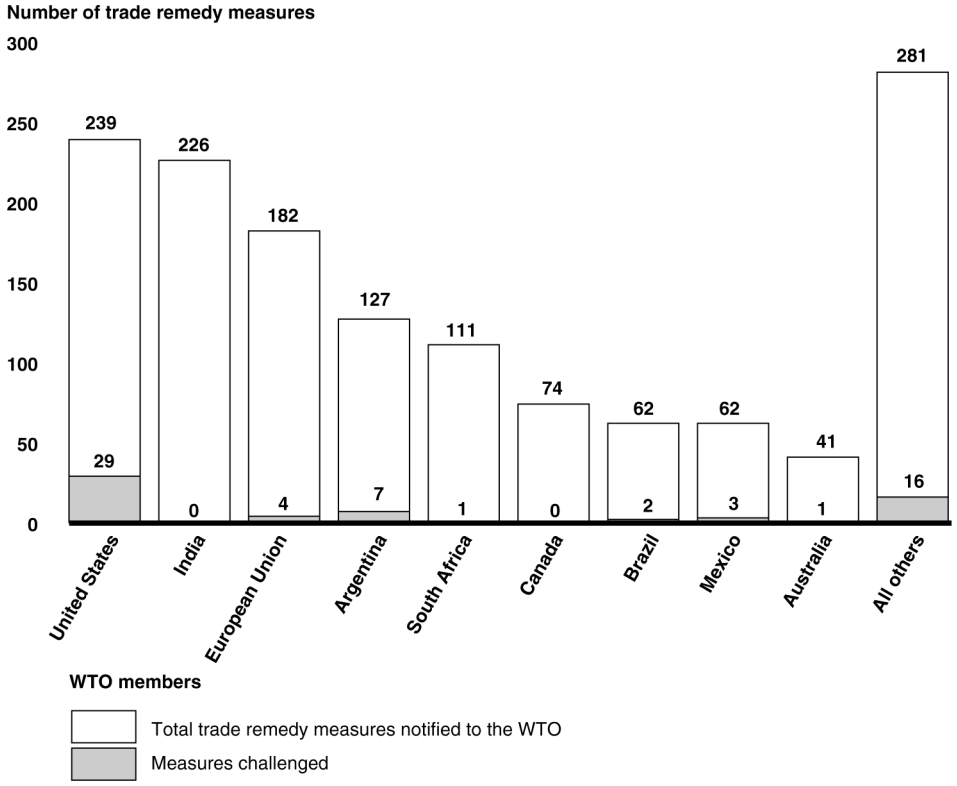
U.S. agency officials said that it was not surprising that the United States had been a defendant more often than a complainant in WTO disputes since (1) the United States has the world's biggest economy and most desirable market and (2) U.S. laws and procedures are more detailed and transparent than those of other members that are large users of trade remedies. These officials also pointed to the easy availability in the United States of trade lawyers, who could assist in bringing trade remedy actions, as another factor.

Few Imposed Measures Were Challenged, but U.S. Measures Were Challenged Most

Although members notified the WTO that they imposed 1,405 trade remedy measures from 1995 through 2002, only a small percentage of these measures were challenged in the dispute settlement system. Specifically, WTO members challenged only 63 (4 percent) of the 1,405 measures, but nearly one-half of these challenges involved U.S. trade measures. Over the same period, as shown in figure 3, the United States imposed the most trade remedy measures (239) and had the biggest number and share (29, or

12 percent) of its measures challenged by other WTO members. On the other hand, India, the next biggest user of trade remedy measures, had none of its 226 measures challenged. WTO members challenged 4 (2 percent) of the EU's 182 trade remedy measures and 7 (6 percent) of Argentina's 127 trade remedy measures.

Figure 3: Total Number of WTO Trade Remedy Measures Imposed and Number Challenged, by Most Frequent Trade Remedy Users, 1995-2002



Source: GAO analysis of WTO data.

Notes:

Data on trade remedy measures imposed are the most recent available from the WTO and are through December 2002.

Challenges to WTO members' sunset reviews are not included in these figures. Sunset reviews are domestic agency reviews of whether to terminate antidumping or countervailing duties after a certain period, usually 5 years. The duties are terminated unless the authorities determine, in a review, that the duties' elimination would likely lead to a continuation or recurrence of dumping or subsidies and injury.

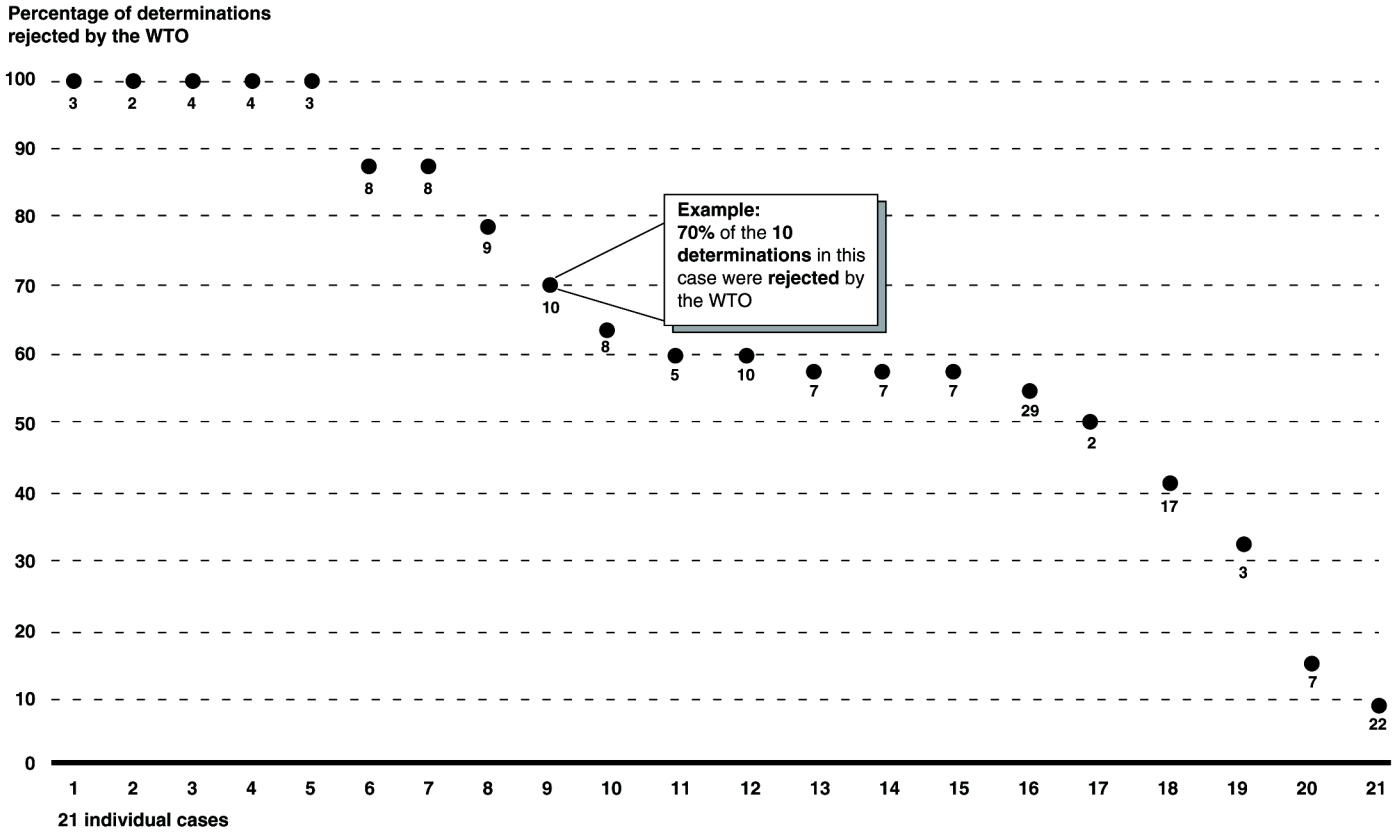
Domestic Determinations Generally Were Rejected, but Statutes Were Upheld

While the 25 WTO trade remedy rulings completed from 1995 through 2002 generally rejected domestic agency determinations supporting trade measures, the rulings upheld a vast majority of the trade remedy laws that were challenged. The WTO rejected at least half of the domestic agency determinations in most of the 21 cases dealing with such determinations. The WTO also rejected roughly the same proportion of U.S. and non-U.S. domestic determinations. The 21 rulings addressed issues ranging from whether domestic agencies adequately justified imposing a trade remedy measure to whether WTO members followed proper procedures in initiating the disputes. Regarding WTO rulings on members' laws, only U.S. laws were challenged during the period. The WTO upheld more than three-quarters of the U.S. laws challenged in 9 cases involving 13 challenges.

WTO Rejected Majority of Domestic Determinations; U.S./Non-U.S. Rejection Ratios Were Similar

The WTO made findings on a total of 175 domestic agency determinations in 21 of the 25 trade remedy cases completed through 2002. As shown in figure 4, in 17 of the 21 cases the panels rejected 50 percent or more of the domestic agency's determinations—rejecting all determinations in 5 cases. In all 21 cases, the WTO found at least one aspect of a measure to be inconsistent with WTO requirements.

Figure 4: Number of Findings on Domestic Agency Determinations and Percentage of Those Determinations Rejected by the WTO in 21 Completed Trade Remedy Cases, 1995-2002

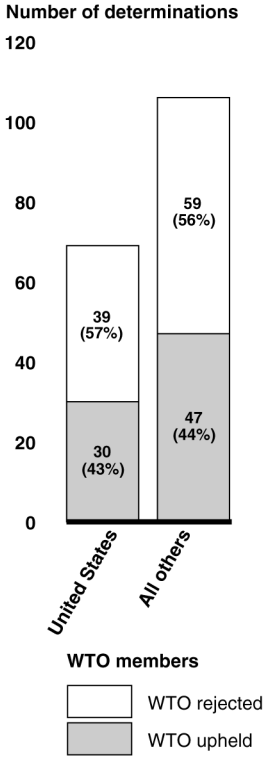


Source: GAO analysis of WTO panel and Appellate Body reports.

Note: The WTO findings on domestic determinations range in importance from how well the domestic agency justified imposing the trade remedy by adequately establishing a causal link between the increased imports and injury to domestic industry to whether the domestic agency followed proper procedures by providing public notice of the initiation of its antidumping investigation.

When comparing rulings among WTO members on domestic determinations, the United States and other WTO members fared similarly. Overall, as shown in figure 5, the WTO rejected almost the same proportion of the U.S.'s and other WTO members' domestic determinations—57 percent and 56 percent, respectively.

Figure 5: Number (Percent) of Domestic Agency Determinations Upheld and Rejected by the WTO, the United States Versus Other Members, in Completed Trade Remedy Cases, 1995-2002



Source: GAO analysis of WTO panel and Appellate Body reports.

All WTO Challenges to Trade Remedy Laws Involved U.S. Laws, but Most Laws Were Upheld

Although to date WTO members have challenged only U.S. laws, the WTO upheld a large majority of these laws. As shown in table 1, in the 13 instances (in 9 cases), in which WTO members directly challenged U.S. laws, the WTO upheld U.S. laws in 11 challenges and rejected U.S. laws in 2 challenges.[16]

[16]In the 13 challenges to U.S. law, 3 were cases challenging only laws, while 10 involved both laws and domestic agency determinations.

Table 1: U.S. Trade Remedy Laws Challenged in WTO Dispute Settlement, 1995-2002

Law challenged	WTO dispute settlement case	Ruling outcome
Sections 733(e) and 735(a)(3) of the Tariff Act of 1930	United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan (DS 184)	Law upheld
Section 771(7)(c)(iv) of the Tariff Act of 1930	United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan (DS 184)	Law upheld
Sections 776(a) and 782(d) and (e) of the Tariff Act of 1930	United States – Antidumping and Countervailing Measures on Steel Plate from India (DS 206)	Law upheld
Section 751(b) of the Tariff Act of 1930 and accompanying regulations	United States – Antidumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabyte or Above Originating from Korea (DS 99)	Law upheld
Section 751(c)(2) of the Tariff Act of 1930	United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (DS 213)	Law upheld
Sections 751(c)(1)(A) and 752(b) of the Tariff Act of 1930	United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (DS 213)	Law upheld
Section 752(b)(4)(B) of the Tariff Act of 1930	United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (DS 213)	Law upheld
Section 771(5)(F) of the Tariff Act of 1930	United States – Countervailing Measures Concerning Certain Products from the European Communities (DS 212)	Law upheld
Sections 777A(e)(2)(A) and (B) of the Tariff Act of 1930 and accompanying regulations	United States – Preliminary Determinations With Respect to Certain Softwood Lumber from Canada (DS 236)	Law upheld
Section 129(c)(1) of the Uruguay Round Agreements Act	United States – Section 129(c)(1) of the Uruguay Round Agreements Act (DS 221)	Law upheld
Section 771(5)(B)(iii) of the Tariff Act of 1930	United States – Measures Treating Export Restraints as Subsidies (DS 194)	Law upheld
Section 735(c)(5)(A) of the Tariff Act of 1930	United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan (DS 184)	Law rejected
Section 801 of the Revenue Act of 1916[a]	United States – Antidumping Act of 1916 (DS 136/162)	Law rejected

Legend: DRAMS dynamic random access memory semiconductors
URAA Uruguay Round Agreements Act

Source: GAO analysis of WTO panel and Appellate Body reports.

[a]The official name of the law is section 801 of the Revenue Act of 1916; however, for purposes of this report, we use the name of the law that the WTO used—the Antidumping Act of 1916.

Addressing why only U.S. trade remedy laws were challenged, a U.S. agency official said that U.S. laws tend to be more vulnerable because they are more detailed than those of other members, and their language is not the same as the language in the WTO agreements. In contrast, according to the official, some WTO members essentially take the language in the relevant WTO agreement and make it their law.

Rulings Resulted in Few Changes to Members' Laws, Regulations, and Practices but Caused Numerous Changes to U.S. Measures

The 25 WTO trade remedy rulings completed from 1995 through 2002 did not result in many changes to WTO members' laws, regulations, or practices.[17] However, the rulings more often resulted in the onetime revision to, or removal of, trade remedy measures. The rulings affected a number of U.S. laws, regulations, practices, and measures; but for other WTO members, no laws or regulations were affected, and only one practice was subject to change. Furthermore, fewer foreign trade measures were subject to removal or revision. Nonetheless, U.S. officials told us that the rulings to date had not significantly impaired their ability to impose trade remedies. However, they told us they were concerned about the potential for rulings to have a greater adverse impact in the future. In addition, U.S. agencies said that, with few exceptions, the rulings did not question U.S. methodologies for determining whether to impose remedies but have required them to provide fuller explanations and justifications for their decisions.

Rulings Caused Few Changes to Members' Laws, Regulations, or Practices

WTO rulings resulted in a small number of changes to members' laws, regulations, and practices, with all but one of those changes involving U.S. trade remedies. In the 14 completed trade remedy cases in which the United States was the defendant, two U.S. laws, one regulation, and three practices were changed or are subject to change, as shown in table 2. In the 11 cases involving other WTO members, only one practice was subject to change.

[17]"Practices" refer to WTO members' uncodified methodologies and procedures in investigating injury to domestic industry and in determining the appropriate trade remedy measures, according to Commerce Department officials.

Table 2: Impact of WTO Rulings on Members' Laws, Regulations, Practices, and Measures, 1995-2002

Defendants	Laws subject to change	Regulations subject to change	Practices subject to change	Measures subject to revision or removal
United States	2	1	3	21
Other WTO members	0	0	1	7

Source: GAO analysis of compliance action documents filed with the WTO by members, plus information from U.S. agencies.

Notes:

The 21 U.S. measures were subject to revision or removal in 9 cases. While 7 of those cases each involved 1 measure, 2 cases involved more than 1 measure—1 case involved 12 measures and 1 case involved 2 measures.

In 2 cases, WTO members technically removed the relevant measures in response to other judicial bodies that made similar rulings to the WTO: one case was in direct response to a North American Free Trade Agreement (NAFTA) panel ruling, and the other was in response to U.S. domestic litigation (see app. II, case summaries 7 and 9).

Specifically, the two U.S. laws subject to change are a section of the Antidumping Act of 1916 and a section of the Tariff Act of 1930[18] involving calculation of the "all others" rate.[19] In the 1916 Antidumping Act case, the WTO found the U.S. law to be in violation of GATT 1994 and the WTO Antidumping Agreement because it authorized imposing fines, imprisonment, and recovery of damages in response to the dumping of products in the U.S. market—remedies that are not provided for in those agreements. Both the U.S. Senate and the House of Representatives have introduced legislation to repeal the 1916 Act.[20] The proposed change to the Tariff Act of 1930 involves making calculation of the "all others" rate consistent with the WTO Antidumping Agreement. The WTO granted the United States until the end of December 2003 to comply, but so far Congress has not addressed this change.

[18]Sections 735(c)(5) of the Tariff Act of 1930, codified at 19 U.S.C. § 1673d(c)(5).

[19]The "all others" rate is the rate used to calculate antidumping duties for exporters and producers who are not individually investigated.

[20]While the House bill (H.R. 1073), introduced on March 4, 2003, and one of the Senate bills (S. 1155), introduced on May 23, 2003, explicitly state that the repeal would not affect pending cases, another Senate bill (S. 1080), introduced on May 19, 2003, would apply to any pending cases on the date of enactment.

The one change to a U.S. regulation stemmed from a case involving U.S. antidumping duties imposed on imports of Korean dynamic random access memory semiconductors (DRAMS). To implement the ruling, the United States replaced its regulatory standard for revoking an antidumping order—that dumping was "not likely" to occur—with the standard in the WTO Antidumping Agreement—that "continued imposition of the antidumping duty is necessary to offset dumping."

The three changes to U.S. practices involved a revision of the "arm's-length"[21] methodology in antidumping cases and two privatization methodologies that the Commerce Department used in countervailing duty cases to calculate the extent to which the benefit of past subsidies are passed on to private purchasers of state-owned enterprises.[22] The United States revised its "arms-length" methodology to conform to the WTO Antidumping Agreement by expanding the scope of sales to an affiliated business that could be considered to be made in the ordinary course of trade. Commerce revised its countervailing duty methodology to conform to the Appellate Body's first privatization decision, but the Appellate Body later ruled that the revised methodology was also inconsistent with the Subsidies and Countervailing Measures Agreement. Commerce revised its methodology a second time[23] to reflect the Appellate Body's finding that an arm's-length, fair market value sale of a subsidized, state-owned entity to a private buyer creates a presumption that the privatized entity no longer benefits from past subsidies.

[21]The "arm's-length" methodology involves determining whether home market sales by an exporter to an affiliated party are made at arm's length, that is, in the ordinary course of trade.

[22]The privatization cases concern the issue of whether past subsidies provided to a state-owned enterprise continue to benefit the enterprise after it is sold to a private buyer. The two relevant U.S. methodologies are commonly referred to as the "gamma" and "same person" methodologies and are described by the Appellate Body in paragraphs 12-16 of *United States—Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R (see case summary 22 in app. II). The U.S. Court of Appeals for the Federal Circuit rejected the gamma methodology in Delverde, SRL v. United States, 202 F.3d 1360, 1362-63 (Fed. Cir. 2000). This occurred before the WTO Appellate Body ruled in the first WTO privatization case—*United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (see case summary 9 in app. II).

[23]The final modification to the U.S. privatization methodology was published in the *Federal Register* on June 23, 2003. 68 Fed. Reg. 37125.

Aside from the changes to U.S. laws, regulations, and practices, 1 case resulted in a change to an EU practice. In that case,[24] the WTO ruled that the EU's practice of "zeroing" was not permitted under the WTO Antidumping Agreement. Zeroing[25] in that case concerned the EU's changing negative dumping margins to zero when comparing dumping margins of different models of like products—for example, comparing dumping margins of high-end satin sheets with low-end polyester/cotton blend sheets.

Rulings Brought about Increased Removals and Revisions of Specific Trade Measures

In contrast to the relatively few changes in members' laws, regulations, and practices, most of the rulings in the 25 completed trade remedy cases[26] involved a case-specific removal or revision of a WTO member's trade remedy measure. More U.S. measures were affected than those of all other members. In the 14 completed cases brought against the United States, 21 U.S. trade measures were subject to revision or removal,[27] while the 11 completed cases against other countries resulted in 7 trade measures being subject to revision or removal, as shown in table 2.

[24]*European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (see case summary 10 in app. II).

[25]The dumping margin is the amount by which the imported merchandise is sold below normal value. For example, if the export price is $200 and the normal value is $220, the dumping margin is $20. This margin is expressed as a percentage of the export price; in this example, the margin is 10 percent. The term "zeroing" is used to describe designating dumping margins for non-dumped sales (i.e., sales made above the normal value) as zero. Thus, if the export price is $220 and the normal value is $200, the level of dumping (i.e., the amount by which normal value exceeds the export price) is zero, not negative $20. By zeroing comparisons where the export price exceeds normal value, dumping margins tend to be higher.

[26]Four U.S. cases did not involve domestic agency determinations, and thus did not concern trade measures; 3 directly challenged laws, and 1 was found not to be properly before the WTO.

[27]The 21 U.S. measures were subject to revision or removal in 9 cases. While 7 of those cases each involved only 1 measure, 2 cases concerned more than 1 measure. *United States—Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, involved 12 measures, and *United States—Antidumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R (see case summary 14 in app. II), concerned 2 measures.

Specifically, the United States reduced antidumping margins on measures in response to 3 WTO rulings,[28] removed countervailing duty measures in 1 case as a result of domestic litigation,[29] and is revising countervailing duty measures in 2 other cases.[30] And in 3 cases, the United States removed, or allowed to expire, safeguard measures that the Appellate Body found inconsistent with the WTO Safeguards Agreement.[31]

By contrast, other WTO members removed antidumping measures in 3 cases[32] and are due to remove or revise antidumping measures in 2 cases.[33]

[28]These cases were *United States—Antidumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R; *United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (see case summary 15 in app. II); and *United States—Antidumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R (see case summary 19 in app. II).

[29]See Delverde, SRL v. United States, 202 F.3d 1360, 1362-63 (Fed. Cir. 2000).

[30]These cases were *United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R (see case summary 23 in app. II), and *United States—Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R (see case summary 22 in app. II).

[31]These cases were *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (see case summary 18 in app. II); *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (see case summary 12 in app. II); and *United States—Safeguard Measures on Imports of Fresh, Chilled, or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R and WT/DS178/AB/R (see case summary 13 in app. II).

[32]The cases were *Guatemala—Definitive Antidumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R (see case summary 11 in app. II); *Argentina—Definitive Antidumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R (see case summary 16 in app. II); and *Mexico—Antidumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R (see case summary 7 in app. II). In the latter case, Mexico actually removed its antidumping measure pursuant to a panel ruling under the North American Free Trade Agreement. The WTO panel had made similar rulings and recommendations regarding Mexico's compliance with the Antidumping Agreement.

[33]These cases are *Egypt—Definitive Antidumping Measures on Steel Rebar from Turkey*, WT/DS211/R (see case summary 21 in app. II), and *European Union—Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (see case summary 10 in app. II).

In addition, other members removed safeguard measures as a result of 2 WTO rulings.[34]

U.S. Officials Are Concerned about the Potential Impact of WTO Rulings on U.S. Ability to Impose Trade Remedy Measures

While U.S. officials told us that WTO trade remedy rulings had not yet significantly impaired the U.S.'s fundamental right and ability to use its trade remedies, they are concerned about the rulings' potential to do so in the future. For example, Commerce Department officials said that implementing the second Appellate Body ruling on privatization may have a substantial impact on similar proceedings in the future as well as existing countervailing duty orders.

In addition, U.S. officials expressed concern about the potential negative ramifications of the WTO ruling in the EU bed linen case. First, U.S. officials said that although the United States did not change its "zeroing" practice as a result of the ruling against the EU, they noted that the ruling could affect a current Canadian dispute against the United States involving U.S. zeroing practices.[35] Furthermore, the EU has recently challenged 21 Commerce Department antidumping determinations with regard to the U.S.' zeroing practice. The EU alleged that U.S. application of its zeroing practice is inconsistent with the WTO Antidumping Agreement and GATT 1994. The EU also asserted that U.S. laws and regulations providing for this zeroing practice appear to be inconsistent with those agreements. As shown by this challenge, U.S. officials believe that when the WTO strikes down a practice, there is significant potential for WTO members to challenge similar practices of other members. Accordingly, these officials said they are monitoring WTO rulings and recommendations in cases not involving the United States in order to prepare for similar, potential challenges against the United States.

[34]These cases were *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (see case summary 5 in app. II), *and Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (see case summary 3 in app. II).

[35]According to a Commerce Department official, the WTO panel is due to issue an interim ruling in a case involving a final dumping determination on softwood lumber from Canada in September and a final ruling in December 2003. See *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264.

In the safeguards area, U.S. officials indicated that some WTO rulings[36] were confusing and extremely difficult to implement, particularly regarding certain aspects of causation—the extent to which increases in imports cause serious injury, or threaten serious injury, to domestic industry. U.S. officials also said that they have had to increase the level of detail they provide in explaining their analyses and how they apply their methodologies in safeguard investigations. For example, they cited safeguard rulings dealing with "nonattribution," an aspect of causation requiring that injury to domestic industry caused by factors other than increased imports not be attributed to increased imports.[37] U.S. officials said that these rulings could be viewed as calling for domestic agencies to quantify the amount of injury due to increased imports versus the amount due to other factors—a task they consider to be difficult, if not impossible. Moreover, the officials said they would now have to expend more resources in conducting safeguard investigations.

Two Standards of Review Apply to WTO Trade Remedy Cases

WTO panels use two standards of review in evaluating the factual and legal determinations of WTO members' domestic agencies in trade remedy cases. Article 11 of the WTO Dispute Settlement Understanding applies to all cases brought under the WTO dispute settlement system and calls for an objective assessment of domestic agency determinations. The Appellate Body has stated that in applying article 11, panels should not conduct a new review of domestic agency fact-finding nor totally defer to domestic agency determinations. Article 17.6 of the Antidumping Agreement applies only to antidumping cases and is more specific and deferential than article 11. Appellate body guidance on article 17.6 calls for panels first to apply established international rules of treaty interpretation to interpreting provisions of the Antidumping Agreement before deciding whether to uphold a domestic agency's interpretation. In the relatively few number of instances in which the Appellate Body has considered standard of review

[36]In addition to the safeguard rulings in this study, a WTO panel in July 2003 issued a decision on challenges brought by a number of WTO members against U.S. safeguards imposed on certain steel products. The panel found against the United States on unforeseen developments and aspects of causation, among other issues. See *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248-49, 251-54, 258-59/R.

[37]The Appellate Body has found, with regard to the issue of nonattribution, that members must separate and distinguish the injurious effects of other factors from the injurious effects of increased or dumped imports to comply, respectively, with article 4.2(b) of the Safeguards Agreement and article 3.5 of the Antidumping Agreement.

issues, it has found that panels have generally interpreted and applied both standards of review correctly. Finally, panel and Appellate Body decisions generally discuss the standards of review, but the extent of the discussion varies by trade remedy area, case, and issue.

WTO Has Two Principal Standards of Review

The standard of review that WTO panels and the Appellate Body apply in WTO dispute settlement cases refers to how they evaluate and defer to the factual and legal determinations of domestic agencies of WTO members.[38] The two principal standards of review that WTO panels and the Appellate Body use to evaluate these determinations are article 11 of the WTO Dispute Settlement Understanding and article 17.6 of the WTO Antidumping Agreement.[39] Article 11 applies to cases brought under all the WTO agreements that are covered by the dispute settlement system and supplements article 17.6 in antidumping cases. Article 17.6 only applies to cases brought under the Antidumping Agreement, which is the only WTO agreement that has a specific standard of review.[40]

[38]In the 25 trade remedy cases we reviewed, panels and the Appellate Body also resolved 13 direct challenges to U.S. laws. For many of these challenges to laws, panels and the Appellate Body did not specifically mention articles 11 or 17.6 or articulate any other standard of review for evaluating whether the laws were consistent with WTO obligations.

[39]Some experts view article 3.2 of the Dispute Settlement Understanding as an additional standard of review. Under article 3.2, WTO members recognize that the dispute settlement system serves both to preserve the rights and obligations of WTO members under the WTO agreements covered by dispute settlement and to clarify the provisions of those agreements in accordance with customary rules of interpretation of public international law. It also provides that Dispute Settlement Body recommendations and rulings cannot add to or diminish the rights and obligations provided in the WTO agreements. Although panels and the Appellate Body have not specifically identified article 3.2 as a standard of review, they frequently do refer to it when interpreting provisions of WTO trade remedy agreements.

[40]A WTO ministerial decision adopted by the Uruguay Round Trade Negotiations Committee in December 1993 states that the standard of review in article 17.6 "shall be reviewed after three years with a view to considering the question of whether it is capable of general application." This has not been done. In addition, in the WTO countervailing duty case, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, the United States argued that article 17.6 should also apply to countervailing duty cases brought under the WTO Subsidies and Countervailing Measures Agreement. Part of the U.S. argument was based on a WTO ministerial declaration that called for "consistent resolution of disputes arising from anti-dumping and countervailing duty measures." The Appellate Body, however, rejected this position and found that article 11 was the appropriate standard of review to apply in these disputes.

Article 11 Calls for an Objective Assessment

Article 11 obligates a panel to make an "objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant" WTO agreement.[41] The Appellate Body has interpreted this requirement to mean that panels should neither conduct a new review of domestic agency fact-findings, often referred to as a "*de novo* review," nor totally defer to domestic agency determinations. In rejecting both these extremes, the Appellate Body has found that the panels are poorly suited to engage in new reviews and cannot ensure an objective assessment by totally deferring to domestic agency determinations. What the panels should do in safeguards cases, according to the Appellate Body, is ascertain whether domestic agencies have evaluated all relevant facts and provided an adequate, reasoned, and reasonable explanation about how the facts supported their determinations.[42]

Article17.6 Is More Specific and Deferential than Article 11

Article 17.6 is more specific than article 11 and calls for more deference to domestic agency determinations. Article 17.6 is divided into two subparts—factual and legal—and establishes standards of review for panel evaluations of domestic agency determinations. Under the factual standard of review in article 17.6(i), panels must determine whether domestic agencies have properly established the facts and evaluated them in an unbiased and objective manner. When a panel finds that the domestic agency has performed this task, the panel cannot overturn the domestic agency's determination even if it might have reached a different conclusion. The Appellate Body has stated that the panel's obligation under the factual standard in article 17.6(i) closely reflects the obligation imposed on panels under article 11.[43]

Under the legal standard of review in article 17.6(ii), panels must apply established international rules in interpreting provisions of the WTO Antidumping Agreement. These rules are set forth in articles 31 and 32 of

[41]Article 11 also obligates panels to "make such other findings as will assist the Dispute Settlement Body in making" recommendations and rulings.

[42]See *Fresh Lamb Meat from New Zealand and Australia*, above, paragraphs 97-108.

[43]In paragraphs 55 and 62 of *United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, the Appellate Body described the complementary interaction between articles 11 and 17.6, particularly regarding panel review of factual determinations of domestic agencies.

the Vienna Convention on the Law of Treaties[44] and provide a method for interpreting provisions of the Antidumping Agreement. When a panel applies these rules and finds that there is more than one permissible way to interpret a provision of the Antidumping Agreement, the panel must uphold the domestic agency's determination if it is consistent with one of the permissible interpretations. The Appellate Body's guidance to panels about how they are to apply this standard is consistent with the sequence implied above. Thus, panels should first use the international rules to interpret the WTO provision in question, and only after completing this task should panels then decide whether to uphold the domestic agency's legal determination. The Appellate Body has stated that application of the international rules could give rise to at least two permissible interpretations of some provisions of the Antidumping Agreement.[45]

Appellate Body Generally Upheld Panels' Treatment of Standards, but Treatment Was Seldom Challenged

WTO members did not often challenge panel interpretations and applications of the standards of review, and most challenges involved article 11. In most instances, the Appellate Body upheld the panels' treatment of the standards. In the 14 instances in which the Appellate Body specifically ruled on panel interpretations and applications of standard of review, it found that the panels had correctly addressed the standards in 11 instances—9 involving article 11 and 2 involving article 17.6.

Panels/Appellate Body Discuss Standard of Review in Cases, but Extent Varied

As indicated above, panels have the responsibility for applying the standards of review in articles 11 and 17.6 when evaluating determinations of WTO member domestic agencies. The Appellate Body's function is to review how panels have interpreted and applied these standards and to uphold, modify, or reverse panel actions. For the most part, Appellate Body

[44]These provisions call for applying general and supplementary methods to interpreting provisions of treaties and international agreements. Under article 31, general rules for interpreting treaty provisions are first applied, and supplementary methods under article 32 are used to (1) confirm the meaning resulting from application of article 31 or (2) determine the meaning when the interpretation under article 31 is ambiguous or obscure or leads to an unreasonable result.

[45]*United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, paragraphs 59-60. See also, *Thailand—Antidumping Duties on Angles, Shapes, and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS/AB/R, paragraphs 125-27 (see case summary 6 in app. II).

decisions in trade remedy cases have included longer and more detailed discussions of standard of review than the panels.[46]

Aside from differences between the panels and the Appellate Body, the extent to which standards of review are discussed vary by trade remedy area, case, and issue. Thus, standards of review are discussed, at least to some extent, in all safeguard and antidumping cases involving determinations of domestic agencies but are not mentioned in a number of countervailing duty cases. In many of the safeguard and antidumping cases, the panels discuss article 11 or article 17.6, respectively, at the beginning of the case, indicating that they are the standards of review to be applied in evaluating the domestic agency determinations involved, though the amount of introductory discussion varies from case to case. The standards of review are sometimes also discussed, or alluded to, later in panel and Appellate Body reports in connection with evaluations of particular domestic agency determinations. These allusions to the standards of review involve use of language from the standards themselves or interpretations of the standards rather than any specific mention of them. For example, in the safeguard cases, panels often invoke Appellate Body guidance about what kind of domestic agency explanation is necessary—an "adequate, reasoned, and reasonable explanation"—without mentioning article 11. Similarly, in antidumping cases, panels sometimes refer to the requirement in article 17.6(i) to conduct an "unbiased and objective" evaluation of domestic agency fact-finding without specifically mentioning 17.6(i). Finally, for some issues, panels neither specifically mention nor allude to standard of review provisions.

Expert Views and U.S. Agency Positions on Standard of Review and Other Trade Remedy Issues

How the WTO has interpreted and applied the standard of review in trade remedy cases and how it has resolved important trade remedy issues are highly controversial issues in the United States. Further, a number of these important trade remedy issues are highly complex, technical, and not easily explained, as evidenced by their lengthy treatment in WTO panel and Appellate Body reports. Accordingly, we decided to interview a wide range of WTO legal experts to obtain their views on these issues.

[46]The Appellate Body decisions in *United States—Safeguard Measures on Imports of Fresh, Chilled, or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, and *United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, contain the most detailed discussions, respectively, of articles 11 and 17.6.

The most common concern identified by the experts with whom we spoke, although a minority view, was about how the WTO was applying article 17.6(ii) in antidumping cases. Notwithstanding this concern, overall a majority of the experts believed that the WTO had not exceeded its authority in applying the standard of review in the trade remedy cases we reviewed. Commenting on more general issues surrounding the WTO trade remedy rulings, almost all of the experts believed that the United States and other WTO members have received the same treatment in trade remedy cases. In addition, a majority of the experts who responded concluded that WTO decisions generally have not added to obligations or diminished rights of WTO members and that it was appropriate for the WTO to interpret vague and ambiguous provisions in WTO agreements, sometimes referred to as "gap filling." However, a significant minority of experts strongly disagreed with this view about WTO members' obligations and rights and considered gap filling to be inconsistent with several provisions of the Dispute Settlement Understanding. Regarding specific rulings, a number of experts cited some safeguard rulings as confusing and unclear.

In contrast to the majority views expressed above, the U.S. agencies most involved in trade remedy activities believed that article 17.6(ii) has been improperly applied in some trade remedy cases, mainly because the WTO has not applied article 17.6(ii) in a way that allows for upholding permissible interpretations of WTO members' domestic agencies. They also believed that in certain trade remedy cases, the WTO has found obligations and imposed restrictions on WTO members that are not supported by the texts of the WTO trade remedy agreements.

Significant Minority Expressed Concerns about WTO Application of Article 17.6(ii)

A common concern raised by a significant minority of experts with whom we spoke was that the WTO was not properly applying the legal standard of review in article 17.6(ii) of the Antidumping Agreement. Specifically, these experts maintained that Appellate Body guidance calling for panels to first apply international rules in the Vienna Convention on the Law of Treaties to interpret provisions of the Antidumping Agreement before they evaluate the domestic agencies' legal determinations necessarily leads to only one interpretation. Consequently, panels never reach the point of applying the part of article 17.6(ii) that allows for multiple permissible interpretations and upholding an agency determination that is based on one of these

interpretations.[47] In fact, while several experts mentioned specific rulings in which panels or the Appellate Body had upheld domestic agency determinations as permissible, it was unclear whether this was due to these bodies going through the article 17.6(ii) analysis or solely because they agreed with the domestic agency. In this regard, in the trade remedy cases we reviewed, no expert pointed to a clear instance in which a panel first applied the Vienna Convention, found several permissible interpretations, and then upheld the agency determination because it was consistent with one of them.[48] One expert, who was a former U.S. negotiator in the Uruguay Round, stated that U.S. negotiators in the round had not fully appreciated how application of the Vienna Convention would limit the possibility of panels or the Appellate Body finding multiple permissible interpretations of the Antidumping Agreement.

Some experts also believed that panels and the Appellate Body have not applied the legal standard of review in article 17.6(ii) in the deferential way intended by the United States, as expressed in the U.S. Statement of Administrative Action (SAA) accompanying the U.S. Uruguay Round Agreements Act.[49] The SAA describes article 17.6 as a special standard of review analogous to the deferential standard applied by U.S. courts in reviewing actions by the Commerce Department and the ITC, commonly

[47]Some of these experts stated that by not applying part of article 17.6(ii), panels and the Appellate Body are violating the principle that every provision of a treaty or international agreement should be given effect.

[48]In *United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, on an issue involving calculation of normal value, the Appellate Body upheld a U.S. determination as resting on an interpretation of article 2.1 of the Antidumping Agreement that was, in principle, permissible "following application of the rules of treaty interpretation in the Vienna Convention." Nevertheless, the Appellate Body did not first set forth several permissible interpretations and then uphold the United States determination because it was consistent with one of them. In the April 2003 WTO panel report, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, the panel appeared to go further in applying the article 17.6(ii) process in finding permissible an Argentinean interpretation dealing with the definition of "domestic industry."

[49]The SAA is an authoritative expression of the United States about the interpretation and application of the Uruguay Round Agreements and the Uruguay Round Agreements Act. Public Law No. 103-465, 108 Stat. 4815, codified at 19 U.S.C. §§ 3512(d). H.R. Doc. No.103-316, at 818 (Vol. 1 1994).

referred to as the Chevron standard.[50] Thus, from the U.S. perspective, article 17.6 was intended to ensure that WTO panels neither second-guess the factual conclusions of domestic agencies, even when panels might have reached a different conclusion, nor rewrite, under the guise of legal interpretation, the provisions of the Antidumping Agreement.

Majority Said WTO Did Not Exceed Its Authority in Applying Standard of Review

Despite the concerns expressed above, the majority of the experts with whom we spoke indicated that the panels and the Appellate Body generally had not exceeded their authority in applying the standards of review in articles 11 and 17.6 in the trade remedy cases we reviewed.[51] These experts indicated that panels and the Appellate Body had properly applied article 11 in safeguards and countervailing duty cases as well as the factual standard of review in article 17.6(i) in antidumping cases. Several of this group even questioned whether article 11 was intended to be a standard of review provision at all and, if it was, that it did not intend the same level of deference as article 17.6.[52] Majority support for how panels and the Appellate Body applied the legal standard in article 17.6(ii) included experts who thought the panels and the Appellate Body had generally applied the article correctly and provided the right amount of deference, those who believed the article was not particularly deferential, and those who considered the article to primarily set forth a method for interpreting provisions of the Antidumping Agreement rather than for conferring deference. Finally, a number of experts, including a few with divergent opinions about whether the legal standard in article 17.6(ii) had been properly applied, stated that evaluation of panel and Appellate Body decisions should focus on their substantive rulings and not the technical issue of standard of review.

[50]The Chevron standard or doctrine was established by the United States Supreme Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S.C. 837, 842-45 (1984). Under the Chevron doctrine, when a reviewing court determines that the law is clear on a particular issue, the court as well as the agency must give effect to the law. If, however, the law is silent or ambiguous, the court is to uphold an agency's interpretation when it is reasonable, even if it is different from the interpretation of the law that the court would have reached.

[51]A majority of experts also agreed that, both in a WTO and domestic political context, the United States has had the most concerns about how standard of review has been applied in trade remedy cases.

[52]This included one expert who was highly critical about how panels and the Appellate Body had applied article 17.6(ii) in a number of instances in antidumping cases.

A majority of experts also maintained that the United States was not successful in getting the standard of review it wanted in the Antidumping Agreement and that the SAA only expresses the U.S.'s view about the intent of article 17.6. They pointed out that while the United States was the main proponent for having a strongly deferential standard included in the Antidumping Agreement,[53] numerous WTO members opposed the United States on this issue. Although the experts agreed that the lack of written negotiating history makes it difficult to determine how much deference article 17.6 was intended to provide, a large number believed that the language that was ultimately agreed to did not include the Chevron standard.[54]

Large Majority Said All WTO Members Were Treated the Same in Trade Remedy Cases

Experts with markedly divergent views on other issues were in near unanimous agreement that the United States generally was being treated about the same as other WTO members in trade remedy cases. Although several experts pointed out that the United States was the most frequent defendant and was losing more often than other WTO members, they believed that the panels and the Appellate Body had ruled against other WTO members with the same frequency and in the same or similar manner as they had for the United States. Several experts also were emphatic in describing the WTO as a plaintiff's court in trade remedy cases and pointed out that in nearly all trade remedy decisions and all the safeguards decisions we reviewed, respondents were asked to take some action—for example, to ensure that a safeguard measure was applied consistent with the Safeguards Agreement. When asked why respondents usually lose trade remedy cases, some experts cited a WTO free trade bias or bias against trade remedies as the principal reason.[55] Several others said that WTO members only bring trade remedy actions in the WTO that they are confident they can win. As to why the United States was the most frequent defendant in trade remedy cases, several experts mentioned the fact that the United States was the biggest market as well as the biggest user of trade remedies. In addition, several experts believed that some of the Commerce Department's decisions to impose trade remedy measures were unfounded.

[53]The United States also wanted article 17.6 to apply to countervailing duty cases.

[54]Among other things, the U.S.'s draft language for article 17.6(ii) that incorporated the Chevron term "reasonable interpretation" was changed to "permissible interpretation."

[55]A few of these experts viewed a bias toward liberalizing trade positively and consistent with WTO agreement provisions.

Majority Said No New Obligations or Diminished Rights, but Minority Strongly Disagreed

A majority of experts who responded to this issue agreed that panels and the Appellate Body generally have not added to the obligations or diminished the rights of the United States and other WTO members in trade remedy cases. They believed panels and the Appellate Body generally had ruled appropriately in these cases, including the rulings on issues that the experts cited most frequently as being important and controversial—zeroing, facts available,[56] nonattribution, unforeseen developments, and privatization.[57] A number of these experts believed that the panels and the Appellate Body had both the authority and the need to interpret vague or ambiguous provisions, or to fill gaps,[58] in the trade remedy agreements when no provision clearly deals with an issue. A number also cited article 3.2 of the Dispute Settlement Understanding, which calls for dispute settlement to "clarify the . . . provisions of the [WTO] Agreements," as support for panel and Appellate Body interpretations of vague or ambiguous provisions. Furthermore, a number stated that it is a common and accepted practice for courts to interpret vague or ambiguous provisions of laws and agreements, or to fill gaps, when the meaning of a legal provision is unclear.

A significant minority of experts, however, strongly believed that panel and Appellate Body findings on a number of important issues, including those listed above, had added to obligations or diminished the rights of the United States and other WTO members. For example, some in this group believed that panels or the Appellate Body should have upheld the domestic agency determinations on the antidumping issues of zeroing, facts available, and nonattribution as permissible under the legal standard of review in article 17.6(ii). In addition, they contended that gap filling was prohibited by articles 3.2 and 19.2 of the Dispute Settlement Understanding, both of which preclude the Dispute Settlement Body from

[56]Under the "facts available" provisions in article 6.8 and annex II of the WTO Antidumping Agreement, domestic agencies are authorized to make antidumping determinations on the basis of whatever facts are available to them when the defending party fails to provide relevant facts within a reasonable period of time or significantly impedes the investigation.

[57]The Appellate Body ruled against respondents on nearly all of these issues and, with the exception of zeroing, all involved cases in which the United States was a respondent.

[58]Not all of the experts agreed on the meaning of "gap filling." Some viewed the term negatively in that it led to inappropriately adding obligations to WTO agreements, while others agreed that it was synonymous with interpreting vague or ambiguous provisions. When asked about which of several factors had influenced WTO decisions, gap filling was among the most frequently cited by the experts.

adding to obligations or diminishing the rights of WTO members as provided in the WTO agreements covered by dispute settlement. Furthermore, they believed that the WTO had engaged in improper gap filling in its rulings regarding the aforementioned issues, including privatization. They said that WTO provisions on these issues were unclear and that privatization was not specifically referred to in the Subsidies and Countervailing Measures Agreement. Finally, some experts concluded that it was improper for the panels and the Appellate Body to rule on issues that the negotiating members had intentionally left unclear. They believed that the proper way to deal with vague and ambiguous language in the WTO agreements was through additional negotiations rather than through panel or Appellate Body rulings.

Experts Believed Some Safeguard Rulings Were Confusing and Unclear

A substantial number of experts stated that WTO rulings on the safeguard issues of causation and unforeseen developments were confusing and difficult to follow. This group included experts with sharply divergent views on other trade remedy issues. Specifically, these experts believed that the lack of clarity in the rulings on the causation issue of nonattribution has made it difficult for domestic agencies to implement the rulings. Some in this group were concerned that the rulings seemed to require a quantitative analysis of each factor causing serious injury to domestic industry to ensure the factors were not being improperly attributed to increased imports,[59] and several questioned whether domestic agencies could perform this kind of analysis. The experts also had concerns about how domestic agencies could implement the Appellate Body rulings on the issue of unforeseen developments. Specifically, they were unsure how WTO members would show that increased imports causing serious injury resulted from developments they had not foreseen when they made tariff concessions or assumed other obligations under GATT. A few experts were surprised that the Appellate Body had resurrected the GATT requirement on unforeseen developments, which they thought had been abandoned and had not been specifically included in the Safeguards Agreement.

[59]In the antidumping context, the Appellate Body recognized that it might not be easy to separate and distinguish the injurious effects of different causal factors but found that this was what was intended by the nonattribution language in the Antidumping Agreement. *United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, paragraph 228.

U.S. Agency Positions on Standard of Review and Other Trade Remedy Issues

In its December 2002 report to Congress,[60] the executive branch concluded that, overall, the United States had fared well in WTO dispute settlement, including in a number of trade remedy cases. Nevertheless, the report raised concerns about how the WTO had applied standard of review in trade remedy cases and stated that some rulings were troubling in "their failure to recognize that agreement terms may be susceptible of multiple, reasonable interpretations among which WTO members may properly choose." The report specifically criticized the Appellate Body ruling in *United States—Antidumping Measures on Certain Hot-Rolled Steel Products from Japan* for how it had applied the legal standard of review in article 17.6(ii).

The executive branch report also stated that in certain trade remedy cases, the WTO had found obligations and imposed restrictions on WTO members that were not supported by the texts of the WTO agreements.[61] The report mentioned the rulings on facts available, unforeseen developments, nonattribution, and several others as examples. The report qualified these criticisms by stating that not all of the WTO findings it cited were based on a problematical analytical approach or that the WTO would have necessarily found in favor of the United States had the proper approach been used. Nevertheless, the report emphasized that the problematic findings were troubling due to their lack of grounding in the texts of the negotiated agreements.

During the course of our work, the Commerce Department and ITC officials reiterated these concerns. ITC officials indicated that they do not agree that the WTO has properly applied standard of review in trade remedy cases. Specifically, they stated that the WTO has applied article 17.6(ii) of the Antidumping Agreement in a manner that raises a question about whether the second sentence of the provision, requiring the WTO to uphold domestic agency determinations that rest on permissible

[60]The report was entitled *Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body: Report to the Congress Transmitted by the Secretary of Commerce, at 6-10* (Dec. 30, 2002), and was required by the Trade Act of 2002, Public Law No. 107-210, § 2105(b)(3), 116 Stat. 1016. The report was prepared by the Commerce Department in consultation with the Secretary of State, the Secretary of the Treasury, the Attorney General, and the U.S. Trade Representative.

[61]In contrast, an EU and a WTO official we interviewed stated that standard of review has been properly applied by the WTO in trade remedy cases and that WTO rulings have not added to obligations or diminished rights of WTO members.

interpretations of the Antidumping Agreement, has real meaning. In these officials' view, the WTO has not allowed for more than one permissible interpretation of the relevant provisions. In this regard, the United States recently proposed that article 17.6 be considered as a topic for discussion in the Negotiating Group on Rules in the ongoing WTO negotiations. In its submission, the United States stated that panels and the Appellate Body have not accepted WTO members' reasonable, permissible interpretations of the Antidumping Agreement.

ITC officials also stated that in some instances, the Appellate Body had ruled incorrectly on important issues and created new obligations, which do not appear in and are unsupported by the plain language of the relevant agreements. One example involved the Appellate Body findings on the nonattribution provision of the Safeguards Agreement. The ITC also found it particularly significant that the WTO had enunciated systemic requirements for this issue, as well as unforeseen developments,[62] even though they are not specifically covered by U.S. law.

Agency Comments and Our Evaluation

We requested comments on a draft of this report from the Secretary of Commerce, the Chairman of the U.S. International Trade Commission, and the U.S. Trade Representative (USTR). The Commerce Department and the ITC provided written comments, which are reprinted in appendixes IV and V. We obtained oral comments from USTR officials, including the Assistant U.S. Trade Representative for Monitoring and Enforcement.

The Commerce Department had three areas of concern regarding our report. First, it emphasized the potential future impact of WTO trade remedy rulings on the U.S.'s ability to impose trade remedies, noting that this potential is far more significant than these rulings' limited impact to date. Commerce cited, in particular, the possible negative ramifications of two WTO rulings. Specifically, it said that the ruling on privatization could impact a significant number of U.S. countervailing duty orders, and that as a result of the EU bed linen ruling, the EU has recently challenged more than 20 U.S. antidumping investigations and reviews. As a result of this increased emphasis, we modified the sections of this report that present U.S. agency views on the potential future ramifications of WTO decisions

[62]In the recent panel report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248-49, 251-54, 258-59/R, the panel found against the United States on the issue of unforeseen developments, among others.

on the U.S.'s ability to impose trade remedies. Second, Commerce raised concerns regarding the composition of the group of legal experts we consulted and our characterization of their views as "majority" and "minority." However, we believe that our methodology for selecting these experts was sound (see app. I). In addition, we believe that our report sufficiently addresses the concerns of the minority of experts. Nevertheless, we have made modifications to the relevant sections of our report to ensure that majority positions and minority concerns are presented in a balanced manner. Finally, Commerce expressed concern that we did not adequately address the executive branch's views on the WTO's application of standard of review and other trade remedy issues. As a result, we modified our report to give more prominent treatment to U.S. agency positions.

The ITC had two main areas of concern regarding the report. First, the ITC said that the report understated the full effect of WTO rulings on the ability of the United States to impose and maintain trade remedy measures in that the full effect of WTO rulings likely has not yet been realized, citing for example several systemic WTO requirements for safeguard determinations. In response to this comment as well a similar comment from the Commerce Department, we modified the relevant sections of the report as discussed above and used examples that the ITC cited. Second, the ITC did not agree that WTO panels and the Appellate Body have properly applied the standard of review in article 17.6(ii) of the Antidumping Agreement. In response to this concern, we have incorporated the ITC's views in our report.

In addition, we obtained technical comments from the Commerce Department and the ITC, which we have incorporated into the report as appropriate. For example, Commerce noted that we had included challenges to WTO members' sunset reviews in some of our statistics on trade remedy measures. As a result, we eliminated the sunset review challenges from our statistics.

USTR provided technical comments such as clarification of certain terminology. For example, USTR noted that the term "domestic determination" usually connotes a final decision by the appropriate agency as to whether dumping has occurred or whether increased imports have caused injury or are threatening injury to domestic industry. Accordingly, we clarified our definition in this report and made other technical changes as appropriate. USTR also noted that U.S. trade remedy measures had been challenged more frequently than those of other WTO members in part

because U.S. trade remedy laws and investigations are more transparent. We have added this point to our report.

We are sending copies of this report to interested congressional committees, the U.S. Trade Representative, the Secretary of Commerce, and the Chairman of the U.S. International Trade Commission. We will also make copies available to others upon request. In addition, the report will be available at no charge on the GAO Web site at http://www.gao.gov.

If you or your staff have any questions about this report, please contact me at (202) 512-4128. Other GAO contacts and staff acknowledgments are listed in appendix VI.

Sincerely yours,

Loren Yager, Director,
International Affairs and Trade

Objectives, Scope, and Methodology

The Ranking Minority Member of the Senate Committee on Finance asked us to conduct a review of the World Trade Organization's (WTO) dispute settlement activity during the past 8 years, focusing on trade remedy disputes. Specifically, in this report we (1) identified the major trends in WTO dispute settlement activity concerning trade remedies; (2) analyzed the outcome of WTO rulings in completed trade remedy cases; (3) assessed the major impacts of these rulings on WTO members' laws, regulations, and practices and on their ability to impose trade remedies; (4) identified the standards of review for trade remedy cases and Appellate Body guidance on how they should be applied; and (5) summarized legal experts' views and U.S. agencies' positions on standard of review and other trade remedy issues.

To identify the major trends in dispute settlement activity during the last 8 years, we developed a database containing all members' requests for consultation (complaints) filed from 1995 through 2002. We obtained the data for the database from the WTO Web site, including data on each request for consultation; data on the complainant(s), defendant, and complaint date; and a short title. To determine which disputes related to trade remedies, we examined the short titles of the cases; the initial complaint filed with the WTO; and WTO documents, including the *Update of WTO Dispute Settlement Cases, January 2003*. Our analysis of trade remedy cases focused exclusively on cases brought under the WTO trade remedy agreements—the Antidumping Agreement, the Agreement on Safeguards, the Subsidies and Countervailing Measures Agreement, and parts of the General Agreement on Tariffs and Trade 1994.

To obtain the number 198 for formal dispute settlement cases filed with the WTO from 1995 through 2002, we combined multiple complaints against one WTO member on the same law, measure, or action into one distinct case for the purposes of our analysis. We did this because multiple WTO members can file complaints against one member. For example, 9 WTO members filed complaints regarding 1 U.S. steel safeguard measure imposed in March 2002. As a result, the 276 separate complaints filed from 1995 through 2002 resulted in 198 distinct cases.

To determine which WTO members imposed the most trade remedy measures from 1995 through 2002, we used WTO data that were based on the notifications filed with the WTO by each member. We excluded challenges to WTO members' sunset reviews in our data on trade remedy measures in response to agency comments. For antidumping and countervailing duty measures, we used summary data that the WTO

Secretariat compiled. Department of Commerce officials noted that these WTO data differ from Commerce's data on U.S. antidumping and countervailing measures and recommended that we use Commerce data. However, because the WTO is the only source of comparable data on the use of trade remedy measures by all WTO members, we ultimately used the WTO data. For safeguards, we analyzed the information contained in the annual reports of the WTO Committee on Safeguards. These reports included information on both preliminary and definitive safeguard measures imposed.

To analyze the outcome of WTO rulings in the completed trade remedy cases, we compiled statistics on panel and Appellate Body findings about whether domestic agency determinations and members' laws were found to be consistent or inconsistent with WTO trade remedy provisions. We defined "completed" cases as those cases in which the Dispute Settlement Body had adopted a panel or Appellate Body decision as of December 31, 2002. To analyze WTO findings about domestic determinations, for the most part, we reviewed the concluding findings at the end of the panel and Appellate Body reports. When several findings were included within a single paragraph in the concluding findings, we generally counted each finding separately. In the several instances in which concluding sections of panel reports did not clearly indicate these findings, we obtained our numbers by evaluating the full reports. For our statistics on findings about domestic agency determinations, we did not distinguish between more important issues—such as the causal relationship between increased imports and injury to domestic industry—and those that seemed less important—for example, notification requirements and certain evidentiary issues. To analyze direct challenges to members' laws in the completed cases, we analyzed the full panel and Appellate Body reports.

To assess the major impacts of the WTO rulings in the completed trade remedy cases on members' laws, regulations, and practices, and on their ability to impose trade remedies, we identified compliance actions taken, or in the process of being taken, by WTO members as a result of the rulings. First, we consulted the WTO Web site to find any and all official documents filed in the completed trade remedy cases. WTO members and relevant parties in the cases file such documents with the WTO to report actions taken following the rulings and recommendations of adopted panel and Appellate Body reports. Alternatively, some documents indicate only agreements between the relevant parties for compliance actions to be taken, or the status of any ongoing negotiations regarding compliance. For cases where official documentation regarding compliance actions was not

found on the WTO Web site, we searched the Dispute Settlement Body archives. We also consulted U.S. agency officials on the one case in which the United States was the complainant.

For the cases in which the United States was the defendant, we also consulted officials from the Commerce Department, the U.S. International Trade Commission (ITC), and the U.S. Trade Representative (USTR). These officials provided us the most up-to-date information on the status of bilateral negotiations and U.S. intentions for certain completed cases where compliance information was not yet publicly available. In addition, we monitored congressional Web sites to glean information on the status of legislation in cases involving challenges to U.S. laws. Finally, we obtained copies of the changes to one U.S. regulation and two established practices from the *Federal Register*.

For cases not involving the United States, for the most part, we did not consult with foreign government officials. We relied primarily on official documents that WTO members and relevant parties had filed with the WTO to report their compliance actions and on pertinent comments from U.S. agency officials.

To identify the WTO standards of review for trade remedy cases, we analyzed the standards and obtained the views of legal experts, including practitioners and academics (see below). To identify how the panels and the Appellate Body were interpreting and applying the standards, we read the panel and Appellate Body reports for the trade remedy cases completed from 1995 through 2002 as well as Appellate Body reports for other relevant WTO dispute settlement cases. In reading these reports, we identified Appellate Body guidance on how the standards should be applied. Finally, we also read the provisions of the Vienna Convention on the Law of Treaties that the Appellate Body had identified as pertinent to how one of the standards should be applied.

To obtain and summarize legal experts' views on WTO standard of review and other trade remedy issues, we conducted structured interviews with 18 legal experts, including practitioners, academics, and advisers on WTO-related trade remedy issues. In addition, we interviewed a current WTO official and an European Union (EU) official; however, in response to agency comments, we reviewed our decision rule on the composition of our expert group and excluded the WTO official and EU representative from our discussion of expert views, since we did not include U.S. agency officials in this group.

To identify the legal experts for our study, we conducted literature searches, read formal publications on WTO standard of review and trade remedies, sought recommendations from other experts and the International Trade Committee of the American Bar Association, and attended seminars on issues surrounding standard of review and trade remedies. Our main criteria for selecting the experts for our study were that they (1) had past experience with WTO trade remedy cases; (2) had been active in writing and/or speaking about issues pertaining to WTO dispute settlement, including standard of review and trade remedies; and (3) constituted a mix of experts representing or affiliated with U.S. domestic interests, foreign interests, or both. We did not choose experts on the basis of their expressed views, because we did not believe that this was methodologically sound. To obtain the views of the experts, we conducted structured interviews to ensure that we asked all of the experts the same questions. We coded the answers to key survey questions to help us analyze the experts' views and assess the frequency with which particular views were held.

To write the case summaries, we consulted the WTO Web site and reviewed the panel and Appellate Body reports for the 25 completed trade remedy cases. We also reviewed the dispute settlement commentaries on the www.WorldTradeLaw.net Web site.

We performed our work from September 2002 to July 2003 in accordance with generally accepted government auditing standards.

Summaries of Completed WTO Trade Remedy Cases

Between the inception of the World Trade Organization (WTO) in 1995 and December 31, 2002, the WTO ruled on 25 cases involving the trade remedies of antidumping, countervailing duties (CVD), and safeguards. Table 3 lists the cases in order of their WTO dispute case number. It is followed by a brief summary of each case that includes information on the case's outcome and major issues.

Table 3: WTO Trade Remedy Dispute Settlement Cases Completed Between 1995 and December 31, 2002

GAO case number	Case name: Defendant – subject	WTO dispute case number	Circulation date of panel or Appellate Body report[a]
1	Brazil – Measures Affecting Desiccated Coconut	DS 22	02/21/1997
2	Guatemala – Antidumping Investigation Regarding Portland Cement from Mexico	DS 60	11/02/1998
3	Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products	DS 98	12/14/1999
4	United States – Antidumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabyte or Above Originating from Korea	DS 99	01/29/1999
5	Argentina – Safeguard Measures on Imports of Footwear	DS 121	12/14/1999
6	Thailand – Antidumping Duties on Angles, Shapes, and Sections of Iron or Non-Alloy Steel and H-Beams from Poland	DS 122	03/12/2001
7	Mexico – Antidumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States	DS 132	01/28/2000
8	United States – Antidumping Act of 1916	DS 136/162	08/28/2000
9	United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom	DS 138	05/10/2000
10	European Union – Antidumping Duties on Imports of Cotton-Type Bed Linen from India	DS 141	03/01/2001
11	Guatemala – Definitive Antidumping Measures on Grey Portland Cement from Mexico	DS 156	10/24/2000
12	United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities	DS 166	12/22/2000
13	United States – Safeguard Measures on Imports of Fresh, Chilled, or Frozen Lamb Meat from New Zealand and Australia	DS 177/178	05/01/2001
14	United States – Antidumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea	DS 179	12/22/2000
15	United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan	DS 184	07/24/2001
16	Argentina – Definitive Antidumping Measures on Imports of Ceramic Floor Tiles from Italy	DS 189	09/28/2001

(Continued From Previous Page)

GAO case number	Case name: Defendant – subject	WTO dispute case number	Circulation date of panel or Appellate Body report[a]
17	United States – Measures Treating Export Restraints as Subsidies	DS 194	06/29/2001
18	United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea	DS 202	02/15/2002
19	United States – Antidumping and Countervailing Measures on Steel Plate from India	DS 206	06/28/2002
20	Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products	DS 207	05/03/2002
21	Egypt – Definitive Antidumping Measures on Steel Rebar from Turkey	DS 211	08/08/2002
22	United States – Countervailing Measures Concerning Certain Products from the European Communities (“Privatization”)	DS 212	12/09/2002
23	United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (“Sunset”)	DS 213	11/28/2002
24	United States – Section 129(c)(1) of the Uruguay Round Agreements Act	DS 221	07/15/2002
25	United States – Preliminary Determinations With Respect to Certain Softwood Lumber from Canada	DS 236	09/27/2002

Source: GAO analysis of WTO data.

[a]In cases that concluded with the adoption of the panel report, the circulation date of the panel report is listed. In all other cases, the circulation date of the Appellate Body report is listed.

GAO Case Number 1: Brazil – Measures Affecting Desiccated Coconut (DS 22)

Complainant: Philippines[1]
Defendant: Brazil

Nature of Complaint

In June 1994, Brazil initiated a countervailing duty (CVD) investigation to determine whether imports of desiccated coconut and coconut milk from Côte d'Ivoire, Indonesia, Malaysia, the Philippines, and Sri Lanka had been subsidized. Brazil imposed provisional CVDs on imports of desiccated coconut from all of these countries except Malaysia in March 1995 and final CVDs in August 1995.

The Philippines challenged the Brazilian CVDs under various provisions of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the World Trade Organization (WTO) Agreement on Agriculture. Brazil's principal argument was that none of the WTO provisions relied upon by the Philippines applies in this case because the Brazilian subsidy investigation was initiated on the basis of an application received prior to the date the WTO Agreement entered into force.

Outcome

The Appellate Body upheld the panel finding that GATT 1994 provisions on CVD investigations did not apply because this dispute involved application of a Brazilian CVD measure based on an investigation initiated prior to January 1, 1995—the date on which the WTO Agreement entered into effect. Accordingly, the Appellate Body upheld the panel's finding that the dispute was not properly before it.

Compliance Action

No compliance action was necessary.

[1]Canada, the EU, Indonesia, Sri Lanka, and the United States were third parties in this case.

Table 4: Case 1 – Major Case Issue and Panel/Appellate Body Findings

Major case issue	Panel findings	Appellate Body findings
Whether GATT 1994 rules on CVD investigations, particularly article VI, and the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) applied to the Philippines' challenge of Brazil's CVD measures on desiccated coconut imports.	GATT 1994 rules on CVDs did not apply to this dispute because the Brazilian investigation that led to the CVD measure was initiated prior to the WTO Agreement's entering into effect for Brazil. The imposition of CVDs must comply both with article VI of GATT 1994 and the SCM Agreement. Article 32.3 of the SCM Agreement indicates that it only applies to CVD investigations initiated pursuant to applications made on or after the date of entry into force for a WTO member of the WTO Agreement. Pursuant to a GATT Tokyo Round SCM Committee decision, the Philippines could have invoked the Tokyo Round SCM Code dispute settlement provisions to resolve this dispute.	Upheld the panel. CVDs may only be imposed in accord with article VI of GATT 1994 and the SCM Agreement. Article VI cannot be applied independently of the SCM Agreement. Article 32.3 of the SCM Agreement clearly states that for CVD investigations, the dividing line between the GATT 1947 system of arrangements and the WTO Agreement is to be determined by the date on which the application was made for the CVD investigation. The Tokyo Round SCM Committee was to handle disputes arising out of CVD investigations initiated pursuant to applications made prior to the date the WTO Agreement became effective.

Source: GAO analysis of WTO panel and Appellate Body reports.

GAO Case Number 2: Guatemala – Antidumping Investigation Regarding Portland Cement from Mexico (DS 60)

Complainant: Mexico[2]
Defendant: Guatemala

Nature of Complaint

Mexico challenged both the initiation of Guatemala's antidumping investigation of imports of grey portland cement from Mexico and various decisions and conduct of the Guatemalan domestic authority during the investigation. Guatemala's principal claim was that Mexico's panel request did not identify any of the three measures listed in article 17.4 of the Antidumping Agreement (ADA), and therefore the panel should not hear the claim.

Outcome

The panel found that Guatemala had failed to comply with article 5.3 of the ADA by initiating the antidumping investigation on the basis of insufficient evidence of dumping, injury, and casual link between dumping and injury. The panel also found that the matters referred to in Mexico's panel request for establishment of a panel were properly before it. The Appellate Body reversed the panel and determined that the dispute was not properly before the panel because Mexico's panel request did not identify the measure it was complaining about. Consequently, it did not consider the panel's findings on article 5.3.

Compliance Action

After the Appellate Body effectively dismissed this case, Mexico brought the case again with a new panel request (see our case summary 11 of *Guatemala – Definitive Antidumping Measures on Grey Portland Cement from Mexico*, DS 156). The new panel considered many of the same issues that were involved in this case.

[2]Canada, El Salvador, Honduras, and the United States were third parties in this case.

Table 5: Case 2 – Major Case Issues and Panel/Appellate Body Findings

Major case issues	Panel findings	Appellate Body findings
Whether article 17 of the ADA provides for a coherent set of rules for dispute settlement specific to antidumping cases that replaces the more general approach of the Dispute Settlement Understanding (DSU).	Article 17 of the ADA provides for a coherent set of rules for dispute settlement specific to antidumping cases that replaces the more general approach of the DSU.	Reversed the panel. Only when a provision of the DSU and a special or additional provision of another WTO Agreement are mutually inconsistent can the special or additional provision be read to prevail over the DSU provision.
Whether Mexico was required by article 6.2 of the DSU and article 17 of the ADA to identify at least one of the three antidumping measures in article 17.4 in its panel request—definitive antidumping duties, acceptance of a price undertaking, or a provisional measure.	Mexico's panel request did not have to identify one of the three types of measures in article 17.4. Article 17.4 is a "timing provision" establishing when a panel may be requested but not establishing the appropriate subject of a request. A formalistic requirement that Mexico identify one of the three types of measures identified in article 17.4 would undermine the status of the special dispute settlement rules in the ADA.	Reversed the panel. In disputes under the ADA relating to the initiation and conduct of an antidumping investigation, members must identify in their panel requests one of the three measures listed in article 17.4 of the ADA.
Whether it was appropriate for the panel to make suggestions about how Guatemala might deal with its substantive violation of the standards for initiation of an antidumping investigation.	Consistent with the authority in article 19.1 of the DSU, it was appropriate for the panel to suggest that Guatemala revoke its existing antidumping measure on imports of Mexican cement.	Since the dispute was not properly before the panel, the Appellate Body came to no conclusions about whether the panel was right or wrong on this issue.

Source: GAO analysis of WTO panel and Appellate Body reports.

GAO Case Number 3: Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products (DS 98)

Complainant: European Union (EU)[3]
Defendant: Korea

Nature of Complaint

The EU challenged Korea's imposition of a safeguard measure on imports of skimmed milk powder preparations from the EU. The safeguard measure was in the form of a quantitative restriction on imports of these dairy products. The EU argued that Korea's safeguard measure was inconsistent with various provisions of the Safeguards Agreement as well as article XIX:1 of GATT 1994. Generally, the EU contended that Korea had not shown that increases in imports resulted from "unforeseen developments," had not examined all factors in its examination of serious injury, and had not adequately considered the extent of application of the safeguard measure.

Outcome

The Appellate Body upheld several panel findings that Korea had acted inconsistently with the Safeguards Agreement because of its determinations regarding serious injury. The Appellate Body also reversed a panel finding on the issue of "unforeseen developments." Accordingly, it recommended that Korea bring its safeguard measure into conformity with the Safeguards Agreement.

Compliance Action

Korea reported to the WTO that it had effectively terminated the safeguard measure on imports of the dairy products on May 20, 2000. By lifting the safeguard measure, Korea considers that it has implemented the recommendations and rulings of the Dispute Settlement Body (DSB).

[3]The United States was a third party in this case.

Table 6: Case 3 – Major Case Issues and Panel/Appellate Body Findings

Major case issues	Panel findings	Appellate Body findings
Whether Korea was required to examine if increases in imports were the result of "unforeseen developments" as described in article XIX:1(a) of GATT 1994.	Korea was not required to examine whether import trends under investigation were the result of "unforeseen developments." The "unforeseen developments" clause in article XIX:1(a) does not provide an independent basis for finding that a safeguard measure violates WTO rules.	Reversed the panel. Although article XIX:1(a) does not establish independent conditions for application of a safeguard, "unforeseen developments" must be demonstrated as a matter of fact for a safeguard measure to be applied. The Appellate Body could not decide whether Korea had violated article XIX:1(a) due to insufficient facts on the record.
Whether Korea was required by article 5.1 of the Safeguards Agreement to ensure that the safeguard applied was not more restrictive than necessary to prevent or remedy serious injury and facilitate adjustment.	When members apply a safeguard measure, they must (1) apply a measure no more restrictive than necessary to prevent or remedy serious injury and facilitate adjustment and (2) provide a reasoned explanation about how authorities reached a conclusion that the measure satisfied all requirements of article 5.1. Korea violated article 5.1 by not including in its recommendations and determinations an explanation of how it concluded that the measure was necessary to remedy serious injury and facilitate adjustment of the industry.	Upheld the panel finding that the first sentence of article 5.1 imposes an obligation on a WTO member applying a safeguard measure to ensure the measure is "commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment." Reversed the panel finding that article 5.1 requires members to explain how it ensures these goals are met when making recommendations about application of a measure that is not a quantitative restriction. Absent a factual record, the Appellate Body could not determine whether Korea had violated the second sentence of article 5.1.
How the standard of review under article 11 of the WTO DSU should be applied to evaluations under article 4.2 of the Safeguards Agreement.	A panel should consider whether a domestic authority (1) examined all facts in its possession (or facts it should have in its possession) and (2) provided an adequate explanation about how facts supported the determinations.	Under article 11, a panel has a duty to examine and consider all evidence before it, not just evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece of evidence.
Whether Korea's finding that serious injury occurred was consistent with article 4.2(a) of the Safeguards Agreement.	Korea violated article 4.2(a) by not adequately examining all serious injury factors.	Not appealed.

Source: GAO analysis of WTO panel and Appellate Body reports.

GAO Case Number 4: United States – Antidumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabyte or Above Originating from Korea (DS 99)

Complainant: Korea
Defendant: United States

Nature of Complaint

Korea challenged the U.S.'s failure to revoke an antidumping order on Korean dynamic random access memory semiconductors (DRAMS) of one megabyte or above. Korea contended that the U.S. regulatory standard[4] under which it refused to revoke the antidumping order with respect to two Korean producers violated the ADA. Korea also challenged the Department of Commerce's rejection of certain cost information and its application of the *de minimis*[5] standard during the administrative review of the antidumping order.

Outcome

The panel found that the U.S. regulatory standard for revoking an antidumping order was inconsistent with the ADA. However, the panel also upheld several aspects of the U.S.'s application of its antidumping laws. The panel recommended that the DSB request that the United States bring its regulatory standard for revoking an antidumping order, and the results of its third administrative review, into conformity with its obligations under the ADA. The parties did not appeal the panel findings.

[4] The regulatory provision in question deals with revocation of an antidumping order based on the absence of dumping and should not be confused with the regulatory provision dealing with "sunset reviews."

[5] *De minimis* refers to the level below which a dumping margin or subsidy is considered to be negligible. Antidumping or CVD actions are terminated in cases where the margin of dumping or level of subsidy is below the *de minimis* level.

Compliance Action

The United States took several compliance actions as a result of the panel's findings. The United States deleted the "not likely" criterion from its regulation and replaced it with a requirement that the Secretary of Commerce consider "whether the continued application of the antidumping duty order is otherwise necessary to offset dumping." Using this modified standard, the United States found that the continued application of the dumping order was necessary to offset dumping and, accordingly, did not revoke the antidumping order. Korea asserted that these actions failed to comply with the DSB's recommendations and rulings. During the compliance panel proceeding, however, the United States revoked the antidumping order as a result of the U.S. sunset review process, primarily because the petitioner withdrew from the proceeding. The United States and Korea then notified the DSB of a mutually agreed-upon solution to the dispute, and the compliance panel proceeding was terminated.

Table 7: Case 4 – Major Case Issues and Panel Findings

Major case issues	Panel findings
Whether the U.S. regulatory standard for revoking an antidumping order, requiring the United States to find that the foreign producer is "not likely" to sell products at less than foreign market value,[a] violates article 11.2 of the ADA.	The U.S. regulatory standard requiring a finding that it is "not likely" that the producer will sell the merchandise in the future at less than foreign market value was inconsistent with article 11.2. The "not likely" standard is not equivalent to the standard in article 11.2 that requires the domestic authority to examine whether "injury would be likely to continue or recur" if the dumping duty were removed.
Whether the U.S. rejection of certain cost data submitted by a Korean firm violated article 2.2.1.1 of the ADA relating to the calculation of costs.	The U.S. rejection of the data did not violate the ADA. Korea failed to establish that an objective and impartial investigating authority could not properly have found that the data did not reasonably reflect the costs associated with the production and sale of DRAMS.
Whether the *de minimis* standard for antidumping investigations in article 5.8 of the ADA also applies to duty assessment procedures under article 9.3.	The *de minimis* standard in article 5.8 does not apply to duty assessments under article 9.3.

Source: GAO analysis of the WTO panel report.

[a]The term "foreign market value" was later replaced with "normal value."

GAO Case Number 5: Argentina – Safeguard Measures on Imports of Footwear (DS 121)

Complainant: European Union (EU)[6]
Defendant: Argentina

Nature of Complaint

The EU challenged Argentina's imposition of safeguards on imports of EU footwear. The safeguard measure took the form of minimum specific duties on these imports. For several years prior to this EU challenge, Argentina had maintained various measures regarding imports of footwear and other clothing and textiles. The EU contended that the safeguard measure violated article XIX:1(a) of GATT 1994 and various provisions of the Safeguards Agreement.

Outcome

The Appellate Body upheld panel findings that Argentina's safeguard investigation and determinations of increased imports, serious injury, and causation were inconsistent with articles 2 and 4 of the Safeguards Agreement, and thus there was no legal basis for applying safeguards. As a result, it recommended that the DSB request that Argentina bring its safeguard measures into conformity with its obligations under the Safeguards Agreement.

Compliance Action

Argentina indicated to the WTO in February 2000 that it intended to implement the DSB's rulings and recommendations.

[6]Brazil, Indonesia, Paraguay, the United States, and Uruguay were third parties in this case.

Table 8: Case 5 – Major Case Issues and Panel/Appellate Body Findings

Major case issues	Panel findings	Appellate Body findings
Whether safeguard measures that meet the requirements of the Safeguards Agreement must also satisfy the requirements of article XIX:1(a) of GATT 1994 with respect to "unforeseen developments."	Safeguard measures that meet the requirements of the Safeguards Agreement also satisfy the requirements of article XIX:1(a) of GATT 1994 on "unforeseen developments."	Reversed the panel's conclusion, but in view of other findings did not decide whether Argentina demonstrated that increased imports occurred as a result of "unforeseen developments." The "unforeseen developments" clause establishes certain "factual circumstances" that must be demonstrated in a safeguard investigation.
Whether Argentina violated article 2 of the Safeguards Agreement by including imports from MERCOSUR[a] countries in its investigation of imports, injury, and causation, but excluding them from application of the safeguards measure.	Argentina violated article 2 because members of a customs union, like MERCOSUR, must apply a safeguard measure to imports from all sources considered in its analysis of imports during the investigation.	Reversed the panel finding that it was dealing with a safeguard measure applied by MERCOSUR on behalf of a member state. The safeguard was applied by Argentina, not MERCOSUR. Upheld the panel's parallelism analysis and concluded that Argentina could not impose safeguards only on non-MERCOSUR sources on the basis of investigation of imports from all sources, including imports from MERCOSUR member states.
Whether the panel correctly applied the proper standard of review in article 11 of the DSU to the EU claims under articles 2 and 4 of the Safeguards Agreement.	The task of a panel is not to conduct a *de novo* review of Argentina's investigation. The panel reviewed the full file and noted portions of the record relied on by Argentina.	The panel correctly stated and applied the appropriate standard of review set forth in article 11. The panel did not conduct a *de novo* review of the evidence or substitute its analysis and judgment for that of the Argentine authorities.
Whether Argentina's examination of increased imports, serious injury, and causation was consistent with articles 2 and 4 of the Safeguards Agreement.	Argentina's examination of increased imports, serious injury, and causation were inconsistent with articles 2 and 4. In its causation analysis under article 4.2(b), Argentina did not adequately consider factors operating within the market other than increased imports, so that injury caused by these other factors could be identified and properly attributed.	Upheld the panel's conclusions, but disagreed with the panel's interpretation of the requirement in article 2.1 on increased imports. It was not reasonable for the panel to examine the trend in imports over a 5-year period. Article 2.1 requires that the increase in imports must have been recent, sudden, sharp, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury.

Source: GAO analysis of WTO panel and Appellate Body reports.

[a]MERCOSUR is a South American customs union composed of Argentina, Brazil, Paraguay, and Uruguay. Bolivia, Chile, and Peru are associate members.

GAO Case Number 6: Thailand – Antidumping Duties on Angles, Shapes, and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (DS 122)

Complainant: Poland[7]
Defendant: Thailand

Nature of Complaint

Poland challenged Thailand's imposition of antidumping duties on imports of certain Polish steel products. The final antidumping duty was a percentage of a determined value of these products. Poland contended that Thailand's injury and dumping determinations were inconsistent with various provisions of the ADA.

Outcome

The Appellate Body affirmed the panel's findings that Thailand had violated the ADA with regard to Thailand's findings about injury to domestic industry and the causal relationship between dumped imports and injury to domestic industry. Although the Appellate Body also upheld the panel's application of the standard of review in article 17.6(ii) of the ADA, it reversed a panel interpretation of article 17.6(i). As a result of these rulings, the Appellate Body recommended that the DSB request that Thailand bring its antidumping measure into conformity with its obligations under the ADA.

Compliance Action

Thailand reexamined aspects of the injury determination that the panel and Appellate Body had found to be inconsistent with the ADA and found that the antidumping measure should be maintained. Subsequently, in December 2001, Thailand informed the WTO that it had fully implemented the DSB's recommendations. In January 2002, Poland and Thailand

[7]The EU, Japan, and the United States were third parties in this case.

announced they had reached agreement that this case should no longer be on the DSB's agenda.

Table 9: Case 6 – Major Case Issues and Panel/Appellate Body Findings

Major case issues	Panel findings	Appellate Body findings
Whether Thai authorities had sufficient evidence of dumping, injury, and the causal link between them to initiate an investigation under article 5.2 of the ADA.	Poland did not establish that the contents of the application were insufficient to meet the requirements of article 5.2.	Not appealed.
Whether Thailand's injury determination was based on an "objective examination" of the facts, as required by articles 3.1 and 17.6(i) of the ADA, since it included evaluation of confidential information that was not made available to the parties.	Confidential government documents, which had not been made available to the parties, could not be reviewed by the panel. Articles 3.1 and 17.6(i) dictate that the reasoning supporting an injury determination must be formally or explicitly stated in the documentary record of the investigation to which interested parties have access and that the factual basis relied upon by the authorities must be discernible from those documents.	Reversed the panel. Investigating authorities may rely on confidential information not shared with the parties. The "facts" referred to in article 17.6(i) embrace all facts, confidential and nonconfidential, that are made available to the authorities of the importing member.
Whether Thailand was required to consider all of the15 injury factors listed in article 3.4 of the ADA in making an injury determination.	The text of article 3.4 is mandatory, and each of the 15 individual factors listed must be evaluated. Therefore, Thailand acted inconsistently with article 3.4 of the ADA.	Upheld the panel's interpretation of article 3.4 and its application of the standard of review in article 17.6(ii). Since article 3.4 requires consideration of all its listed factors, the panel could not have found Thailand's argument, that not all factors need to be considered, a permissible interpretation under article 17.6(ii).
Whether Thailand was required to consider all the factors listed in article 3.5 of the ADA with respect to demonstrating a casual relationship between dumped imports and injury to the domestic industry.	Thailand was not required to consider all the factors listed in article 3.5 since that list is merely illustrative. Thailand had considered the factors raised by Poland.	Not appealed.

Source: GAO analysis of WTO panel and Appellate Body reports.

GAO Case Number 7: Mexico – Antidumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States (DS 132)

Complainant: United States[8]
Defendant: Mexico

Nature of Complaint

The United States challenged Mexico's imposition of antidumping duties on imports of two grades of high-fructose corn syrup (HFCS) from the United States. The final antidumping measure imposed duties of up to $175.50 per metric ton of imported HFCS and ordered the collection of duties retroactive to the imposition of provisional duties. The United States contended that both the initiation of the antidumping investigation and the determination of threat of injury were inconsistent with the ADA.

Outcome

Although the panel upheld the way in which Mexico initiated its antidumping investigation, it concluded that Mexico's imposition of the antidumping measure was inconsistent with various provisions of the ADA. As a result, the panel recommended that the DSB request that Mexico bring its antidumping measure into conformity with its obligations under the ADA. The panel findings were not appealed.

Compliance Action

Mexico revised its antidumping determination following the panel report.[9] However, in a subsequent proceeding, Mexico again concluded that the imports of HFCS constituted a threat of material injury to the domestic sugar industry. As a result, the United States requested a compliance review under article 21.5 of the DSU. In the article 21.5 proceeding, the Appellate Body upheld panel findings that Mexico's revised determination

[8]Jamaica and Mauritius were third parties in this case.

[9]A North American Free Trade Agreement (NAFTA) panel also found that Mexico failed to establish a threat of material injury to the domestic injury.

was inconsistent with various provisions of the ADA. According to U.S. officials, Mexico revoked the antidumping measure in May 2002.

Table 10: Case 7 – Major Case Issues and Panel Findings

Major case issues	Panel findings
Whether Mexico had enough evidence of a threat of injury or of a causal link between dumped imports and injury to initiate an antidumping investigation as provided by article 5.3 of the ADA.	A panel's role under the standard of review in article 17.6(i) is to examine whether an unbiased and objective investigating authority evaluating the evidence and information before it could properly have determined that sufficient evidence of dumping, injury, and causal link existed to justify initiating the antidumping investigation. A panel's role is not to newly evaluate the evidence and information. An unbiased and objective investigating authority could have found sufficient evidence to justify initiation of an antidumping investigation under article 5.3. Under the standard of review in article 17.6(i), as well as article 17.5(ii), in evaluating the consistency of the initiation with article 5.3, a panel may only consider what was actually available to the investigating authority at the time of initiation of the antidumping investigation.
Whether in reaching a determination that a threat of material injury exists, Mexico had to consider factors set forth in both articles 3.7 and 3.4 of the ADA, which deal respectively with threat of material injury and the impact of dumped imports on the domestic industry.	A threat of injury determination requires that the factors in both articles 3.7 and 3.4 be considered. The Mexican investigating authority's determination of threat of material injury failed to adequately address the factors set forth in article 3.4 of the ADA concerning the impact of dumped imports on the domestic industry. Accordingly, its determination of threat of material injury was inconsistent with the ADA.
Whether Mexico properly concluded in its final determination that the relevant domestic industry for purposes of its threat of injury determination was Mexican sugar producers, instead of the industry as a whole.	Mexico ignored possible effects of imports on the portion of the domestic industry's production sold in the household sector and ignored the effect of the household sector on the condition of the domestic producers of sugar. Accordingly, Mexico failed to make a determination of threat of material injury to the domestic industry as a whole, consistent with the requirements of article 3 of the ADA.

Source: GAO analysis of the WTO panel report.

GAO Case Number 8: United States – Antidumping Act of 1916 (DS 136/162)

Complainants: European Union (EU), Japan[10]
Defendant: United States

Nature of Complaint

Japan and the EU separately challenged section 801 of the Revenue Act of 1916 (1916 Act)[11] as being inconsistent with article VI of GATT 1994 and various provisions of the ADA. Section 801 of the 1916 Act allows for private claims against, and criminal prosecutions of, parties that import or assist in importing goods into the United States at a price substantially less than actual market value or wholesale price. The Japan and EU challenges were to the law itself rather than to its implementation.

Outcome

The Appellate Body affirmed the panel conclusions that antidumping legislation, including the 1916 Act, can be directly challenged, absent any particular application. It also upheld the panel findings that the 1916 Act itself was inconsistent with article VI of GATT 1994 and various provisions of the ADA. Accordingly, the Appellate Body recommended that the United States bring the 1916 Act into conformity with its obligations under these agreements.

Compliance Action

The United States continues to work to enact legislation to implement the WTO ruling. Although a number of bills have been introduced in the Congress calling for repeal of section 801 of the 1916 Act, to date no legislation has been passed. As of July 15, 2003, the latest bills were H.R. 1073, introduced in the House of Representatives on March 4, 2003; S. 1080, introduced in the Senate on May 19, 2003; and S. 1155, introduced in the Senate on May 23, 2003. The bills are somewhat different in that the repeals under H.R. 1073 and S. 1155 would not affect pending cases, whereas the S. 1080 repeal would apply to them.

[10]India and Mexico were third parties in this case.

[11]15 U.S.C. § 72.

Table 11: Case 8 – Major Case Issues and Panel/Appellate Body Findings

Major case issues	Panel findings	Appellate Body findings
Whether panels have jurisdiction to hear challenges of antidumping law, absent any specific application of the law.	The panel had jurisdiction to hear direct challenges to the 1916 Act.	Upheld the panel. GATT and WTO case law firmly establish that members may directly challenge legislation. Nothing is inherent in antidumping legislation that would distinguish it from other types of legislation for these purposes.
Whether the 1916 Act constitutes a mandatory or discretionary law within WTO and GATT practice.	The 1916 Act is mandatory. The discretion enjoyed by the United States Department of Justice about whether to initiate a case is not the kind of discretion to transform the 1916 Act into discretionary legislation.	Upheld the panel. The relevant discretion for purposes of distinguishing between mandatory and discretionary legislation is discretion vested in the executive, and not the judicial, branch of government.
Whether article VI of GATT 1994 and the ADA apply to the 1916 Act.	These WTO provisions apply to the 1916 Act.	Upheld the panel. Article VI and the ADA apply to any specific action against dumping. The civil and criminal proceedings and penalties provided for in the 1916 Act are specific actions against dumping.
Whether the 1916 Act is inconsistent with article VI of GATT 1994 and various provisions of the ADA.	The 1916 Act violates various requirements of article VI and the ADA. The 1916 Act violates article VI:2 of GATT 1994 by providing for imposition of fines or imprisonment or for recovery of treble damages.	Upheld the panel. Article VI and the ADA limit permissible responses to dumping to definitive antidumping duties, provisional measures, and price undertakings. To the extent that the 1916 Act provides for civil and criminal proceedings and penalties, it is inconsistent with these obligations.

Source: GAO analysis of WTO panel and Appellate Body reports.

GAO Case Number 9: United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (DS 138)

Complainant: European Union (EU) [12]
Defendant: United States

Nature of Complaint

The United States imposed CVDs on imports of certain hot-rolled lead and bismuth carbon steel products originating in the United Kingdom, as a result of alleged subsidies[13] the British Government granted to British Steel Corporation, a state-owned company, between 1977 and 1986. The British Government began the privatization of British Steel in 1986 and completed it in 1988. The Commerce Department found the sale to be at arm's length for fair market value and consistent with commercial considerations. Notwithstanding these factors, the Commerce Department imposed CVDs on these United Kingdom imports, initially in 1993 and in subsequent annual reviews, on the grounds that a certain proportion of the subsidies granted to British Steel had passed through to the new entities. The EU claimed that the U.S. methodology[14] in calculating the amount of these subsidies was inconsistent with several provisions of the WTO SCM Agreement.

Outcome

The Appellate Body upheld the panel finding that the financial contributions provided to British Steel did not confer a benefit on the new

[12]Brazil and Mexico were third parties in this case.

[13]The subsidies principally were in the form of equity infusions.

[14]This methodology is commonly referred to as the "gamma" methodology.

owners. In doing so, the Appellate Body also upheld a panel finding that faulted the Commerce Department's methodology in presuming that a benefit had been provided to the new owners. Accordingly, it found that the U.S. CVDs were inconsistent with the SCM Agreement and recommended that the DSB request that the United States bring its measures into conformity with its obligations under that agreement. The panel suggested that the United States take all appropriate steps, including revision of its administrative practices, to prevent a violation of the SCM Agreement, but the Appellate Body did not make this specific recommendation.

Compliance Action

Prior to the issuance of the Appellate Body report, the Commerce Department revoked the CVD measure in response to a request from the U.S. industry. However, the Commerce Department changed its methodology as a result of related domestic litigation.[15]

[15]See Delverde, SRL v. United States, 202 F.3d 1360, 1362-1363 (Fed. Cir. 2000).

Table 12: Case 9 – Major Case Issues and Panel/Appellate Body Findings

Major case issues	Panel findings	Appellate Body findings
Whether the panel should have applied the standard of review in article 17.6 of the ADA to a dispute under Part V of the SCM Agreement.	Article 11 is the standard of review that should be applied in cases involving Part V of the SCM Agreement. Article 17.6 only applies in cases brought under the ADA. Ministerial Declaration on Dispute Settlement under article VI of the ADA[a] is not mandatory and simply recognizes the need for consistent resolution of antidumping and CVD disputes but does not mandate any action.	Upheld the panel. The Decision on Review of Article 17.6,[b] which provides that article 17.6 shall be reviewed after a period of 3 years with a view to considering its general application, supports the conclusion that the article 17.6 standard applies only to disputes arising under the ADA.
Whether Commerce Department administrative reviews should have examined whether a benefit accrued to the new owners of British Steel.	The Commerce Department should have examined whether there was a benefit. Irrebuttable presumption in U.S. CVD law that nonrecurring subsidies pass through to a new owner violates the SCM Agreement.	Upheld the panel. Given changes in ownership leading to creation of the new entity, the Commerce Department was required to examine whether a benefit accrued to the new owners. Disagreed with the panel's view that the method for establishing the existence of a benefit is always the same for the original investigation and an administrative review.
Whether a benefit was provided to the new owners as a result of the contributions made to British Steel.	Because the privatization was done through an arm's length, fair market value transaction, subsidies provided to British Steel did not constitute a benefit to the new owners.	Upheld the panel.
Whether the panel exceeded its mandate by finding that no benefit was conferred on the new owners of British Steel.	No benefit was conferred.	Upheld the panel. Panel acted within the scope of its DSU mandate to resolve this issue.

Source: GAO analysis of WTO panel and Appellate Body reports.

[a]The full name is the Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures.

[b]The full name is the Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

GAO Case Number 10: European Union – Antidumping Duties on Imports of Cotton-Type Bed Linen from India (DS 141)

Complainant: India[16]
Defendant: European Union (EU)

Nature of Complaint

India challenged the EU's imposition of antidumping duties on imports of various types of cotton bed linens from India. Due to the high number of domestic producers involved in its investigation, the EU established a sample of domestic producers consisting of 17 of the 35 companies identified as the EU industry. The dumping duties that were imposed differed in amount depending on the exporter in question. India argued that the imposition of antidumping duties was inconsistent with various provisions of the ADA. One of the principal issues involved the EU's practice of zeroing in calculating antidumping margins.

Outcome

The Appellate Body affirmed the panel's finding that the EU's practice of zeroing was inconsistent with the ADA. The Appellate Body also reversed several panel findings and concluded that the EU had acted inconsistently with the ADA in calculating amounts for administrative, selling, and general costs and profits in its investigation. As a result, the Appellate Body recommended that the DSB request that the EU bring its antidumping measure into conformity with its obligations under the ADA.

Compliance Action

After the DSB adopted the Appellate Body report, the EU established lower dumping margins for Indian imports of bed linens. Although it also concluded that dumped imports from India were still causing material injury to the EU industry, the EU suspended application of the duties for these imports. In a subsequent proceeding, the EU determined that there was a causal link between dumped imports from India and material injury to the EU industry, but the EU continued to suspend imposition of the

[16]Egypt, Japan, and the United States were third parties in this case.

antidumping duties. Because India believed that the EU had not complied with the recommendations of the DSB, it brought a proceeding under article 21.5 of the DSU contesting compliance. Although the panel in the article 21.5 proceeding determined that the EU had implemented the recommendation of the DSB, the Appellate Body reversed and found that the EU was still acting inconsistently with the ADA. Accordingly, it recommended that the DSB request that the EU bring its antidumping measure into conformity with that agreement.

Table 13: Case 10 – Major Case Issues and Panel/Appellate Body Findings

Major case issues	Panel findings	Appellate Body findings
Whether the EU violated the ADA by converting negative dumping margins to zero in establishing overall margins of dumping.	The EU acted inconsistently with article 2.4.2 of the ADA by calculating margins of dumping through a methodology that included zeroing of negative price differences. The dumping calculation can only be for the product as a whole and not for individual transactions concerning that product or discrete models of that product. By using zeroing for some models, the EU failed to carry out a comparison with all transactions, as required by article 2.4.2.	Upheld the panel. The EU clearly identified cotton-type bed linen as the product under investigation. In determining a dumping margin for a product, article 2.4.2 refers to a comparison of all comparable transactions. By not offsetting dumping margins, the EU did not take into account export transactions involving models of cotton-type bed linen that were not dumped. This inflated the margin of dumping. Export transactions involving types or models falling within the scope of a like product are "comparable export transactions" within the meaning of article 2.4.2.
Whether the panel failed to apply the legal standard of review in article 17.6(ii) of the ADA by not finding that the EU's zeroing practice was a permissible interpretation.	In accord with the provisions of the Vienna Convention governing treaty interpretation, the panel looked first to the ordinary meaning of the phrase "a comparison of a weighted average normal value with a weighted average of all comparable export transactions" in article 2.4.2, in its context and in light of its object and purpose, in determining whether zeroing was permitted.	The panel applied the standard of review in article 17.6(ii). The panel viewed the EU interpretation of article 2.4.2 of the ADA, allowing it to use zeroing, as impermissible. Thus, the panel was not faced with a choice among multiple permissible interpretations that, under article 17.6(ii), would have required it to give deference to the EU interpretation.
Whether the EU's methodology for determining amounts for administrative, selling, and general costs and for profit, in constructing normal value, was proper under article 2.2.2(ii) of the ADA.	The EU's methodology was consistent with article 2.2.2(ii). The method for calculating amounts for administrative, selling, and general costs and profits under article 2.2.2(ii) may be applied where there is data for only one other exporter or producer.	Reversed the panel. Method for calculating amounts for administrative, selling, and general costs and profits can only be used if data relating to more than one other exporter or producer are available.

Source: GAO analysis of WTO panel and Appellate Body reports.

GAO Case Number 11: Guatemala – Definitive Antidumping Measures on Grey Portland Cement from Mexico (DS 156)

Complainant: Mexico[17]
Defendant: Guatemala

Nature of Complaint

In 1999, Mexico challenged Guatemala's imposition of an antidumping measure on imports of portland cement from Mexico. The measure was in the form of an antidumping duty of 89.54 percent that was imposed on these imports. In its challenge, Mexico contended that the initiation and conduct of the antidumping investigation and the imposition of the measure violated article VI of GATT 1994 and various provisions of the ADA.

Mexico's challenge was a follow-up to an earlier Mexican challenge to Guatemala's imposition of antidumping duties on imports of the same product (see case summary 2). Although the panel in that case ruled that Guatemala had acted inconsistently with several provisions of the ADA and recommended that Guatemala revoke the dumping order, the Appellate Body reversed the panel and found that the dispute was not properly before the panel.

Outcome

The panel determined that Guatemala did not properly determine that there was sufficient evidence to justify initiation of the antidumping investigation. It also found that Guatemala did not properly determine that the imports under investigation were being dumped, that the domestic producer of cement in Guatemala was being injured, or that the imports were the cause of the injury. Accordingly, it concluded that Guatemala had acted inconsistently with various provisions of the ADA. Under the authority provided in article 19.1 of the DSU, the panel recommended that Guatemala revoke its antidumping measure on these imports. However, the

[17]Ecuador, El Salvador, the EU, Honduras, and the United States were third parties in this case.

panel rejected a Mexican request that the panel recommend that Guatemala refund previously collected antidumping duties. The panel findings were not appealed.

Compliance Action

In December 2000, Guatemala informed the WTO that it had removed the antidumping measures in question and complied with its recommendations.

Table 14: Case 11 – Major Case Issues and Panel Findings

Major case issues	Panel findings
Whether the panel should perform a *de novo* review of the evidence under the standard of review in article 17.6(i) of the ADA.	It is not the panel's role under article 17 to perform a *de novo* review of the evidence that was before the investigating authority. The panel must determine whether an unbiased and objective investigating authority evaluating the evidence before it at the time of the investigation could properly have made the determinations Guatemala made. A panel is not to examine any new evidence that was not part of the record of the investigation.
Whether Guatemala had sufficient evidence to justify initiation of the antidumping investigation, consistent with article 5.3 of the ADA.	An objective and unbiased investigating authority could not have properly determined that there was sufficient evidence of dumping and threat of injury to justify Guatemala's initiating an antidumping investigation under article 5.3.
Whether Guatemala informed the Mexican exporter of the essential facts that would be taken into account in imposing the definitive antidumping measure, as required by various provisions in article 6.9 of the ADA.	Guatemala's disclosing to Mexico the essential facts forming the basis of its preliminary antidumping determination and offering to provide interested parties with copies of all information in its file were not sufficient to satisfy the requirements of article 6.9. Article 6.9 is intended to allow exporters a fair opportunity to comment on the important issues in an investigation after the record is closed to new facts. An interested party will not know whether a particular fact is important unless the investigating authority has explicitly identified it as one of the essential facts.
Whether Guatemala was entitled to rely on the best information available, as permitted by article 6.8 of the ADA, for calculating normal value because the Mexican exporter refused to cooperate in the investigation.	Guatemala was not entitled to rely on the best information available. Guatemala did not act as an objective and impartial investigating authority in finding that the Mexican exporter significantly impeded Guatemala's investigation because it objected to Guatemala's including nongovernmental experts with a conflict of interest in its verification team. Although there are consequences under article 6.8 when interested parties fail to cooperate with an investigating authority, they do not apply here since the Guatemalan authority did not act in a reasonable, objective, and impartial manner.

Source: GAO analysis of the WTO panel report.

GAO Case Number 12: United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (DS 166)

Complainant: European Union (EU)[18]
Defendant: United States

Nature of Complaint

The EU challenged a United States safeguard measure imposed on imports of wheat gluten[19] from the EU. The safeguard measure consisted of a quantitative restriction on these imports for 3 years. The United States excluded products from Canada, a U.S. NAFTA[20] partner, and from certain other WTO members from the application of the safeguard. The EU contended that the safeguard measure violated provisions of the Safeguards Agreement and GATT 1994. The EU complaints were directed at the U.S.'s serious injury determination, its causation[21] analysis, and its findings about the relationship between the members included in its investigation and those covered by the safeguard measure.

Outcome

The Appellate Body found that the U.S.'s safeguard measure was applied inconsistently with the Safeguards Agreement and GATT 1994 and recommended that the DSB request that the United States bring the measure into conformity with those agreements. Although the Appellate Body upheld part of the panel findings on serious injury, it reversed the panel findings on another serious injury issue and on an important aspect of the panel's causation analysis. In addition, the Appellate Body agreed

[18]Australia, Canada, and New Zealand were third parties in this case.

[19]Wheat Gluten is a by-product of the industrial production of starch and, among other things, is used to enrich protein in flours for bread, pasta, etc.

[20]The parties to NAFTA are Canada, Mexico, and the United States.

[21]Causation in safeguards cases refers to whether increased imports cause or threaten to cause serious injury to domestic industry.

with the panel that the United States inappropriately excluded imports from Canada from its safeguard measure after including such imports in its injury investigation.

Compliance Action

The safeguard measure expired in June 2001.

Table 15: Case 12 – Major Case Issues and Panel/Appellate Body Findings

Major case issues	Panel findings	Appellate Body findings
Whether the United States was required to examine only the relevant factors listed in article 4.2(a) of the Safeguards Agreement in evaluating serious injury to a domestic industry.	The United States need only consider factors other than those in article 4.2(a) that are clearly raised by the interested parties in the investigation.	Reversed the panel. The United States must evaluate all relevant factors, not just those raised by interested parties.
Whether the causation standard in article 4.2(b) of the Safeguards Agreement requires that increased imports alone cause serious injury to the domestic industry.	Increased imports alone must cause serious injury.	Reversed the panel. Domestic authorities must only find a causal link between increased imports and serious injury that shows a genuine and substantial relationship of cause and effect between the imports and injury.
Whether the United States, consistent with article 4.2(b) of the Safeguards Agreement, adequately explained that injury to the domestic industry from factors other than increased imports was not attributed to increased imports.	Did not fully analyze this issue.	The United States did not adequately show that injury caused to the domestic industry by increases in average capacity to produce wheat gluten was not attributed to increased imports.
Whether the United States properly excluded Canadian imports from the safeguard measure after including such imports in its investigation to determine whether serious injury to the domestic industry had occurred.	The United States was not justified in excluding imports from Canada from its safeguard measure. The United States failed to consider whether non-Canadian imports themselves caused serious injury.	Upheld the panel. Although the United States examined imports from Canada separately, it did not establish that imports from the other sources satisfied the conditions for application of a safeguard measure.
Whether the panel properly applied the standard of review in article 11 of the DSU in evaluating factors dealing with serious injury, as required by article 4.2(a) of the Safeguards Agreement.	The panel applied the standard of review to evaluating four factors.	The panel properly applied article 11 to three factors, but violated article 11 regarding the fourth factor—“profits and losses”—by improperly relying on supplementary information the United States provided to the panel that was not part of the domestic proceeding.

Source: GAO analysis of WTO panel and Appellate Body reports.

GAO Case Number 13: United States – Safeguard Measures on Imports of Fresh, Chilled, or Frozen Lamb Meat from New Zealand and Australia (DS 177/178)

Complainants: Australia, New Zealand[22]
Defendant: United States

Nature of Complaint

Australia and New Zealand challenged a U.S. safeguard measure imposed on imports of fresh, chilled, and frozen lamb meat from New Zealand and Australia. The measure was in the form of a tariff rate quota[23] that was to span 3 years. The safeguard measure did not apply to imports from Canada, Mexico, certain other U.S. trading partners, and developing countries. Australia and New Zealand contended that the safeguard measure violated various provisions of the Safeguards Agreement and GATT 1994. Their complaints were directed at U.S. findings about the definition of the domestic lamb meat industry, the existence of serious injury, and the causal relationship between increased imports and injury to the domestic lamb meat industry.

Outcome

The Appellate Body found that the United States safeguard measure was applied inconsistently with the Safeguards Agreement and GATT 1994 and recommended that the DSB request that the United States bring its measure into conformity with those agreements. Although the Appellate Body upheld a number of important panel findings—including those involving the definition of the domestic lamb meat industry, serious injury, and a part of the panel's causation analysis—it reversed the panel's interpretation of the causation requirements in the Safeguards Agreement.

[22]Canada, the EU, Iceland, and Japan were third parties in this case.

[23]Tariff rate quotas consist of two different tariff rates. A lower rate is applied to a certain quota amount of a product, and a higher tariff rate applies to amounts that exceed that quota.

The Appellate Body also concluded that the panel incorrectly applied the standard of review in article 11 in evaluating the U.S.'s determination about the existence of a threat of serious injury.

Compliance Action

In August 2001, the United States decided to end the application of the safeguard measure on imports of lamb meat, effective in November 2001.

Table 16: Case 13 – Major Case Issues and Panel/Appellate Body Findings

Major case issues	Panel findings	Appellate Body findings
Whether the United States violated article XIX:1(a) of GATT 1994 by failing to demonstrate, as a matter of fact, the existence of "unforeseen developments" prior to applying a safeguard measure.	Found a violation. Investigating authorities must clearly examine the existence of "unforeseen developments" and come to a reasoned conclusion about it.	Upheld the panel finding though it didn't agree with all of the panel's reasoning. Failure to address "unforeseen developments" is not surprising. U.S. legal measures do not obligate it to examine them in its investigation into the situation of a domestic industry.
Whether the United States appropriately defined the domestic industry in its safeguard investigation by including growers and feeders of live lambs.	Found the U.S. definition improper. An enterprise can only be considered a producer of goods it actually makes. Growers and feeders of live lambs are producers of live lambs, not lamb meat.	Upheld the panel. Input products can only be included in defining the domestic industry if they are "like or directly competitive" with the end products.
Whether the panel appropriately interpreted and applied the standard of review in article 11 in its evaluation of the U.S. determination that a threat of serious injury to the domestic industry existed.	The panel's task was limited to reviewing the U.S. threat of injury determination and examining whether the determination provided an adequate explanation of how the facts supported it. The panel should not conduct a new review of the evidence.	Upheld the panel's interpretation of the standard of review, but found that the panel did not apply it properly in examining whether the United States provided a reasoned and adequate explanation of how the facts supported its determination that a threat of serious injury existed.
Whether the U.S. examination of causation was consistent with article 4.2(b) of the Safeguards Agreement.	United States violated article 4.2(b) by applying a "substantial cause"[a] standard and by failing to ensure that the threat of serious injury caused by other factors was not attributed to increased imports. Increased imports alone must be sufficient to cause serious injury.	Upheld the panel finding but reversed its interpretation that increased imports alone must cause, or threaten to cause, serious injury. Since the United States did not provide a meaningful explanation of the injurious effects of six factors it considered, it was impossible to determine whether injury caused by those factors was attributed to increased imports.

Source: GAO analysis of WTO panel and Appellate Body reports.

[a]The panel explained that under the U.S. standard, the U.S. International Trade Commission examines whether imports are an important cause of injury and no less important than any other single cause.

GAO Case Number 14: United States – Antidumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea (DS 179)

Complainant: Korea[24]
Defendant: United States

Nature of Complaint

Korea challenged several aspects of the U.S. antidumping investigation and measures on imports of stainless steel plate in coils (plate) and stainless steel sheet and strip (sheet) from Korea. Specifically, Korea challenged the U.S. treatment of currency conversions and of sales to U.S. companies that failed to pay for the imports due to bankruptcy. Finally, Korea challenged the U.S. calculation of the dumping margin.

Outcome

The panel found several aspects of the U.S. investigation to be inconsistent with the ADA. It found that the currency conversions in the sheet investigation were inconsistent with the ADA, though it also found that the conversions in the plate investigation were consistent with the ADA. The panel also found the U.S. treatment of sales for which payment was never received and its use of multiple averaging periods in its calculation of dumping margins were inconsistent with the ADA. Accordingly, the panel recommended that the United States bring its antidumping duties on Korean steel plate and sheet into compliance with the ADA. The panel findings were not appealed.

Compliance Action

As of April 2003, the antidumping orders were still in effect. According to officials from the Commerce Department, the United States made some revisions in its calculation of dumping margins in this case.

[24]The EU and Japan were third parties in this case.

Table 17: Case 14 – Major Case Issues and Panel Findings

Major case issues	Panel findings
Whether the U.S. actions regarding currency conversions violated the ADA.	The U.S. treatment of currency conversions in the stainless steel plate investigation complied with the ADA. However, in the sheet investigation, the United States acted inconsistently with the ADA by performing unnecessary currency conversions.
Whether the United States treatment of sales for which payment was never received due to a company's bankruptcy violated article 2.4 of the ADA.	The United States acted inconsistently with article 2.4 of the ADA by improperly adjusting for unpaid sales.
Whether the U.S. use of multiple averaging periods for comparing prices—by dividing the period of investigation into two averaging periods to take into account a major devaluation of the Korean won—violated articles 2.4.2, 2.4.1, and 2.4 of the ADA.	The U.S.'s use of multiple averaging periods in this investigation was inconsistent with the requirement of article 2.4.2 to compare a "weighted average normal value with a weighted average of all comparable export transactions." However, the U.S.'s use of multiple averaging periods was not inconsistent with article 2.4.1 or the first sentence in the chapeau of article 2.4 of the ADA.

Source: GAO analysis of the WTO panel report.

GAO Case Number 15: United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan (DS 184)

Complainant: Japan[25]
Defendant: United States

Nature of Complaint

Japan challenged the U.S.'s imposition of antidumping duties on imports of hot-rolled steel products from Japan. Japan claimed that certain provisions of U.S. antidumping laws, regulations, and administrative procedures were inconsistent with the ADA. For example, Japan challenged the U.S.'s application of "facts available" and adverse facts as inconsistent with its ADA obligations. Japan also challenged the U.S.'s statutory method[26] for calculating an "all others" rate as inconsistent with the ADA.

Outcome

The Appellate Body upheld panel findings of U.S. violations relating to the use of facts available, adverse facts, calculation of all other rates, and application of the arm's-length test.[27] The Appellate Body also reversed the panel finding on the issue of nonattribution without specifically finding against the United States on that issue. Although the Appellate Body upheld a panel finding that United States law on captive production was consistent with the ADA, it reversed the panel's finding that the United States had applied the law properly. As a result of the findings against the United States, the Appellate Body recommended that the DSB request that the United States bring its measures into conformity with the ADA. The

[25]Brazil, Canada, Chile, the EU, and Korea were third parties in this case.

[26]Section 735(c)(5)(A) of the Tariff Act of 1930.

[27]This test relates to whether certain sales are "in the ordinary course of trade." The United States treated home market sales by an exporter to an affiliated customer as within the ordinary course of trade so long as prices to the affiliated customers were on average at least 99.5 percent of the average prices charged to unaffiliated customers.

Appellate Body also made important statements about the standard of review in article 17.6 of the ADA.[28]

Compliance Action

In November 2002, the United States completed a new antidumping determination that implemented the recommendations and rulings of the DSB. As a result of the changes made to the dumping margin calculations, the dumping margins for all three companies and all others were reduced.

The United States also revised its rules regarding its arm's-length test to determine if sales are "in the ordinary course of trade." The United States continues work to implement the recommendations and rulings regarding the U.S. antidumping statutory provision on the "all others rate." The United States and Japan agreed to extend the deadline for implementation to December 2003, or until the end of the first session of the next Congress, whichever is earlier.

[28]The Appellate Body concluded that there was no conflict between the factual standard of review in article 17.6(i) and article 11, and that the legal standard of review in article 17.6(ii) supplements rather than replaces article 11. The Appellate Body also concluded that the second sentence of article 17.6(ii) presupposes that application of the rules in articles 31 and 32 of the Vienna Convention on the Law of Treaties could give rise to, at least, two permissible interpretations of some ADA provisions.

Table 18: Case 15 – Major Case Issues and Panel/Appellate Body Findings

Major case issues	Panel findings	Appellate Body findings
Whether the United States violated article 6.8 and annex II of the ADA by using facts available instead of certain information from two companies submitted after the expiration of the deadline for such information.	The United States acted inconsistently with the ADA because an objective and unbiased investigating authority could not have concluded the two companies failed to provide necessary information within a reasonable period of time.	Upheld the panel, but on the basis of modified reasoning.
Whether the United States violated article 6.8 and annex II of the ADA by using certain adverse information because a company did not provide information the United States had requested.	The United States acted inconsistently with the ADA by using certain adverse information because the use of adverse facts is only appropriate when a party does not cooperate in an investigation. An unbiased and objective investigating authority could not have found that the Japanese company failed to cooperate.	Upheld the panel.
Whether the U.S.'s statutory methodology for calculating a dumping margin for exporters and producers was not individually investigated—the "all others rate"—and its application violated article 9.4 of the ADA.	U.S. law governing calculation of a dumping margin for all other exporters, and its application, was inconsistent with article 9.4 of the ADA because it required consideration of margins that were based, in part, on facts available.	Upheld the panel.
Whether the United States "captive production" law[a] is, on its face, and, as applied, inconsistent with the ADA.	The captive production law is not on its face or as applied inconsistent with the ADA. The U.S. International Trade Commission (ITC) made an affirmative injury or threat of injury determination whether they applied the captive production provision or not.	Upheld the panel with regard to the challenge to the captive production law, but reversed the panel with respect to its application. The captive production provision does not require an exclusive focus on the merchant market, nor does it exclude an equivalent examination of the captive market. The ITC provided no adequate explanation about why it failed to examine the merchant market without also examining the captive market in a comparable manner, and therefore acted inconsistently with articles 3.1 and 3.4 of the ADA.
Whether the U.S.'s application of the arm's-length test was inconsistent with article 2.1 of the ADA.	U.S. application of the arm's-length test violated the ADA because it did not rest on a permissible interpretation of the phrase "sales in the ordinary course of trade."	Upheld the panel finding on the basis of modified reasoning.

(Continued From Previous Page)

Major case issues	Panel findings	Appellate Body findings
Whether the U.S.'s reliance on downstream sales between parties affiliated with an investigated exporter and independent purchasers to calculate normal value was inconsistent with article 2.1 of the ADA.	The United States acted inconsistently with article 2.1 of the ADA by using in its calculation of normal value, certain downstream sales made by an investigated exporter's affiliates to independent producers. Normal value is to be determined on the basis of the prices of sales made by the investigated companies themselves, in the ordinary course of trade.	Reversed the panel. Reliance by the United States on downstream sales to calculate normal value rested upon an interpretation of article 2.1 of the ADA that, in principle, is permissible following application of the rules of treaty interpretation in the Vienna Convention.
Whether the United States violated article 3.5 of the ADA by failing to ensure that injury caused by factors other than dumped imports was not attributed to the dumped imports.	The United States did not violate article 3.5 of the ADA because it did not attribute injury actually caused by other factors to dumped imports.	Reversed the panel reasoning without specifically finding against the United States. Investigating authorities must separate and distinguish the injurious effects of other factors from the injurious effects of dumped imports.

Source: GAO analysis of WTO panel and Appellate Body reports.

[a]Section 771(7)(C)(iv) of the Tariff Act of 1930, as amended. This provision distinguishes between the segment of the market consisting of commercial shipments on the open market and the captive segment of the market, which refers to internal transfers of the product that generally do not enter the open market because the product is used by an integrated producer to manufacture a downstream product. Domestic producers whose production is captive, therefore, do not compete directly with importers because their imports generally are not used in the captive production of the downstream product. Japan argued that the captive production provision ignores the fact that a significant part of the domestic industry—captive production—is shielded or protected from the effects of allegedly dumped imports.

GAO Case Number 16: Argentina – Definitive Antidumping Measures on Imports of Ceramic Floor Tiles from Italy (DS 189)

Complainant: European Union (EU)[29]
Defendant: Argentina

Nature of Complaint

The EU challenged Argentina's imposition of antidumping measures on imports of ceramic floor tiles from Italy. The antidumping measures took the form of specific antidumping duties that were based on the difference between the actual import price and a designated minimum export price, whenever the former was lower than the latter. The EU claimed that the antidumping measures were inconsistent with various provisions of the ADA. Among other things, the EU maintained that Argentina disregarded important information provided by exporters, failed to allow for differences in physical characteristics between models of tiles exported to Argentina and those sold in Italy, and did not inform Italian exporters of important facts that formed the basis for the decision to apply antidumping measures.

Outcome

The panel found that Argentina acted inconsistently with various provisions of the ADA and upheld most of the EU claims. As a result, the panel recommended that Argentina bring its antidumping measures into conformity with its obligations under the ADA. The panel findings were not appealed.

Compliance Action

In May 2002, Argentina informed the DSB that on April 24, 2002, it had revoked the antidumping measure at issue in this case.

[29]Japan, Turkey, and the United States were third parties in this case.

Table 19: Case 16 – Major Case Issues and Panel Findings

Major case issues	Panel findings
Whether Argentina acted inconsistently with article 6.8 and annex II of the ADA by calculating dumping margins on the basis of facts available and disregarding, in whole or in part, information submitted to the Argentine investigating authority by Italian tile exporters.	Argentina acted inconsistently with article 6.8 and annex II of the ADA by (1) in large part disregarding exporter information used for determining normal value and export prices; (2) not informing the exporters why it rejected the information; (3) not providing exporters with an opportunity to provide further explanations of questions asked, within a reasonable period; and (4) not giving, in any published determinations, the reasons for rejection of evidence or information. In applying the standard of review in article 17.6(i), the panel found that the Argentine authority failed to perform an objective and unbiased evaluation of the facts by apparently deciding to disregard, in large part, the information provided by the exporters.
Whether Argentina acted inconsistently with article 2.4 of the ADA by failing to make due allowance for physical differences affecting price comparability between the various models of tiles exported to Argentina and those sold domestically.	An objective and unbiased evaluation of the facts of this case would have required Argentina to make additional adjustments for physical differences affecting price comparability. Therefore, Argentina acted inconsistently with article 2.4.
Whether Argentina acted inconsistently with article 6.9 of the ADA by failing to disclose to the exporters the “essential facts” under consideration that formed the basis for the Argentina decision about whether to apply definitive antidumping measures.	Argentina violated article 6.9 by failing to inform the exporters of the “essential facts” under consideration. The exporters could not have been aware, simply by reviewing the complete record of the investigation, that evidence submitted by petitioners and derived from secondary sources, rather than from facts the exporters submitted, would form the primary basis for the determination of the existence and extent of dumping.

Source: GAO analysis of the WTO panel report.

GAO Case Number 17: United States – Measures Treating Export Restraints as Subsidies (DS 194)

Complainant: Canada[30]
Defendant: United States

Nature of Complaint

Canada directly challenged a number of U.S. legal measures[31] that it argued required the United States to treat export restraints[32] as financial contributions, and thus potential subsidies,[33] in violation of the SCM Agreement. Canada argued that export restraints could result in providing subsidies to other products that used or incorporated the restricted product when the domestic price of the restricted product was affected by the restraint. Canada's challenge was only to U.S. legal measures and not to a particular instance in which an export restraint had been the subject of a CVD investigation.

Outcome

The panel found against Canada and concluded that U.S. CVD law is not inconsistent with the SCM Agreement; U.S. law does not require that export restraints be treated as financial contributions and thus subsidies. In addition, the panel suggested that three of the legal measures Canada contested could not be challenged independently of the relevant U.S.

[30]Australia, the EU, and India were third parties in this case.

[31]Canada challenged the following U.S. legal measures: Section 771(5) of the Tariff Act of 1930, codified at 19 U.S.C. § 1677(5), as amended by the Uruguay Round Agreements Act; the U.S.'s Statement of Administrative Action accompanying the Uruguay Round Agreements Act; the Commerce Department's preamble to CVD regulations; and U.S. "practice" related to the treatment of export restraints.

[32]For purposes of this dispute, the panel considered an export restraint to be "a border measure that takes the form of a government law or regulation which expressly limits the quantity of exports or places explicit conditions on the circumstances under which exports are permitted, or that takes the form of a government-imposed fee or tax on exports of the product calculated to limit the quantity of exports."

[33]Under article 1.1 of the SCM Agreement, the definition of a subsidy has two elements: (1) a financial contribution, (2) which confers a benefit. The parties agreed that an export restraint could confer a benefit.

statute.[34] To facilitate its analysis of the challenge to the U.S. legal measures, the panel first concluded that export restraints, as defined in the dispute, do not constitute financial contributions within the meaning of the SCM Agreement. The panel findings were not appealed.

Compliance Action

No compliance action was necessary.

[34]These measures were the Statement of Administrative Action, the preamble to the relevant Commerce Department regulations, and the Commerce Department's administrative practice.

Table 20: Case 17 – Major Case Issues and Panel Findings

Major case issues	Panel findings
Whether export restraints can be considered "financial contributions," and thus subsidies, within the meaning of article 1.1 of the SCM Agreement (Definition of a Subsidy).	Export restraints, as defined in this dispute, do not constitute financial contributions, and thus subsidies, within the meaning of article 1.1. Export restraints in this case cannot be considered government-entrusted or government-directed provision of goods. Rejects U.S. approach that to the extent that an export restraint causes an increased domestic supply of the restrained good—in effect, it is a subsidy.
Whether U.S. law requires the treatment of export restraints as financial contributions, in conflict with article 1.1 of the SCM Agreement.	Section 771(5) of the Tariff Act, as read in light of the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act and the preamble to the U.S. CVD regulations, does not mandate the treatment of export restraints as financial contributions. Section 771(5) does not specifically address export restraints. The SAA and preamble do not require the Commerce Department to interpret section 771(5) as requiring that export restraints be treated as financial contributions. Moreover, Canada did not show that the Commerce Department practice required export restraints to be treated as financial contributions.

Source: GAO analysis of the WTO panel report.

GAO Case Number 18: United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (DS 202)

Complainant: Korea[35]
Defendant: United States

Nature of Complaint

Korea challenged the U.S. imposition of a safeguard measure on imports of certain line pipe from Korea. The safeguard measure that was imposed was in the form of a duty increase for 3 years. The measure applied to imports from all WTO members except Canada and Mexico. Korea maintained that parts of the U.S. investigation as well as the safeguard measure itself violated provisions of the Safeguards Agreement and GATT 1994.

Outcome

The panel and the Appellate Body found several aspects of the U.S. safeguard measure to be inconsistent with provisions of the Safeguards Agreement and GATT 1994. This included U.S. determinations about causation. The Appellate Body also reversed several panel findings about exclusion of certain WTO members from the safeguard measure and the extent of application of the measure, which resulted in findings against the United States. The Appellate Body also reversed the panel on one of its injury findings, which resulted in upholding a United States determination. As a result of the findings against the United States, the Appellate Body recommended that the DSB request that the United States bring its measure into conformity with the Safeguards Agreement and GATT 1994.

Compliance Action

In July 2002, the United States and Korea agreed on several steps to implement the recommendations of the DSB. They agreed that the United States would increase the amount of imports exempt from additional

[35]Australia, Canada, the EU, Japan, and Mexico were third parties in this case.

tariffs, beginning in September 2002 and ending in March 2003. The measure then expired in March 2003.

Table 21: Case 18 – Major Case Issues and Panel/Appellate Body Findings

Major case issues	Panel findings	Appellate Body findings
Whether the United States improperly excluded Canada and Mexico from application of the safeguard measure after including them in its analysis of whether serious injury occurred.	Korea failed to show that the United States had violated the Safeguards Agreement by excluding Mexico and Canada from the measure.	Reversed the panel. The United States violated articles 2 and 4 of the Safeguards Agreement by excluding Canada and Mexico from the safeguard without providing a reasoned and adequate explanation that imports from other sources by themselves satisfied the conditions for applying the safeguard.
Whether the United States adequately explained that the injury to the domestic industry caused by factors other than increased imports was not attributed to increased imports.	The United States violated article 4.2(b) of the Safeguards Agreement by not adequately explaining how it ensured that injury caused by other factors was not attributed to increased imports. The ITC's "more important cause of injury" standard does not satisfy the requirements of article 4.2(b).	Upheld the panel.
Whether Korea made a *prima facie* case that the United States imposed a safeguard measure beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment.	Korea failed to make a *prima facie* case.	Reversed the panel. The United States violated article 5.1 of the Safeguards Agreement by applying the line pipe measure beyond the extent necessary.
Whether U.S. determination of "serious injury or threat of serious injury" was consistent with articles 3.1 and 4.2(c) of the Safeguards Agreement.	The United States violated articles 3.1 and 4.2 (c) of the Safeguards Agreement by not explicitly finding that increased imports either (1) have caused serious injury or (2) threaten to cause serious injury.	Reversed the panel. The ITC's determination of serious injury or threat of serious injury was consistent with the Safeguards Agreement. Articles 3.1 and 4.2(c) do not require a discrete determination either of serious injury or threat of serious injury.

Source: GAO analysis of WTO panel and Appellate Body reports.

GAO Case Number 19: United States – Antidumping and Countervailing Measures on Steel Plate from India (DS 206)

Complainant: India[36]
Defendant: United States

Nature of Complaint

India challenged several aspects of the U.S. antidumping investigation for imports of steel plate from India. Specifically, India challenged the U.S. rejection of certain sales information and its reliance on facts available in its investigation. India further challenged U.S. statutory provisions[37] governing the use of "facts available" and the U.S. treatment of India as a developing country.

Outcome

The panel upheld the U.S. statutory provisions governing the use of "facts available," but found that the United States had not provided a legally sufficient justification for rejecting some sales information during its investigation. Accordingly, the panel recommended that the DSB request that the United States bring its antidumping measure into conformity with its obligation under the ADA. The panel also found that the U.S. "practice" governing total facts available is not a "measure" that can violate the ADA. The panel findings were not appealed.

Compliance Action

In February 2003, the United States informed the DSB that it had implemented the WTO's ruling by issuing a second determination regarding antidumping duties imposed on imports of steel plate from India. Also in February 2003, the United States and India came to an agreement regarding the procedure to be followed if India believes that the United States has not fully complied with the findings and recommendations of the DSB.

[36]Chile, the EU, and Japan were third parties in this case.

[37]Sections 776(a) and 782(d) and (e) of the Tariff Act of 1930.

Table 22: Case 19 – Major Case Issues and Panel Findings

Major case issues	Panel findings
Whether the U.S. rejection of certain sales information and its reliance completely on "facts available" violated article 6.8 and annex II of the ADA.	The United States acted inconsistently with article 6.8 and annex II of the ADA because it did not provide a legally sufficient justification for rejecting certain sales data from the Indian producer and instead relied entirely on "facts available" when calculating dumping margins.
Whether the U.S. statutory provisions governing the use of "facts available" are inconsistent with article 6.8 and annex II of the ADA.	U.S. statutory provisions do not on their face require the investigating authority to act inconsistently with article 6.8 and annex II of the ADA.
Whether the United States failed to give "special regard" to India as a developing country under article 15 of the ADA.	The United States did not act inconsistently with article 15 of the ADA because the article imposes "no specific or general obligation" on members to take any particular action when considering the application of antidumping measures to developing country members.
Whether the U.S. "practice" related to "total facts available" is a "measure" that can violate the ADA.	The U.S. "practice" is not a separate measure that can independently give rise to a WTO violation.

Source: GAO analysis of the WTO panel report.

GAO Case Number 20: Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (DS 207)

Complainant: Argentina[38]
Defendant: Chile

Nature of Complaint

Argentina made two distinct challenges to Chilean restrictions on imports of Argentine wheat, wheat flour, sugar, and edible vegetable oils. Thus, Argentina challenged both Chile's price band system,[39] which Chile applied to calculate tariff rates on these imports, and its imposition of safeguard measures on these imports. In certain situations, the use of Chile's price band system resulted in tariff rates higher than the bound tariff rate in Chile's WTO schedule. Chile also used its price band system to calculate the safeguard measures it imposed on the Argentine imports. Argentina claimed (1) that Chile's price band system violated GATT 1994 and the WTO Agreement on Agriculture and (2) that Chilean safeguards violated various provisions of the Safeguards Agreement as well as GATT 1994. Argentina's safeguards challenges were directed at how Chile evaluated increases in imports, the causal connection between imports and injury to Chile's domestic industry, and the scope of the safeguard measures.

Outcome

With respect to the safeguards issues, the panel determined that Chile had violated various provisions of the Safeguards Agreement and GATT 1994. Nevertheless, the panel did not make a recommendation regarding removal of the safeguard measures because they had been removed before the

[38]Australia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, the EU, Guatemala, Honduras, Japan, Nicaragua, Paraguay, the United States, and Venezuela were third parties in this case.

[39]Under this system, the total amount of a tariff duty that was applied to these Argentine imports was (1) an applied tariff rate of 8 percent and (2) a specific price band duty that was determined for each import by comparing a reference price with the upper or lower threshold of a price band. These upper and lower price bands were calculated for each imported product on the basis of certain international prices. The reference prices were set for each product based on prices in certain foreign markets.

panel published its report. Although the panel findings on safeguards were not appealed, the Appellate Body upheld panel findings that Chile's price band system was inconsistent with GATT 1994 and the Agreement on Agriculture. As a result, the Appellate Body recommended that the DSB request that Chile bring its price band system into conformity with its obligations under the Agreement on Agriculture.

Compliance Action

No action was required with regard to the safeguard measures. Chile's compliance with regard to its price band system involves the WTO Agreement on Agriculture and is due by December 23, 2003.

Table 23: Case 20 – Major Case Issues and Panel/Appellate Body Findings

Major case issues	Panel findings	Appellate Body Decisions
Whether the panel violated article 11 of the DSU by finding that the duties resulting from Chile's price band system were inconsistent with the second sentence of article II:1(b) of GATT 1994.	The duties called for under Chile's price band system are inconsistent with both the first and second sentences of article II:1(b).	Reversed the panel finding with respect to the second sentence of article II:1(b) because Argentina had not made any claim under that sentence. Although the panel acted in good faith, by making a finding on a claim that was not before it, it did not make an objective assessment of the matter and, thus, acted inconsistently with article 11 of the DSU. In making an objective assessment under article 11, a panel is also obligated to ensure that due process is respected.
Whether Chile demonstrated that its safeguard measures were applied as a result of "unforeseen developments," as required by article XIX:1(a) of GATT 1994.	Chile violated article XIX:I(a) by failing to demonstrate that the safeguard measures were applied as the result of "unforeseen developments." "Unforeseen developments" is a circumstance that must be demonstrated as a matter of fact.	Not appealed.
Whether Chile showed sudden and recent increases in imports of products that justified imposing safeguard measures.	Chile acted inconsistently with articles 2.1 and 4.2(a) of the Safeguards Agreement by failing to find a sudden and recent increase in imports of products.	Not appealed.
Whether Chile limited its safeguard measures to remedying serious injury to and facilitating adjustment for its domestic industry, as required by article 5.1 of the Safeguards Agreement.	Chile violated article 5.1 by not ensuring that its safeguards were only applied to the extent necessary to prevent or remedy serious injury and facilitate adjustment. Chile's use of the price band system to calculate safeguards was improper.	Not appealed.

Source: GAO analysis of WTO panel and Appellate Body reports.

GAO Case Number 21: Egypt – Definitive Antidumping Measures on Steel Rebar from Turkey (DS 211)

Complainant: Turkey[40]
Defendant: Egypt

Nature of Complaint

Turkey challenged Egypt's imposition of antidumping duties on imports of steel rebar from Turkey. The antidumping duties imposed ranged from about 23 percent to 61 percent, depending on the exporter. Turkey contended that Egypt's determinations of injury and dumping and the causal relationship between the dumped imports and injury to domestic injury were inconsistent with the ADA. A number of Turkey's claims involved questionnaires that the Egyptian investigating authority sent to respondent companies requesting information about sales prices and the cost of producing rebar.

Outcome

Although the panel upheld 19 determinations of the Egyptian investigating authority, it found that Egypt had violated articles 3.4 and 6.8 of the ADA. Accordingly, the panel recommended that Egypt bring its definitive antidumping measure on imports of steel rebar from Turkey into compliance with the ADA. The panel findings were not appealed.

Compliance Action

In November 2002, Egypt and Turkey informed the WTO that they had agreed Egypt would implement the DSB's recommendations and rulings by July 31, 2003. In May 2003, Egypt reported to the WTO that it was reexamining the dumping calculations of two Turkish companies, and the general injury assessment, in light of this case.

[40]Chile, the EU, Japan, and the United States were third parties in this case.

Table 24: Case 21 – Major Case Issues and Panel Findings

Major case issues	Panel findings
Whether the panel should engage in a new—*de novo*—review of the facts submitted to Egypt.	The standard of review in article 17.6(i) of the ADA precludes a *de novo* review by the panel. It was necessary for the panel to undertake a detailed review of the evidence submitted by Egypt to determine whether an objective and unbiased investigating authority could have reached the determinations that Turkey challenged. The panel would not consider evidence that was not before the Egyptian investigating authority because this could be construed as a *de novo* review.
Whether Egypt appropriately resorted to "facts available" with regard to five Turkish exporters, as permitted by article 6.8 and Annex II of the ADA.	Egypt appropriately resorted to facts available with regard to three Turkish exporters in calculating costs of production. An unbiased and objective investigating authority could have found that the three exporters failed to provide the necessary information Egypt requested. Egypt did not appropriately resort to facts available with regard to two exporters. Although Egypt received information from the two exporters that it had identified as being necessary to be provided, it still found that the exporters had failed to provide the necessary information. Egypt also did not inform the exporters of this finding and, before resorting to the use of "facts available," did not give the exporters the required opportunity to provide further explanations.
Whether Egypt failed to evaluate all of the factors listed in article 3.4 of the ADA, which deals with the examination of dumped imports on the domestic industry.	Although Egypt gathered data on all of the factors listed in article 3.4, it failed to evaluate a number of these factors and thus acted inconsistently with that provision. Under the standard of review in article 17.6(i) panels must determine whether an investigating authority's examination of the facts is objective and unbiased.

Source: GAO analysis of the WTO panel report.

GAO Case Number 22: United States – Countervailing Measures Concerning Certain Products from the European Communities ("Privatization") (DS 212)

Complainant: European Union (EU)[41]
Defendant: United States

Nature of Complaint

The EU challenged U.S. CVDs resulting from 12 investigations on imports of certain EU steel products.[42] The steel products subject to these proceedings were formerly produced by state-owned enterprises that had been privatized in arm's-length transactions for fair market value. The EU complained that the two methodologies[43] the United States used to determine whether past subsidies continued to benefit the privatized company violated the SCM Agreement. In addition, the EU claimed that a provision of U.S. countervailing law—section 771(5)(F) of the Tariff Act of 1930[44]—was, on its face, inconsistent with that agreement.

Outcome

The panel found that where a privatization is at arm's length and for fair market value, the benefit from a prior subsidy to a state-owned enterprise is not passed on to the privatized entity. The Appellate Body affirmed the

[41]Brazil, India, and Mexico were third parties in this case.

[42]The 12 proceedings included 6 original investigations, 2 administrative reviews, and 4 sunset reviews.

[43]These are called the "gamma" and "same person" methodologies. The Appellate Body had faulted the gamma methodology in *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R. A United States Court of Appeals found this methodology to be inconsistent with United States law. Delverde, SRL v. United States, 202 F.3d 1360, 1368-69 (Fed. Cir. 2000).

[44]19 U.S.C. § 1677(5)(F).

panel's finding that the Commerce Department's privatization methodologies were inconsistent with the SCM Agreement but disagreed with the panel reasoning that a fair market value sale of a government entity necessarily extinguishes prior subsidy benefits. The Appellate Body reversed the panel and found that section 771(5)(F) of the Tariff Act of 1930 was consistent with the SCM Agreement.

Compliance Action

On June 23, 2003, the Commerce Department published in the *Federal Register* its final modification to its privatization practice[45] in order to comply with the WTO's rulings and recommendations. The parties have agreed that the United States will use the new methodology in the 12 disputed investigations and reviews by November 8, 2003, and in future cases. In addition, Commerce is evaluating how many other CVD orders might be affected by this new methodology.

[45]68 Fed. Reg. 37125 (June 23, 2003).

Table 25: Case 22 – Major Case Issues and Panel/Appellate Body Findings

Major case issues	Panel findings	Appellate Body findings
Whether the United States acted inconsistently with the SCM Agreement in 12 CVD investigations and reviews by imposing and maintaining CVDs without determining whether a subsidy benefit continued to exist after privatization at arm's length and for fair market value.	The United States violated the SCM Agreement by failing to determine whether the new privatized producer received any benefit from financial contributions previously provided to state-owned producers. Accordingly, the United States violated articles 14 and 19 of the SCM Agreement, which prohibit imposition of CVDs where there has been no subsidization.	Upheld the panel.
Whether a subsidy benefit that is derived from a nonrecurring financial contribution continues to exist following a transfer of ownership of a state-owned enterprise to a new private owner at arm's length and for fair market value.	Once an importing member determines that a privatization has taken place at arm's length and for fair market value, it must conclude that no benefit resulting from the prior subsidization continues to accrue to the privatized producer. Both "gamma" and "same person" methodologies, which the Commerce Department used to determine if a subsidy benefit is extinguished by privatization, violate the SCM Agreement.	Reversed the panel finding on when a subsidy benefit is extinguished by privatization, but upheld the panel finding that "gamma" and "same person" methodologies are inconsistent with the SCM Agreement. There is only a rebuttable presumption, rather than an inflexible rule, that benefits derived from pre-privatization financial contributions expire following privatization at arm's length and for fair market value. "Same person" methodology impedes the Commerce Department from complying with its obligation to examine whether a countervailable subsidy continues to exist where the pre- and post-privatization entities are the same legal person.
Whether section 771(5)(F) of the Tariff Act of 1930 allows the United States to exercise its discretion in a WTO-compatible manner.	Section 771(5)(F) violates the SCM Agreement because it prohibits the Commerce Department from systematically concluding that privatizations at arm's length and for fair market value extinguish prior subsidy benefits.	Reversed the panel. Section 771(5)(F) does not mandate a method contrary to the SCM Agreement for determining the continued existence of a subsidy benefit after a privatization. Therefore it does not prevent the Commerce Department from exercising a WTO-compatible discretion.

Source: GAO analysis of WTO panel and Appellate Body reports.

GAO Case Number 23: United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany ("Sunset") (DS 213)

Complainant: European Union (EU)[46]
Defendant: United States

Nature of Complaint

The EU challenged provisions of U.S. countervailing law and regulations as well as application of the law and regulations to a sunset review of a CVD order on certain imports of carbon steel from Germany. The EU argued that, among other things, the United States had acted inconsistently with the SCM Agreement by automatically self-initiating the sunset review, by failing to apply a 1 percent *de minimis*[47] standard of subsidization set forth in the SCM Agreement, and by applying an improper standard to determine whether a continuation or recurrence of subsidization was likely.

Outcome

The Appellate Body upheld the panel findings that U.S. laws—regarding (1) the automatic self-initiation of sunset reviews and (2) the obligation in the SCM Agreement to determine the likelihood of continuation or recurrence of subsidization in sunset reviews—were consistent with the SCM Agreement. Nevertheless, with regard to the *de minimis* standard, the Appellate Body reversed the panel[48] and found that the 1 percent *de minimis* standard applied only to initial CVD investigations and not to sunset reviews of CVD orders. Accordingly, it found that U.S. law setting

[46]Japan and Norway were third parties in this case.

[47]*De minimis* subsidization is the level below which a subsidy is considered to be negligible. CVD actions are terminated in cases where the level of subsidy is below the *de minimis* level.

[48]Although the panel's majority found that U.S. law was inconsistent with the SCM Agreement, in a rare dissent in WTO dispute settlement cases, one panelist concluded to the contrary.

forth a *de minimis* subsidization threshold for sunset reviews below that set forth for original investigations, as well as its application, was consistent with the SCM Agreement.

In an issue that was not appealed, the panel found that the United States had acted inconsistently with the SCM Agreement in the sunset review by failing to properly determine the likelihood of the continuation or recurrence of subsidization. On the basis of this finding, the Appellate Body recommended that the United States bring its CVD measure into conformity with the SCM Agreement.[49]

Compliance Action

The United States has agreed to implement the panel's finding on the likelihood of continuation or recurrence of subsidization. Commerce Department officials said that implementation would require the agency to conduct a new sunset analysis with respect to this particular German steel order, but would not require a regulatory change.

[49]The United States Court of International Trade also found that the Commerce Department's determination of likelihood of subsidization was inconsistent with U.S. law. AG Der Gillinger Huttenwerke v. United States, 193 F. Supp.2d 1339 (CIT 2002).

Table 26: Case 23 – Major Case Issues and Panel/Appellate Body Findings

Major case issues	Panel findings	Appellate Body findings
Whether absence of an evidentiary standard for self-initiation of sunset reviews in U.S. CVD law is consistent with article 21.3 of the SCM Agreement.	U.S. law does not violate article 21.3. Article 21.3 does not require that investigating authorities apply any evidentiary standard before they self-initiate sunset reviews.	Upheld the panel.
Whether the SCM Agreement requires that a 1 percent *de minimis* standard of subsidization be applied during sunset reviews.	The1 percent *de minimis* standard in article 11.9 of the SCM Agreement applies to sunset reviews described in article 21.3. The ½ percent standard in U.S. CVD law violates article 21.3.	Reversed the panel. U.S. law is consistent with the SCM Agreement because the 1 percent *de minimis* standard in article 11.9 is not implied in article 21.3. A finding that the *de minimis* standard of article 11.9 is implied in sunset reviews would upset the delicate balance of rights and obligations attained in negotiations.
Whether U.S. CVD law and regulations mandate WTO-inconsistent behavior regarding the obligation under article 21.3 for an investigating authority to determine the likelihood of continuation or recurrence of subsidization in a sunset review.	U.S. CVD law is consistent. The language of U.S. law is nearly identical to article 21.3. Though a U.S. regulation imposes severe limitations on the Commerce Department's ability to reach a new rate of subsidization, it does not mandate WTO-inconsistent behavior.	Upheld the panel. The panel acted properly under article 11 of the DSU in evaluating this issue. The panel properly applied the distinction between mandatory and discretionary legislation.
Whether U.S. CVD law was properly applied regarding the Commerce Department's obligation to determine the likelihood of continuation or recurrence of subsidization in a sunset review.	The United States violated article 21.3 of the SCM Agreement by making an improper likelihood determination. The Commerce Department's decision regarding the rate at which subsidization was likely to continue or recur lacked an adequate factual basis.	Not appealed.

Source: GAO analysis of WTO panel and Appellate Body reports.

GAO Case Number 24: United States – Section 129(c)(1) of the Uruguay Round Agreements Act (DS 221)

Complainant: Canada[50]
Defendant: United States

Nature of Complaint

Canada directly challenged section 129(c)(1) of the U.S. Uruguay Round Agreements Act (URAA), claiming that it was inconsistent with provisions of a number of WTO agreements.[51] Canada specifically argued that section 129(c)(1) of the URAA has the effect of requiring the United States to act inconsistently with or precludes the United States from complying with various agreements.

Outcome

Canada failed to establish that section 129(c)(1) is inconsistent with WTO rules. The panel findings were not appealed.

Compliance Action

No compliance action was necessary.

[50]Chile, the EU, India, and Japan were third parties in this case.

[51]Section 129 of the URAA generally authorizes the U.S. Trade Representative (USTR) to request the Commerce Department or the ITC to take actions not inconsistent with WTO rulings in antidumping or CVD cases. Subsection 129(c)(1) provides that Commerce Department determinations under section 129 shall apply to unliquidated entries of merchandise that enter or are withdrawn from a warehouse for consumption on or after the date on which USTR directs Commerce to implement a WTO ruling.

Table 27: Case 24 – Major Case Issue and Panel Findings

Major case issue	Panel findings
Whether section 129(c)(1) of the URAA requires the United States to act inconsistently with provisions of several WTO agreements with respect to unliquidated entries of merchandise occurring prior to the date that the United States Trade Representative (USTR) directs implementation of a WTO ruling.	Section 129(c)(1) does not mandate action that is inconsistent with WTO rules, nor preclude action that is consistent with the rules. Section 129(c)(1) does not apply to unliquidated entries occurring prior to the date that USTR directs implementation of a DSB ruling. Section 129(c)(1) only addresses entries that take place on or after the implementation date.

Source: GAO analysis of the WTO panel report.

GAO Case Number 25: United States – Preliminary Determinations With Respect to Certain Softwood Lumber from Canada (DS 236)

Complainant: Canada[52]
Defendant: United States

Nature of Complaint

Canada challenged the U.S. imposition of provisional CVD measures on certain softwood lumber imports from Canada. Canada also claimed that the U.S. law and regulations concerning expedited and administrative reviews of CVD orders were, in several respects, inconsistent with the SCM Agreement and Article VI of GATT 1994.

Outcome

Although the panel upheld the United States on several issues, including the direct challenges to U.S. law, it found that the methodology the Commerce Department used to determine the subsidy benefit was inconsistent with the SCM Agreement. The panel also found that the Commerce Department's retroactive application of the provisional measure was inconsistent with the SCM Agreement. Accordingly, it recommended that the DSB request that the United States bring its provisional measure into conformity with its obligations under that agreement. The panel findings were not appealed.

Compliance Action

In November 2002, the United States notified the DSB that the CVD measures challenged by Canada were no longer in effect and that the provisional cash deposits had been refunded. Canada, however, argued that Commerce's final determination was substantially unchanged and subsequently brought another WTO complaint challenging that

[52]The EU, India, and Japan were third parties in this case.

determination. The WTO panel's decision in that case is due to be made public around the time this report is issued.[53]

[53]*United States—Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*, WT/DS257.

Table 28: Case 25 – Major Case Issues and Panel Findings

Major case issues	Panel findings
Whether Canadian provincial sales of timber from public lands can amount to a subsidy within the meaning of article 1 of the SCM Agreement, which defines a subsidy for purposes of the agreement.	Canadian provincial stumpage programs by which standing timber was being supplied to tenure holders is a provision of a good within the meaning of article 1.1(a)(l)(iii) of the SCM Agreement. The Commerce Department's determination that the provision of stumpage constituted a financial contribution was not in violation of article 1.1.
Whether the U.S.'s use of U.S. rather than Canadian stumpage prices to determine whether a benefit was provided was consistent with the SCM Agreement.	By using U.S. stumpage prices to determine the benefit to the recipient, the United States acted inconsistently with article 14 of the SCM Agreement, which deals with calculation of subsidy benefits. U.S. stumpage prices do not constitute the prevailing market conditions in Canada. The United States provided no rationale consistent with article 14(d) for rejecting Canadian private stumpage prices as the basis for calculating the benefit.
Whether the United States was required to determine whether a benefit was passed to downstream producers of lumber by unrelated upstream producers of log inputs.	The United States acted inconsistently with article 1.1(b) of the SCM Agreement by assuming that the subsidy passed through to the producers of the lumber. The United States should have examined whether certain lumber producers benefited from the financial contribution given to tenure holders that do not own processing facilities or who sell logs and lumber to the lumber producers.
Whether the U.S.'s retroactive application of the provisional measure was inconsistent with article 20.6 of the SCM Agreement.	The U.S.'s retroactive application of the provisional measure in the form of cash deposits or bonds is inconsistent with article 20.6 of the SCM Agreement since that provision allows only for retroactive application of definitive duties, not preliminary duties. Imposition of provisional measures, such as the requirement of a cash deposit or the posting of a bond, is not necessary to preserve the right to apply definitive duties retroactively.
Whether provisions of the U.S. Tariff Act of 1930 and accompanying regulations[a] mandate action inconsistent with articles 19 and 21 of the SCM Agreement concerning expedited and administrative reviews of CVDs.	The U.S. Tariff Act and accompanying regulations do not preclude the U.S. executive branch from acting consistently with its obligations under articles 19 and 21 of the SCM Agreement with respect to expedited and administrative reviews. Legislation that merely gives the executive authority discretion to act inconsistently with the SCM Agreement cannot be challenged before a panel, independent of its actual application.

Source: GAO analysis of the WTO panel report.

[a]The challenge was to sections 777A(e)(2)(A) and (B) of the Tariff Act of 1930 and 19 C.F.R. §§ 351.214(k) and 351.213(b) and (k).

Experts That GAO Interviewed for this Report

Raj Bhala, Rice Distinguished Professor, School of Law, University of Kansas

Richard Cunningham, Senior International Trade Partner, Steptoe & Johnson LLP

William Davey, Professor of Law, University of Illinois College of Law

James Durling, Partner, Willkie, Farr & Gallagher

David Gantz, Professor of Law and Director, International Trade Law Program, James E. Rogers College of Law, University of Arizona

John Greenwald, Partner, Wilmer, Cutler & Pickering

Gary Horlick, Partner, Wilmer, Cutler & Pickering

Robert Howse, Professor of Law, University of Michigan School of Law

John Jackson, Professor of Law, Georgetown University Law Center

Peter Lichtenbaum, Partner, Steptoe & Johnson LLP

Robert Lighthizer, Partner, Skadden, Arps, Slate, Meagher & Flom LLP

Mitsuo Matsushita, Professor Emeritus, Tokyo University, and Counsel, Nagashima, Ohno & Tsunematsu law firm in Tokyo

Christopher Parlin, Counsel, Kaye Scholer LLP

Joost Pauwelyn, Associate Professor of Law, Duke University Law School

John Ragosta, Partner, Dewey Ballantine LLP

Frieder Roessler, Executive Director, Advisory Center on WTO Law

Terence Stewart, Managing Partner, Stewart and Stewart Law Offices

Daniel Tarullo, Professor of Law, Georgetown University Law Center

Comments from the Department of Commerce

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

July 14, 2003

Mr. Loren Yager
Director, International Affairs and Trade
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Yager:

Thank you for providing the U.S. Department of Commerce with a copy of the draft General Accounting Office (GAO) report entitled "World Trade Organization – Standard of Review and Impact of Trade Remedy Rulings" for review and comment. We appreciate the opportunity to share our views on the report with you and request that you include these views in an appendix to the report.

The report explains that a Member of Congress requested GAO to review trends in WTO disputes over trade remedy cases since 1995, including the outcomes of those disputes and how those outcomes affected members' ability to impose trade remedies. GAO also undertook to identify the standards of review that the WTO applies when ruling on trade remedy disputes and to present legal experts' views on the WTO's application of these standards and related issues.

To respond to this request, the draft report primarily follows a two-pronged approach. First, it compiles and assesses certain statistics regarding the number and broad outcomes of relevant disputes. Second, it reports on a poll of certain experts. While GAO itself carefully refrains from engaging in any analysis either of factors that might underlie the statistical data or of the application of the legal standard of review by WTO panels and the Appellate Body, we are concerned that the manner in which the results of this essentially quantitative approach are reported will inadvertently mislead readers about the Administration's own assessment of these issues, the position of the United States in current trade negotiations, and the very real implications of some WTO panel and Appellate Body decisions that apparently gave rise to the request to GAO for this report.

1. Statistical Reporting

The draft report notes that during the covered period, WTO members notified 1405 trade

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See comment 1.

remedy measures, of which 239 (17%) were from the United States. According to GAO's data, WTO members challenged 78 of those measures (over half of which – 43 – were U.S. measures) in WTO disputes. GAO concludes that these rulings resulted in few changes in WTO members' laws, regulations, and practices, and reports advice from U.S. officials that the rulings generally have not impaired the United States' ability to impose trade remedies.

See comment 2.

The combination of the data presented by GAO and the reported comments of people whom it interviewed unfortunately obscures the potential impact of the WTO dispute settlement system on the United States' use of trade remedies. As the report notes, the number of trade remedy cases has increased over time, and many of the cases fall within the later half of the reporting period. More importantly, however, the report fails to recognize the potential future ramifications of some of these decisions, such as *Privatization* and *Bed Linens*. The fact that these decisions have not *yet* impacted a substantial number of cases is far less significant than the fact that they have the potential to do so. For example, of the 33 countervailing duty measures imposed by the United States since 1995, more than one-third may be impacted by the *Privatization* decision. Similarly, as a result of the *Bed Linens* decision, the EU alone has recently challenged over twenty Department of Commerce dumping determinations. It is important in this regard to bear in mind that there is no statute of limitations in the WTO dispute settlement system. In short, it is premature to conclude that the WTO dispute settlement system has not impacted the United States' ability to impose trade remedies.

See comment 3.

Further, without more meaningful probing, the simple data concerning the number of measures reported and challenged may also be misleading. For example, WTO members apparently challenged only 78 of the 1405 notified measures; no challenges at all are noted for the 226 measures notified by India, or 74 notified by Canada. Thus, the WTO rendered adverse decisions involving relatively few of the 1405 reported measures. Judged on this basis alone, it can hardly be surprising that the draft report's presentation implies that the impact of the dispute settlement system on members' ability to impose trade remedies must be small. Similarly, given this small universe of proceedings, the position of the United States can be seen as not materially different in numerical terms than that of other members.

See comment 4.

The GAO's statistics also show that while 18% of the United States' 239 measures were challenged, members challenged only 3% of the EU's 182 measures and 6% of Argentina's measures, and as noted above, none of India's 226 measures. Thus, the system has unquestionably had a disproportionate impact on U.S. trade remedies – while the percentage of adverse determinations among countries is roughly equal, the United States has had more measures in dispute. As presented, the data also do not convey the rapid rise in the number of measures imposed by WTO members other than the United States and the European Union, nor do they shed light on why few or no measures of these other members have thus far been challenged (although the GAO reports the observation that the United States has a large and desirable market).

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In sum, to understand whether the impact of the WTO dispute settlement process on the United States' administration of its trade remedy laws is potentially greater than the data suggest, it may be important for GAO to delve deeper into the data against which the U.S. experience is being compared, and to determine whether the administration of trade remedy laws by other countries differs materially from that of the United States in ways (*e.g.*, with less transparency) that tend to discourage challenges elsewhere.

2. Poll of Legal Experts

Of more fundamental concern is the draft report's presentation of information gleaned from GAO's polling of legal experts, particularly about the experts' assessments of the manner in which WTO panels and the Appellate Body have interpreted and applied applicable standards of review. The draft report concludes that a "majority" are of the opinion that WTO panels and the Appellate Body properly apply the standard of review and have correctly ruled on important issues in trade remedy cases, along the way appropriately engaging in "gap filling" when interpreting the WTO agreements.

It is important for GAO to consult outside persons with expertise in the field, and to present insights gained from those interviews. Presenting the results of such consultations as "majority" and "minority" views, however – with the clear implication that the "majority" view carries the truth of the matter – immediately calls into question the composition of the group GAO chose to poll. There can be no doubt in this case that what is expressed as the "majority" view directly correlates to the number and backgrounds of the sample group.

See comment 5.

Specifically, of the 18 experts GAO interviewed, a substantial majority either (i) have records of criticism of trade remedy measures, in particular antidumping measures, (ii) regularly represent foreign respondents in U.S. unfair trade actions, and thus have clients with a direct stake in sustaining a critical approach by the WTO in its review of challenged measures, or (iii) were WTO officials directly involved in dispute settlement proceedings during the period in which many of the decisions covered by the report were issued. Had the GAO included more members of the trade bar who represent primarily domestic interests in trade actions (the GAO list of experts includes only three), the results of the poll would undoubtedly have been different. We note also that although the GAO list of experts includes a current EU official, conspicuously absent are U.S. government officials.

See comment 6.

The experts polled by GAO are indeed eminent practitioners and scholars whose opinions are valuable in assessing the WTO dispute settlement process. But to categorize their views as "majority" and "minority" devalues the import of the insights those experts otherwise have to offer as individuals. In short, this section of the draft report suffers from severe sample bias, and should be revised if GAO is to avoid conveying as fact what clearly are views that can be attributed, fairly or not, to persons having pre-ordained answers to the questions put to them.

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3. U.S. Government Position

See comment 7.

The draft report briefly notes that U.S. officials advised GAO that the WTO rulings generally have not impaired the United States' ability to impose trade remedies. We wish to ensure, especially in the context of the findings of the draft report, that this statement is not misinterpreted.

See comment 8.

As noted on page 7 of its December 2002 report to Congress on the Executive Branch's strategy on WTO dispute settlement,

> the United States does not agree with the approach that WTO panels and the Appellate Body have sometimes taken in disputes, and is concerned about the potential systemic implications. In particular, the executive branch views with concern the manner in which WTO panels and the Appellate Body have applied the applicable standard of review in disputes involving U.S. trade remedy and safeguards matters, and instances in which they have found obligations and restrictions on WTO Members concerning trade remedies and safeguards that are not supported by the texts of the WTO agreements.

See comment 9.

As set forth in that report, the Administration is taking action in the current round of WTO negotiations to address its concerns and those of the Congress. Specifically, the United States has proposed as a topic for discussion in the negotiating group on Rules the special standard of review in the Antidumping Agreement. Also, in the Dispute Settlement Understanding review, the United States has made proposals aimed at improving transparency and flexibility and Member control in dispute settlement proceedings.

The December 2002 report and these proposals, therefore, make it clear that the Administration has some serious concerns with WTO dispute settlement.

Thank you again for the opportunity to share our views with you.

Sincerely,

Theodore W. Kassinger
General Counsel

The following are GAO's comments on the Department of Commerce's letter dated July 14, 2003.

GAO Comments

1. Our report presents data on changes to WTO members' laws, regulations, and practices that have resulted from WTO rulings through December 2002. The data clearly indicate there have been few changes in WTO members' laws, regulations, and practices to date.

2. In response to the Commerce Department's (and the ITC's) comment(s), we modified our characterization of U.S. agency views on the impact of WTO rulings on the U.S.'s ability to impose trade remedies. The sections of this report that provide U.S. agencies' viewpoints now reflect the agencies' increased emphasis on the potential future ramifications of WTO decisions indicated by the Commerce Department (and ITC).

3. The Commerce Department states that our report's presentation implies that the impact of the WTO dispute settlement system on members' ability to impose trade remedies must be small based on statistical information we present. However, our report simply provides data on the number of WTO members' measures that were notified to the WTO from 1995 through 2002 and the number that were challenged. Moreover, we have modified the report to reflect agency concerns about the impact of the dispute settlement system on members' ability to impose trade remedies.

4. While our report provides aggregate data on the number of trade remedy measures imposed by all WTO members from 1995 to 2002, it was beyond the scope of our review to analyze trends in the growth of these measures for individual WTO members and reasons for the challenges to these measures.

5. While the Commerce Department raised concerns regarding the composition of the group of legal experts we consulted, we believe that our methodology for selecting these experts as outlined in appendix I is sound. As noted, we selected individuals who were identified as leading experts on WTO dispute settlement. These individuals—academics, practitioners, and advisors on WTO-related trade remedy issues—have been active in writing and/or speaking about issues pertaining to WTO dispute settlement. Moreover, the Commerce Department's assertion that we only included three experts

representing domestic petitioners' interests is incorrect. Although we did not choose experts on the basis of their expressed views because we believe that approach would have been methodologically flawed, our information indicates that of the nine practitioners we interviewed, three represent domestic petitioners, three represent foreign respondents, and three represent both. Nevertheless, in responding to agency comments, we reviewed our decision rule on the composition of the group of experts we consulted. Subsequently, we excluded the views of the current WTO official and the EU representative from our discussion of expert views since we did not include current U.S. officials in this group. However, we briefly noted the views of the current WTO and EU officials.

6. While we believe that our report sufficiently emphasizes the concerns of the minority of experts regarding standards of review and the other trade remedy issues discussed in this report, we have made modifications to the relevant sections of our report to ensure that majority positions and minority concerns are presented in a balanced manner.

7. See comment 2.

8. In response to the Commerce Department's (and the ITC's) comment(s), we added a section to our report presenting U.S. agencies' positions on WTO dispute settlement issues, including the executive branch's position as outlined in its December 2002 report to Congress.

9. In response to the Commerce Department's comments, we have added material to our report that discusses relevant aspects of the recent U.S. submission to the WTO Negotiating Group on Rules.

Comments from the United States International Trade Commission

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, DC 20436

July 14, 2003

Mr. Loren Yager
Director, International Affairs and Trade
United States General Accounting Office
Washington, DC 20548

Dear Mr. Yager:

The U.S. International Trade Commission (Commission) thanks you for the opportunity to comment on this draft report, *Report to the Ranking Minority Member, Committee on Finance, U.S. Senate, on the World Trade Organization: Standard of Review and Impact of Trade Remedy Rulings*, GAO-03-824. As an initial matter, the Commission appreciates the efforts made by the General Accounting Office (GAO) to attempt to document the current state of dispute settlement activity by the World Trade Organization (WTO) with regard to trade remedies. The Commission, as a primary agency with the statutory authority to administer the trade laws that are subject to WTO challenge, wishes to articulate its position on the major questions addressed by GAO's draft report.

See comment 1.

As an initial matter, the Commission thinks that it is premature to conclude that current WTO decisions will not prove to have impaired the United States' ability to impose trade remedies. In fact, in several instances, the Administration has terminated a remedy or reached a negotiated settlement with complaining parties following adverse decisions.[1] Moreover, it is likely that the full effect of WTO rulings on the ability of the United States to impose and maintain trade remedy measures has not yet been realized. The Commission has altered some practices because of Appellate Body reports in response to direct requests from the President pursuant to existing U.S. statutes, but it is not clear whether these changes in practice will satisfy the WTO. Moreover, the changes in practice the Commission can make are necessarily limited given that all decisions must be made pursuant to U.S. law, which has not changed. While the 1994 Uruguay Round Agreements Act is presumed to have put all U.S. laws into compliance with the WTO Agreements, WTO panels and the Appellate Body continue to find that Commission determinations violate WTO Agreements.

[1] According to Table 2 of the GAO draft report, 22 U.S. trade remedy measures have been subject to revision or removal as a result of WTO dispute settlement. The removal or revision of particular measures impairs the ability of the affected U.S. industries to obtain the relief to which they believed they would receive under U.S. law.

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See comment 2.

Of particular significance, WTO panels and the Appellate Body have enunciated three systemic requirements for safeguard determinations, none of which is specifically contemplated by U.S. law: (1) to find that the injurious import increases resulted from developments unforeseen by trade negotiators; (2) where imports from partners to free-trade agreements (such as NAFTA) are excluded from a safeguard measure, to conduct an injury analysis that excludes those partners' imports; and (3) to separate and distinguish the injurious effects of other factors from the effects of imports. The Appellate Body has extended the last requirement to the antidumping context, an area in which the Commission typically issues a much larger number of determinations in comparison to safeguards. These and other important issues continue to be reviewed by the WTO in new cases; and in the absence of any change to the status quo, these issues are likely to result in further adverse rulings.

See comment 3.

The Commission also does not agree that WTO panels and the Appellate Body generally have properly applied the standard of review. For example, under Article 17.6(ii) of the Antidumping Agreement, a panel is to apply international rules of interpretation, which the Appellate Body has interpreted as being Articles 31 and 32 of the Vienna Convention on the Law of Treaties. If there is more than one permissible way to interpret a provision of the Antidumping Agreement, and a competent authority's determination is consistent with one of those interpretations, the panel must uphold the competent authority's determination. The WTO, however, has applied Article 17.6(ii) in a manner that raises the question of whether the second sentence of the clause, requiring the WTO to uphold a determination made on a permissible interpretation of the Agreement, has real meaning because WTO panels and the Appellate Body have not allowed for more than one permissible interpretation of the relevant provisions.

See comment 4.

In light of continued adverse findings by the Appellate Body, it appears likely that the United States will be subject to additional adverse WTO rulings, with all the attendant consequences. Thus, it is too early to fully assess the extent to which the current WTO applications of the standard of review will impair the United States' ability to impose trade remedies.

Thank you for your efforts and the opportunity to comment.

Sincerely,

Deanna Tanner Okun
Chairman

Jennifer A. Hillman
Vice Chairman

Marcia E. Miller
Commissioner

Stephen Koplan
Commissioner

The following are GAO's comments on the U.S. International Trade Commission's letter dated July 14, 2003.

GAO Comments

1. In response to the ITC's (and Commerce's) comment(s), we modified our characterization of U.S. agency views on the impact of WTO rulings on the U.S.'s ability to impose trade remedies. The sections of this report that provide U.S. agencies' viewpoints now reflect the agencies' increased emphasis on the potential future ramifications of WTO decisions.

2. In response to the ITC's comments, we have added some discussion of the safeguards issues that the ITC raises in the report's section on expert views and U.S. agencies' positions.

3. In response to the ITC's comments, we have added some discussion of their views on article 17.6(ii) in the report's section on expert views and U.S. agencies' positions.

4. See comment 1.

GAO Contacts and Staff Acknowledgments

GAO Contacts

Elizabeth Sirois (202) 512-8989
Nina Pfeiffer (202) 512-9639
Richard Seldin (202) 512-4094

Staff Acknowledgments

In addition to those named above, Jason Bair, Josey Ballenger, Sharron Candon, Martin De Alteriis, Rona Mendelsohn, Mary Moutsos, Mark Speight, and Laura Turman made key contributions to this report.

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