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Opportunities in the WTO for Increased Liberalization of Goods: Making Sure the Rules Work for All and That Special Needs are Addressed

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Abstract

Different governments focus on different parts of the existing World Trade Organization rules as posing opportunities for their producers to expand trade if the rules were relaxed or eliminated. While this may be understandable, it is the premise of this Essay that such an approach, if pursued, would result in slower trade liberalization, not increased liberalization, as those segments of industry perceiving that the existing equilibrium is not to their advantage are given no options other than to oppose further liberalization. When, as in agriculture, domestic politics can threaten the survival of governments, liberalization without strong rules can only be slow liberalization.

OPPORTUNITIES IN THE WTO FOR INCREASED LIBERALIZATION OF GOODS: MAKING SURE THE RULES WORK FOR ALL AND THAT SPECIAL NEEDS ARE ADDRESSED

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INTRODUCTION

The multilateral trading system is highly successful in expanding market opportunities for many sectors within agriculture and manufacturing because it recognizes the need for internationally-agreed upon rules that permit countries to address problems in an agreed-upon manner as markets are opened. Historically, the question has not been whether countries will agree to expand trade opportunities in an environment without rules. Few, if any, countries would consider such an approach desirable or workable. Rather, the issue has been what rules are needed for countries to have the confidence to liberalize their economies, particularly import sensitive sectors, so as to achieve overall benefits. "Most Favored Nation" (or "MFN") and "National Treatment" are two important principles/rules that give trading nations the confidence that trade will not be discriminatory. Rules on government subsidies and on injurious dumping have given countries assurance that their producers will win or lose on the basis of underlying competitive strength, not based on the deep pocket of a treasury or the artificial price signals created by dumping. Similarly, countries have been able to tell their producers and workers that should liberalization result in serious dislocations, temporary relief would be available to re-group or permit an orderly retreat from the market under Article XIX of the General Agreement on Tariffs and Trade 1994 (or "GATT") and the Agreement on Safeguards. Indeed, within the United States, organized labor's historic support for trade

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liberalization was premised upon the availability of such safeguard options to prevent massive dislocations. As a result, every major trade agreement entered into by the United States since 1942 includes a safeguard provision, and the safeguard concept in U.S. law is found in principles identified in 1934.¹

During the Uruguay Round, there were efforts to bring historically sensitive sectors—agriculture and textiles—fully under the traditional GATT rules. Because of the sensitivities and/or peculiarities of these sectors, certain transitional provisions were included to allow countries to address potential politically unacceptable inequalities. Thus, for example, importing countries agreed to the full integration of textiles and apparel into the GATT/World Trade Organization² (or “WTO”) system at the end of a ten year phase-in period, as long as there were special transitional safeguard provisions.³ In agriculture, where many products are perishable and have a short shelf life and others are deemed to be politically sensitive, special safeguard provisions were permitted in limited circumstances to give more automatic adjustment rights.⁴

Not surprisingly, different governments focus on different parts of the existing rules as posing opportunities for their producers to expand trade if the rules were relaxed or eliminated. While this may be understandable, it is the premise of this Essay that such an approach, if pursued, would result in slower trade liberalization, not increased liberalization, as those segments of industry perceiving that the existing equilibrium is not to their

1. See Trade Agreements Act of 1934, ch. 474, §1, 48 Stat. 943 (1934). That statute planted the seeds of American safeguard policy in stating that the expansion of foreign trade would serve.

[A]s a means of assisting in the present emergency in restoring the American standard of living, in over-coming domestic unemployment and the present economic depression, increasing the purchasing power of the American public, and in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining, and commerce. . . .

Id.

See also 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992), at 1730-31 (Terence P. Stewart, ed.) (1993) [hereinafter UR TREATISE].

2. See Marrakesh Agreement Establishing the World Trade Organization, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

3. See Agreement on Textiles and Clothing, Apr. 15, 1994, art. 6, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

4. See Agreement on Agriculture, Apr. 15, 1994, art. 5, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

advantage are given no options other than to oppose further liberalization. When, as in agriculture, domestic politics can threaten the survival of governments, liberalization without strong rules can only be slow liberalization.

Let us look at a number of areas where rules need to be revisited, maintained, or added.

<i>Rules That Need to be Revisited:</i>	• Safeguards
	• Dispute Settlement
<i>Rules That Need to be Maintained:</i>	• Anti-dumping
	• Subsidies
<i>Rules That Need to be Added:</i>	• Perishable agriculture
	• Structural excess capacity

Rules are the lifeblood of liberalization. As a new round of negotiations is pursued, hopefully the WTO Members will ensure a structure of rules that will permit maximum trade liberalization.

I. RULES TO BE REVISITED

A. Safeguard Agreement

Every system needs a safety release valve to handle situations where too much pressure has been brought to bear on some part of the system. In the multilateral trading system, the product-specific safety release valve has primarily been contained in Article XIX of the GATT,⁵ and, since the Uruguay Round, in the Agreement on Safeguards.⁶ There has also been a safety release valve for countries *in toto* in exceptional situations—the balance of payments provision.⁷ Special provisions have also existed for developing countries under Article XVIII.⁸ Moreover, some issues have been viewed as too sensitive to be trumped by trade objectives (Article XX, public health, morals, etc.), at least where the action at issue is not a disguised trade restraint.

Article XIX of the GATT 1947 provided for “Emergency Action on Imports of Particular Products.” Paragraph 1(a) of the Article provides:

5. See General Agreement on Tariffs and Trade, Apr. 15, 1994, art. XIX, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1154 (1994) [hereinafter GATT 1994].

6. See Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm [hereinafter Agreement on Safeguards].

7. See GATT 1994 art. XII.

8. See GATT 1994 art. XVIII.

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.⁹

While the threshold for action was high, the concept was very much to encourage countries to participate in the liberalization activity by assuring participants that tools existed to deal with a crisis in any particular industry affected. As stated in the GATT Activities 1988 review of the Safeguards negotiations taking place in the Uruguay Round:

The GATT's draftsmen, in the 1940s, realized that governments would be unwilling to accept far-reaching obligations to reduce and stabilize obstacles to trade unless they were allowed certain limited "escapes" from its general principles. Article XIX is one such "escape clause" and the actions it permits are usually referred to as "safeguards" measures.¹⁰

Hatters Fur, an early GATT challenge to a U.S. escape clause action, upheld the U.S. action and suggests that a reasonable construction of Article XIX is possible by countries implementing the Article that would allow problems to be addressed when they arise.¹¹

Nonetheless, whether because of the administrative requirements that Article XIX suggested or the need for more effective tools, GATT Contracting Parties took a variety of actions that

9. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947].

10. See GATT 1947, *GATT Activities 1988*, at 44 (1989).

11. In *Hatters Fur*, members of the Working Party determined that "unforeseen developments" should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession. It would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen all possible developments at the time when the concession was negotiated. See *Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under Article XIX of the GATT*, GATT/CP/106 (Oct. 22, 1951) [hereinafter *Hatters Fur*].

were not specifically authorized under Article XIX, particularly in textiles and clothing.¹² While the textile sector's problems, identified in the 1950s and 1960s, resulted in the Multifibre Arrangement (or "MFA"), it has taken decades for textiles and clothing to be fully integrated into the international trading system. Indeed, complete integration is not scheduled until the end of 2004.¹³

Similarly, Article XIX of GATT 1947 contains the concept of a balance of rights and obligations after any action by a Member, meaning either compensation to trading partners affected by a safeguard action or the potential for retaliation against exports for the country taking action.¹⁴ Since GATT Contracting Parties were not able to take safeguard actions only against selected countries, compensation could become prohibitive even though only one or a few countries were causing market difficulties. While the concept of a balance of rights makes sense since no unfair trade practice is alleged, it also made a country's use of the safeguard right very difficult regardless of the state of *extremis* being faced by the domestic industry seeking relief. For many countries, it became important to find ways to get relief without having to pursue formal safeguard procedures and remedies. As explained below, this need resulted in countries turning increasingly to the use of "grey-area" measures.

Approximately 130 Article XIX invocations or notifications have occurred since 1947. This number is small in comparison with the number of relief measures adopted by countries. When due to political ramifications, the use of Article XIX is impracticable, Contracting Parties have resorted instead to the use of "grey-area" measures—measures taken that are not part of articulated GATT rights and obligations. Grey-area measures have emerged as an attractive option because countries can negotiate these types of measures outside of GATT rules or disciplines (although such actions are arguably challengeable under Articles XXII and XXIII). One of the other perceived "advantages" of grey-area measures is the lack of compensation or retaliation with grey-area measures. Moreover, grey-area measures may be imposed in fact for extended

12. See GATT Doc. L/1374 (1960), reprinted in GATT, 9th Supp. BISD 106 (1961).

13. See Agreement on Textiles and Clothing, Apr. 15, 1994, art. 9, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

14. See GATT 1947 art. XIX, para. 3a.

periods of time. These agreements include Orderly Marketing Arrangements (“OMAs”), Voluntary Restraint Agreements (“VRAs”), and other bilateral arrangements. Export restraint agreements have been used to cover such important trade areas as automobiles, consumer electronic products, steel and steel-related products, agricultural products, textiles and footwear. The legal status of these measures has never been formally clarified by the Contracting Parties. While attempts have been made since the beginning of the Tokyo Round in 1973 to specify rules that will cover these measures in the General Agreement, no rules were in place as of the end of the Tokyo Round.

Grey-area measures, in numbers exceed the total “escape clause” actions under Article XIX. According to a 1991 GATT source, as of early 1991, only twenty-four Article XIX actions were in force. *See* Table 1 (listing Article XIX actions in effect as of early 1990). In comparison, 284 grey-area agreements were known to be in force. *See* Table 2 (breaking down grey-area measures by product as of December 1990). According to GATT sources, approximately forty percent of these arrangements have been in effect since 1985; and sixty percent of the existing arrangements have no explicit expiration date.¹⁵

During the Uruguay Round, countries were at last able to conclude an Agreement on Safeguards.¹⁶ The Agreement implementing Article XIX of GATT 1994, prohibits “grey-area” measures, permits limited selectivity in certain circumstances, encourages adjustment, and reduces the cost of taking safeguard action by prohibiting retaliation if relief is in place for three years or less.¹⁷ A good test for the trading system is whether

15. UR TREATISE, *supra* note 1, at 1725-26.

16. Under GATT 1947, safeguards were regulated only by Article XIX, and it was the Uruguay Round that created the SG Agreement, which adds clarity and introduces certain changes. The SG Agreement was negotiated in large part because GATT Contracting Parties had been increasingly applying a variety of so-called grey area measures (bilateral voluntary export restraints, orderly marketing agreements, and similar measures) to limit imports of certain products. These measures were not imposed pursuant to Article XIX, and thus were not subject to multilateral discipline through the GATT, and the legality of such measures under the GATT was doubtful. The Agreement now clearly prohibits such measures, and has specific provisions for eliminating those that were in place at the time the WTO Agreement entered into force. *See* World Trade Organization, *Goods: Rules on trade remedies* at www.wto.org/english/thewto_e/whatis_e/eol/e/default.htm (discussing historical background to Agreement on Safeguards).

17. *See* Agreement on Safeguards art. 9.

countries are able to address highly disruptive trade surges within the system now that the WTO and the Agreement on Safeguards are in operation. If not, the trading system will face significant reluctance by participants to engage in further trade liberalization on a multilateral basis, will see the rise of "grey-area" measures despite their prohibition, or will experience a serious rupture as individual countries are not able to withstand the trading pressure in politically-sensitive sectors.

In examining pre- and post-WTO safeguard activity, several facts must be kept in mind. Many developing countries undertook relatively few tariff bindings prior to the Uruguay Round or were long-term users of balance-of-payment ("BOP") exceptions.¹⁸ In contrast, developed countries typically had reduced most industrial tariffs to very low levels over the various rounds of trade negotiations.¹⁹ Developed countries also were not users of BOP exceptions.²⁰ Because the major developed countries had historically focused on each other during tariff negotiations, some developing countries enjoyed tariff liberalization in developed countries because of the "most-favored-nation" rights/obligations of the GATT without making significant tariff bindings and tariff reductions in their own country.²¹ This "free rider" situation halted during the Uruguay Round, as developing country Members of the WTO undertook tariff bindings and reduction obligations on nearly all industrial and agricultural goods.²² Still, some developing countries maintain some tariff flexibility as tariff bindings (even after reductions) are at levels above applied rates in 1993, meaning that they could raise tariffs to some extent on particular products without resorting to Article XIX. At the same time, countries that were long-term users of balance-of-payment exceptions were asked to reassume their obligations or to justify continuation of the BOP measures, with significant pressure to phase out the temporary restraints.²³ Finally, many countries that were not Members of GATT prior to the Uruguay

18. See UR TREATISE, *supra* note 1, at 396.

19. See *id.*, at 385-458.

20. For a discussion on GATT articles XII and XVII (BOP provisions), see *id.*, at 1859-1875.

21. See *id.*, at 386.

22. See generally WTO Agreement vols. 2-26, 28-30, 33 I.L.M. 1144 (1994). These volumes contain the individual member tariff bindings and reduction obligations.

23. See UR TREATISE, *supra* note 1, at 1874-1875.

Round joined the WTO. Most of the new Members are developing countries, so there are significantly more developing country Members today than there were under the GATT.

Because most industrial tariffs are relatively low in developed countries, one would expect that safeguard actions in such nations would flow from large dislocations in demand patterns. Illustrative examples include the collapse of demand in the former Soviet Union; financial crisis in Southeast Asia and the resulting contraction in demand in a number of important countries; severe recessions; and dramatic change in exchange rates. Similarly, this effect could be the result of liberalization in those sectors that have historically enjoyed significant tariff and other protection (e.g., parts of agriculture). Because developing countries have, on average, much higher levels of tariffs than do developed countries, one would expect developing countries to become more avid users of the safeguard provisions as tariff bindings expose domestic producers in developing countries to their first serious challenges from imported goods.²⁴

From 1947 through 1988, the following nations brought 112 of the over 130 total Article XIX cases brought within the GATT: Australia (38), United States (27), European Communities (25), and Canada (22).²⁵ This amounts to three to four actions per year globally, nearly three of which were from these four major developed countries or groups of countries. By contrast, the 2000 annual report of the WTO Safeguard Committee (Annex 2) shows the following number of safeguard cases brought under the WTO since 1995:

24. As shown by the table below, developing countries generally continued to maintain higher average tariffs even after the Uruguay Round.

Trade-Weighted Average Tariffs for Industrial Goods

	Pre-Uruguay Round	Post-Uruguay Round
Developed countries	6.3%	3.9%
Developing countries	15.3%	12.3%
Countries in transition	8.6%	6.0%

Source: Schott, Jeffrey J., *The Uruguay Round: An Assessment* (Institute for International Economics, 1994) at 61 (Table 7). The above rates for developing countries are based on bound, not applied, rates. *Id.*

25. See GATT, GATT ACTIVITIES 1988, at 44 (1989).

Developing countries:	35 cases
Countries in transition:	5 cases
Developed countries:	10 cases ²⁶

Thus, developed countries now represent only 20% of safeguard cases (fewer than two per year) while developing countries now account for 70% of safeguard activity (six to seven per year).

WTO Members continue to impose “grey-area” measures on non-WTO Member countries. For example, China’s accession protocol (draft) has an annex on measures currently in effect that certain WTO Members will phase out over a particular period of time²⁷ and the press has reported that Mexico and China are negotiating over the phase out of Mexico’s coverage of 1400 Harmonized System (“HS”) categories of imports under its dumping law under procedures that would not have been appropriate had China been a WTO Member at the time.²⁸ For WTO

26. The following countries have brought safeguards cases since 1995:

Developing countries:	Argentina (3); Brazil (1); Chile (4); Colombia (1); Ecuador (2); Egypt (3); El Salvador (2); India (11); Korea (4); Morocco (1); Venezuela (3).
Countries in transition:	Czech Republic (1); Latvia (1); Slovak Republic (2); Slovenia (1).
Developed countries:	Australia (1); United States (9).

See Report (2000) of the Committee on Safeguards, G/L/409 (Nov. 23, 2000) at 8-12.

27. See Working Party on Accession of China, Draft Report of Working Party on Accession of China to the WTO, WT/ACC/SPEC/CHN/1/Rev. 4 (Oct. 24, 2000); see also *China Provides New Trade Data as Accession Talks Recommence*, INSIDE U.S. TRADE, Sept. 15, 2000.

28. In November 2000, Mexico and China met to continue negotiations on the terms of a bilateral agreement prior to China’s accession to the WTO. A primary focus of discussions was the status of Mexico’s existing anti-dumping duty orders applicable to imports from China. As reported by the Chinese press:

In April 1993, Mexico carried out anti-dumping investigations on thousands of products exported from China and levied duties on them ranging between 16 and 1,105 per cent of the actual value of the product. So far, more than 1,000 products are still on the Mexican anti-dumping list, according to Long, noting that this goes against the basic principles of the WTO.

The Mexican side said it needed a transitional period to smooth away the difficulties facing its domestic businesses.

In consideration of this, China has agreed that Mexico’s anti-dumping arrangement, which violates WTO rules, can be phased out gradually, Long said. *Mexico Not Likely to Hinder WTO Bid*, CHINA DAILY, Nov. 11, 2000, at www.chinadaily.com.cn/cndydb/2000/11d1-1wto.b18.html.

Members, however, the Safeguards Agreement required that all "grey-area" measures be eliminated or brought into conformity with the Agreement by the end of 1998, with Members afforded an opportunity to select one measure that could be maintained until the end of 1999.²⁹ Only the European Community ("EC") exercised the latter option, maintaining restraints on Japanese automobiles that expired at the end of 1999.³⁰

The increased use of the Agreement on Safeguards by developing countries (and others) is a positive development. It is simply not realistic to assume that trade liberalization can go on at a significant pace without some significant dislocations and the occasional need for regrouping in particular sectors. The activity level for 140 nations (nine to ten cases per year) is almost certainly too low if other restraints are not being used by countries. It is unclear whether the relatively low usage rate is due to (a) difficulties for most Member nations in implementing their rights and complying with their obligations, (b) constructions of WTO rights and obligations by WTO panels and the Appellate Body, or (c) other reasons. What is certain is that the direction taken by the panels and Appellate Body, to date, is discouraging use of Article XIX and the Agreement on Safeguards. The result will be predictable—a slowdown in liberalization efforts within the multilateral context (already seen in the slowness of progress towards a new Round within the WTO) and/or a search for new bilateral solutions outside of the system.

It is not the function of this Essay to review in depth the decisions of individual panels or the Appellate Body. Whether the constructions of the panels and the Appellate Body have

29. See Agreement on Safeguards art. 11.2.

30. See Agreement on Safeguards art. 11.2. As noted by the WTO Secretariat: Article XIX safeguard measures in effect when the WTO Agreement came into force must end not later than eight years after they were first applied, or by the end of 1999, whichever is later. Grey area measures in existence when the WTO came into force must be brought into conformity with the Agreement on Safeguards, or removed according to a notified timetable, ending not later than 31 December 1998. Each member was given the right to maintain a single notified measure for one year longer, to 31 December 1999. For the European Communities, the measure concerned was specified in an annex to the agreement, and consists of restrictions on imports of Japanese cars and light commercial vehicles. That is, and will remain, the sole example of this exception, as no other member exercised its right to nominate a similar measure within the time limit of 90 days after the entry into force of the WTO.

WTO SECRETARIAT, GUIDE TO THE URUGUAY ROUND AGREEMENTS 109 (1999).

been correct or not, the four panel decisions and three Appellate Body decisions make the Safeguard provisions harder to use and hence less likely to be used. Indeed, all of the panel proceedings that have gone to report and all of the Appellate Body decisions have found each safeguard action reviewed to violate some WTO obligations.³¹

Despite the fact that most GATT, and now WTO, Members viewed the "unforeseen developments" provision of Article XIX of GATT 1947 and GATT 1994 to have been a dead letter for a number of decades and to have been carefully avoided in the Agreement on Safeguards, the Appellate Body has breathed life back into the concept by requiring governments to make a finding on the matter. Since no subsequent decision has defined the parameters of what can be found to be an "unforeseen development," it is unclear whether this issue alone will make the Agreement on Safeguard largely unusable. Certainly, for developing

31. The following are the safeguard panel reports and AB decisions that have been issued:

Case	Panel Report	Appellate Body Report
<i>Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98</i>	WT/DS98/R (June 21, 1999)	WT/DS98/AB/R (Dec. 14, 1999)
<i>Argentina—Safeguard Measures on Imports of Footwear, WT/DS121</i> <i>United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the EC, WT/DS166</i>	WT/DS121/R (June 25, 1999) WT/DS166/R (July 31, 2000)	WT/DS121/AB/R (Dec. 14, 1999) WT/DS166/AB/R (Dec. 22, 2000)
<i>United States—Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand, WT/DS177 and United States—Safeguard Measure on Imports of Lamb Meat from Australia, WT/DS178</i>	WT/DS177/R WT/DS178/R (Dec. 21, 2000)	

A number of other cases have been initiated although some have been abandoned as safeguard actions have terminated or have not been pursued (excluding transitional safeguard cases under the Textiles Agreement):

- *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202.*
- *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products from Argentina, WT/DS207.*
- *Hungary—Safeguard Measure on Imports of Steel Products from the Czech Republic, WT/DS159.*
- *United States—Safeguard Measure Against Imports of Broom Corm Brooms from Colombia, WT/DS78.*
- *Colombia—Safeguard Measure on Import of Plain Polyester Filaments from Thailand, WT/DS181.*

countries, it will be hard to argue that trade expansion is not foreseeable at the time of negotiations when they move from high tariffs to significantly lower tariffs. The message for developing countries, if the panels and Appellate Body place significant emphasis on this aspect of safeguard actions, will be to hold off on further trade liberalization moves or to seek other tools to address the problems particular sectors face.

The concern that should exist within the WTO is that collectively the positions taken by those challenging safeguard actions seek a construction of the Agreement that would make it an extraordinary event that any country could ever bring a safeguard action. If the complainants are successful in their efforts, they will have effectively sealed the system off from effective pressure release in particular sectors. They will collectively share the responsibility for slowing the pace of trade liberalization or for encouraging the misuse of other provisions (e.g., SPS measures, standards, etc.).

Actions needed by the WTO include a reopening of the Safeguards Agreement to clarify the requirements so as to be sure that the Agreement can be used exactly when it should be available. This may require a clarification that "unforeseen developments" are not required going forward or a set of examples of what would constitute unforeseen developments that would make the concept workable for the types of situations likely to arise. Emergency action should be available when needed. Creating artificially onerous burdens to the use of safeguard measures will disserve the trading system, not promote it. Consider the experience of the United States at the time of adoption of the current U.S. safeguard law in 1974:

From 1951 through 1962 the escape clause worked reasonably well. The criteria were fair and equitable, and relief was occasionally granted. However, in 1962 the Administration proposed and the Congress adopted rigid and stringent tests of injury and causal relationships between tariff concessions, increased imports and serious injury.

As a result, the provisions of the Trade Expansion Act of 1962 for invoking the escape clause (like the adjustment assistance provisions also adopted in that Act, which contained similar injury tests) have proven to be an inadequate mechanism for providing relief to domestic industries injured by import competition. One result of this inadequacy has been a num-

ber of special "voluntary" agreements for industries deemed by the Congress or the Executive to be suffering from excessive imports. The Committee believes it is better to provide a fair and reasonable test for any industry which is being injured by imports—a determination made by an independent factfinding body, such as the International Trade Commission—than to rely on ad hoc agreements for a few select industries.³²

Similarly, Members of the WTO must be concerned that the construction of what is required in an investigation and in a published report of the investigation is manageable by all Members. A review of panel reports often suggests a requirement of detail in investigation reports that may be unreasonable to expect all Members to be able to satisfy. For example, in *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*³³ ("Korea-Dairy"), the Appellate Body determined that for Members to meet their notification requirements in safeguard cases, they must, at a minimum, address all items listed in Article 12.2 and Article 4.2 of the Agreement on Safeguards.³⁴ Thus, under Arti-

32. Senate Report No. 93-1298, 93d Cong. 2d Sess. 119 (1974). Labor groups in the United States have traditionally supported trade liberalization as long as adequate and effective safeguards remain in place to address emergency situations. For example, in testimony before the Senate Finance Committee considering the Trade Expansion Act of 1962, George Meany, President of the AFL-CIO, stated:

As its name implies this bill proposes to increase the volume of America's foreign trade. We endorse that objective. We endorse it because this increased trade will strengthen the unity of the free world and promote the cause of democracy in the newly established or less developed nations in Africa, Asia, and Latin America.

We also endorse it because increased trade will stimulate the economic growth of the United States—if the safeguards provided in the bill are retained. . . .

[W]e, in the AFL-CIO have consistently supported the various extensions of the Reciprocal Trade Act over the last 28 years. . . .

We must be clear eyed in facing the problem of imports. . . . We could talk for days about the broad, general benefits of foreign trade; the many jobs it creates compared to the few jobs it costs; the tastes, and more important, the needs of our people that only imports can satisfy. . . .

Even so, we can't ignore the workers, the industries and the communities that suffer the consequences of increased imports.

Hearings Before the Senate Finance Committee on the Trade Expansion Act of 1962, H.R. 11970, Part 1 at 239-41 (July 24, 1962) (statement of George Meany, President American Federation of Labor).

33. *See id.*

34. *See Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, Appellate Body Report, WT/DS98/AB/R (Dec. 14, 1999) [hereinafter *Korea-Dairy*].

cle 12.2, Members must provide the Committee on Safeguards with all pertinent information including “evidence of serious injury” or threat thereof caused by increased imports, a precise description of the product involved and the proposed measure, the proposed date of introduction, and the expected duration and timetable for progressive liberalization. These requirements should not be onerous to supply.

However, the Appellate Body in *Korea – Dairy* added that:

What constitutes “evidence of serious injury” is spelled out in Article 4.2(a) of the *Agreement on Safeguards* which provides: The competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.³⁵

The Appellate Body, moreover, noted that the list of factors in Article 12.2 and Article 4.2 were not exhaustive and the Committee on Safeguards could request additional information if necessary. As collecting the type of information listed in the provisions can be quite difficult for investigating authorities on many sectors of the economy (if for no other reason, when industries are highly fragmented and there are no trade association data normally collected or available), the Appellate Body decision may over time constitute a barrier to the use of safeguard provisions because of lack of resources or data sources within countries.

Similarly, in *Argentina—Safeguard Measures on Imports of Footwear*³⁶ (“*Argentina—Footwear*”), the Appellate Body went on to state that under the “serious injury” requirement of Article 4.2(a), the competent authorities were required to evaluate, “at a minimum, each of the factors listed in Article 4.2(a) as well as others that are relevant to the situation of the industry concerned.” And, again, in *United States—Wheat Gluten from the European Communities*³⁷ (“*Wheat Gluten*”), the Appellate Body held

35. *Id.* at 33.

36. *Argentina—Safeguard Measures on Imports of Footwear*, Appellate Body Report, WT/DS121/AB/R (Dec. 14, 1999) [hereinafter *Argentina Footwear*].

37. *United States—Wheat Gluten from the European Communities*, Appellate Body Re-

that competent authorities may not limit their evaluation of “all relevant factors” under Article 4.2(a) to the factors that interested parties raise, but rather, “[t]he competent authorities must, in every case, carry out a full investigation to enable them to conduct a proper evaluation of all relevant factors expressly mentioned in Article 4.2(a) of the *Agreement on Safeguards*.”

It is suggested that panels and the Appellate Body need to take a more practical approach to the problems of investigating authorities or the WTO will need to modify the agreement language to be sure meritorious cases are not prevented because of evidentiary standards that become prohibitive.

B. *Dispute Settlement*

In 1988, the U.S. Congress declared that one of the “principal trade negotiating objectives” of the United States was a more automatic and predictable dispute settlement process where time delays could be reduced and countries would bring their activities into compliance.³⁸ In contrast, a major negotiating objective for many of the trading partners of the United States was to constrain the United States and make it operate within the system—more specifically, to curb the ability of the United States to unilaterally determine, under Section 301 of the Trade Act of 1974, that U.S. commercial interests have been harmed by the acts of its trading partners.³⁹ The system has worked fairly well from the perspective of most Member nations who would agree with Article 3.2 of the DSU that “[t]he dispute settlement system

port, WT/DS166/AB/R (Dec. 22, 2000) [hereinafter *Wheat Gluten*]. Although the Appellate Body reversed the panel’s analysis and conclusions regarding causation of injury, it found nevertheless that the U.S. International Trade Commission had not established an adequate causal link between increased imports and serious injury to the domestic industry. *Id.* In conclusion, the AB determined that the U.S. safeguards measure on wheat gluten from the EC was inconsistent with the Safeguards Agreement. *Id.*

38. See Omnibus Trade and Competitiveness Act of 1988, Title I at Section 1101(b)(1), P.L. 100-418, 102 Stat. 1121 (Aug. 23, 1988); 19 U.S.C. § 2901(b)(1):

The principal negotiating objectives of the United States with respect to dispute settlement are—(A) to provide for more effective and expeditious dispute settlement mechanisms and procedures; and (B) to ensure that such mechanisms within the GATT and GATT agreements provide for more effective and expeditious resolution of disputes and enable better enforcement of United States rights.

Id.

39. See Terence P. Stewart & Mara M. Burr, *The WTO’s First Two and a Half Years of Dispute Resolution*, 23 N.C. J. INT’L & COM. REG. 481, 485-86 (1998).

of the WTO is a central element in providing security and predictability to the multilateral trading system.”⁴⁰ Nevertheless, there have been some, perhaps, unanticipated developments that have put pressure on the system, for example: (1) the publicity of “wins” or “losses” and the need to demonstrate that the system is working for a country as well as against it, (2) the power being wielded by the panels and Appellate Body is not easily checked regardless of Members’ perceptions that the panels are overstepping, or creating new rights and obligations, and (3) other possible problems in particular cases.

What follows is a partial list of topics that should be examined by the WTO as part of a new Round or otherwise.

1. Capacity of the system for disputes, and the implications for panelists, for Appellate Body Members, and for the budget needs;
2. Lessons learned from the first six years and modifications to the system that would promote speed and efficiency while preserving Member rights;
3. Whether Members are in fact being judicious in their selection of disputes, including adherence to Article 3.7 of the DSU [“Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful”];
4. Since the real parties in interest are often non-governmental entities, whether the system should be modified to permit greater participation and protection of private-party interests;
5. Whether panels and the Appellate Body should be using a different standard of review in evaluating cases; and
6. Whether a mechanism is needed to permit challenges of actions by the Appellate Body where perception of overstepping authority exists (not for resolution of the underlying dispute but for future disputes).

Let’s consider these six areas in dispute settlement and the concerns raised by some for reform. As of the end of 2000, there have been 216 requests for consultations involving 165 distinct

40. Understanding on the Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 3.2, WTO Agreement, Annex 2, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 31, 33 I.L.M. 1125, 1127 [hereinafter *Dispute Settlement Understanding* or *DSU*].

matters—or an average of thirty-six requests per year.⁴¹ This is a substantial increase from the GATT system, which generated approximately ten requests for consultations per year.⁴² The WTO system does not envision that all requests for consultations will result in the need for formal dispute settlement proceedings through the request for a panel. Many matters have been resolved through consultations,⁴³ although countries tend to pursue the panel process more quickly under the WTO than was true under the GATT. During the first six years of the WTO, there have been a total of forty-five panel reports and Appellate Body decisions (excluding reports resulting from proceedings pursuant to Article 21.5 of the DSU, which have totaled six to date), with eighteen active cases as of December 13, 2000.⁴⁴ Stated differently, during the first six years, there have been an average of seven to eight panel and Appellate Body decisions each year. While there has been a pick-up in the volume of decisions rendered, the number remains small compared to the volume of matters handled by national courts. The U.S. Court of International Trade, for example, publishes several hundred de-

41. World Trade Organization, *Overview of the State-of-Play of WTO Disputes* at www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

42. Under the WTO's DSU, the workload of the WTO dispute settlement system has been greatly expanded in comparison to the workload of its predecessor, the GATT dispute settlement system. Counts of the total number of disputes addressed under the GATT differ, but Professor Jackson estimates that over its existence (1948-1994), the GATT system handled about 500 disputes.

It is interesting to note some of the statistics about cases brought under the GATT system. There are various inventories. The GATT Analytical Index through January 1995 contains 196 cases, but seems not to include most cases for which no panel report was issued (usually because parties settled). It also does not include cases under the separate Tokyo Round codes. A GATT document in March 1994 notes 306 disputes contained in the GATT secretariat's official inventory. Hudec's 1993 book analyses 207 complaints. Another rough inventory that I compiled for many years includes many cases noted from some informal sources, including some that were never brought as a formal complaint. The disputes in this list number 418 to about mid-1994. Thus it seems plausible that in some sense the GATT system has handled over 500 disputes since its inception.

JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 120 (2nd ed., 1997). Thus, where the GATT system dealt with about 10-11 case filings per year on average, the WTO system is handling about 35-36 complaints each year on average. *Id.*

43. Between January 1, 1995 and December 13, 2000, 36 cases were settled or inactive. See World Trade Organization, *Overview of the State-of-Play of WTO Disputes*, at www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

44. See *id.*

cisions a year, although many are not on the merits. Even though the number of panel and AB decisions is relatively small, the system is straining under the existing load, and there is every indication that the caseload will increase, not decrease, in the years ahead.⁴⁵ Many countries that have not traditionally been complainants are developing internal capabilities or hiring outside counsel to permit them to bring cases if for no other reason than the domestic public relations need to demonstrate that the WTO permits them to be plaintiffs as well as defendants in particular matters.

There are significant problems in finding panelists who are acceptable to the disputing parties.⁴⁶ Selection issues delay the start of panel proceedings and result in a slowing of the dispute settlement process. Some Members, including the European Union, are urging adoption of a permanent group of panelists similar to what exists on the Appellate Body, but with a base group larger than seven.⁴⁷

Service on the Appellate Body is becoming increasingly time consuming as an increasing percentage of panel reports are appealed.⁴⁸ Appeals give the losing party additional time before conformance is required and permit governments to tell their constituents that they have done everything possible to maintain the measure in question. The heavy caseload at the Appellate Body, however, draws into question the ability of the Appellate Body Members to handle the assignment on a part-time basis and without relocating to Geneva. Obviously, any change in the nature of the assignment will result in a change in the pool of eligible Appellate Body Members. Similarly, the burden on Appellate Body Members increases when the collegiality require-

45. As of December 13, 2000, there were 80 pending consultations and 18 active cases before the WTO. See *Overview of the State-of-Play of WTO Disputes*, at http://www.wto.org/english/tratop_e/disp_e/dispu_c.htm.

46. In cases where the parties cannot agree on panelists within 20 days of the establishment of the panel, Article 8.7 of the DSU authorizes the Director-General to appoint the panelists. See DSU art. 8.7.

47. See Terence P. Stewart & Amy A. Karpel, *Review of the Dispute Settlement Understanding: Operation of Panels*, 31 *LAW & POL'Y INT'L BUS.* 593, 611 fn. 86 (2000), citing *EU Outlines Proposals for Changes to the WTO Dispute Settlement System*, *INSIDE U.S. TRADE*, Oct. 30, 1998, at 12.

48. If parties to the dispute do not agree with the Panel's determination, they may appeal the panel report to the Appellate Body within 60 days of its circulation to the public. See DSU art. 16.4. Third parties may not appeal the panel report although they may make written submissions to the Appellate Body. See DSU art. 17.4.

ments mandate the review of all cases by each Member, even though a panel of three Members is charged with the decision-making responsibility.⁴⁹ Moving the Appellate Body in the direction of traditional appellate courts would let seven Members handle more work. The price, however, might be the uniformity in construction that the collegiality approach presumably sponsors.

Because Member nations of the WTO have an interest in having documents translated into all official languages, there are serious delays in the release of panel reports as the WTO's limited translation capabilities struggle with the increased requirements.⁵⁰ Moreover, because panel reports typically run hundreds of pages in length and reflect all arguments made by all of the parties, the process, even when personnel are available, is time consuming and costly. Efforts have been made by some countries to limit the contents of the panel report and not to require translation of all of the parties' underlying documents if such documents are included as attachments instead of being folded into the report itself. To date, some countries have been unwilling to permit a deviation from the requirements of full translation into all three official languages. With a limited budget and many Member nations unable or unwilling to significantly increase the budget to address increased capacity needs, translation alone can add months to the dispute settlement process. This process will presumably become more cumbersome as more cases are decided and as the official language list grows over time. New countries that become Members will presumably press for adding languages typically included in other multilateral agreements as official languages, such as Chinese, Russian, and Arabic.

Similarly, the review by Members of the dispute settlement rules and procedures prior to the Seattle Ministerial Meeting identified a host of technical issues⁵¹ the resolution of which

49. To ensure consistency and coherence in decision-making, all Appellate Body Members meet on a regular basis to discuss matters of policy, practice and procedure. See *Working Procedures for Appellate Review*, WT/AB/WP/1, at para. 4(1) (Feb. 15, 1996). Moreover, Appellate Body Members receive all documents filed in an appeal and Members remain informed on dispute settlement activities and other relevant activities of the WTO. See *id.* at para. 4(2).

50. For a discussion on problems with the timeliness of translating panel reports, see *Dispute Settlement Body*, Minutes of Meeting, WT/DSB/M/46, at 15 (Aug. 6 1998).

51. See U.S., *WTO Members Spill Over How to Change DSU at Seattle*, INSIDE U.S. TRADE,

could

- (1) expedite proceedings (e.g., existing right to block request for a panel once; whether requests for panel must be in sequential meetings); and
- (2) clarify existing ambiguities (e.g., how to preserve the right to compensation or retaliation while, at the same time, permitting resolution of whether changes by a member bring the country into compliance with its obligations).

While it appeared likely that resolution of this package of modifications was going to occur in Seattle, the difficulties that arose on the overall launch of a new Round prevented closure on the reforms identified from the review process.⁵²

To prevent the system from bogging down with disputes, to permit issues between nations to be addressed by less formal means where possible, and to be sure that disputes are not pursued where there are no realistic expectations that the dispute will permit a solution, WTO Members are supposed to exercise restraint when resorting to the dispute settlement system. Some of these self-restraint notions can be seen in the DSU itself.⁵³ In fact, it is far from clear whether all, or most of, the major Members are showing self-restraint. Looking at the number of disputes and the stage at which complaints are registered in some cases suggests otherwise.⁵⁴ So do discussions with delegations in Geneva which suggest that, for national political reasons, they need to have the ability and record of bringing actions to show that the system is working for their countries (a circumstance usually present where a country has been a defendant in another case which was lost). Developing countries have been con-

Nov. 26, 1999; see also *Proposed Amendment of the Dispute Settlement Understanding, Communication from Canada, Costa Rica, Czech Republic, Ecuador, the European Communities and its member States, Hungary, Japan, Korea, New Zealand, Norway, Peru, Slovenia, Switzerland, Thailand and Venezuela*, WT/MIN(99)/8, (Nov. 22, 1999).

52. See *DSU Review Faces Substantive, Procedural Challenges After Seattle*, INSIDE U.S. TRADE, Dec. 24, 1999.

53. See DSU art. 3.7.

54. Two examples: (1) Canada's case on U.S. countervailing duty law as it pertains to "export restraints," and (2) the request by the EU, Japan and six other members for consultations on the so-called U.S. "Byrd Amendment" before the provision had been implemented or made operational. See *United States—Measures Treating Export Restraints As Subsidies*, Request for Consultations by Canada, WT/DS194/1 (May 19, 2000); Press Release, European Union, U.S. Anti-Dumping Scheme: EU Joins WTO Partners in call for consultations (Dec. 22, 2000) (on file with author).

cerned about the number of cases filed by the United States on TRIPs and TRIMs issues when requests were pending for blanket extensions of time.⁵⁵ Korea and other countries expressed concerns about cases in which developed countries file cases where there is little economic interest in fact by the complainant (e.g., the EU challenge of a Korean safeguard action on dairy products; the U.S. challenge of the EU banana regime). Similarly, there is a feeling among some Members that challenges are being filed, through the panel process, in an effort to win those matters which countries were unable to win through negotiations, despite the admonition that “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”⁵⁶

With the inability of losing countries to block panel reports or Appellate Body decisions and with the expanded jurisdiction of the WTO as compared to the GATT, certain Members are under significant pressure from the private sector—whether businesses, workers, environmentalists, consumer groups or others—to make the system more transparent, subject to rights of participation by those who view their interests as being directly affected, and, generally, to make the system more democratic. While environmentalists and some consumer groups receive much of the media attention on NGO concerns with WTO decision making, particularly in the dispute settlement process, other groups are deeply concerned over the lack of rights when their economic interests are directly affected by disputes brought to and heard by the WTO. Businesses and workers that seek access to foreign markets or seek the use of national laws to provide conditions of fair trade or temporary import relief are not allowed to participate in consultations or hearings or even to have briefs considered by the panel or Appellate Body (although *amicus curiae* briefs are, at least theoretically, permissible and have been permitted in very limited circumstances).⁵⁷

55. “TRIPs” refers to the Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1197 (1994). “TRIMs” refers to the Agreement on Trade-Related Investment Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

56. See DSU art. 3.2.

57. See *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle*]. In *Shrimp-Turtle*, the Appellate Body concluded that panels may use relevant information

Moreover, different countries pursue different approaches to private sector participation and representation. Some governments perceive that they do not have the internal capacity to handle some or all of the disputes that they are involved in and, consequently, will retain outside counsel who will prepare briefs, make oral arguments, and generally control the approach taken (subject, of course, to government agreement).⁵⁸ Paid for by the domestic industry affected, outside counsel have been involved in the matter on behalf of the private sector for some time prior to the dispute. In such situations, the private sector is substantially represented by its counsel in fact. By contrast, other countries may try to handle all aspects of the dispute internally, although they may be willing to receive input from private sector parties. The real parties in interest may not be deputized and may not be able to attend hearings. They will seldom be able to defend the real party-in-interest's position during the proceeding other than indirectly. Not surprisingly, there is often discontent by those believing that their client's interests are not being adequately represented by the government position.

While NGOs push hard for more open proceedings (including public access to the hearings, the right of private parties to submit *amicus curiae* briefs, etc.), there is strong resistance from many Member nations. Such nations perceive NGOs (by definition, not Members of an intergovernmental organization) as seeking rights that exceed those of Members (which cannot participate where third-party rights are not timely asserted) and

(whether it be requested or non-requested) to make an informed decision. Panels are given the authority to decide what information and technical advice they will consider in making their objective determination of the case. Thus, although *amicus curiae* briefs are accepted, it is up to the panel to decide what weight to give to such briefs.

58. See *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Report of the Panel, Complaint by Ecuador, WT/DS27/R/ECU, Report of the Panel, Complaint by Guatemala and Honduras, WT/DS27/R/GTM, Report of the Panel, Complaint by Mexico, WT/DS27/R/MEX, Report of the Panel, Complaint by United States, WT/DS27/R/USA (May 22, 1997) [hereinafter *EC-Bananas*]. In *EC-Bananas*, the Appellate Body stated:

[W]e can find nothing in the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"), the DSU or the Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings . . . it is for a WTO Member to decide who should represent it as members of its delegation in an oral hearing of the Appellate Body.

Id.

complicating the ability of governments to resolve matters amicably between themselves.⁵⁹ Although it has been in the forefront of those nations pushing for increased transparency and access for the private sector, the United States routinely does not deputize the private sector and is one of the countries capable of handling matters internally without using the services of outside counsel.

Another issue, particularly with respect to rules, is whether the standard of review used by panels and the Appellate Body is the proper one, at least where administrative records and fact finding are involved. Case law established that the special rule included in dispute settlement cases involving anti-dumping matters⁶⁰ is not applicable to other unfair trade disputes such as countervailing duty matters.⁶¹

The spate of decisions in Safeguards, Subsidies and Anti-dumping agreements cases also raises questions about the proper role of panelists and Appellate Body Members in reviewing cases and drawing answers from what are, typically, limited portions of the overall record. Few panelists in rules decisions have any experience either as an administrator or as a practitioner in the types of matters being reviewed and hence have little knowledge of the real world conditions in which investiga-

59. Although the United States has been a strong advocate of transparency in the WTO, other countries have pressed only for limited changes in transparency. See, e.g., *U.S. Rides Solo on Key WTO External Transparency Proposals*, *INSIDE U.S. TRADE*, Oct. 20, 2000. While the US believes that WTO committee meetings and DSB hearings should be opened to the public, and that *amicus* briefs from NGOs should be accepted in DSB proceedings, the EU and Australia propose more limited proposals such as de-restricting documents and holding annual meetings and symposia to incorporate the input of outside groups. *Id.*

60. The Anti-dumping Agreement provides a specific standard of review for the panel to follow in dumping cases. Article 17.6(i) states that:

[I]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation should not be overturned.

Anti-dumping Agreement art. 17.6(i).

61. See *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body, WT/DS138/AB/R (May 10, 2000) [hereinafter *US-Lead Bismuth Steel*]. In *US-Lead Bismuth Steel*, the Appellate Body agreed with the panel that Article 17.6 applied only to disputes under the Anti-dumping Agreement, and that it did not also apply to the Agreement on Subsidies and Countervailing Measures.

tions are conducted under tight internationally-agreed timelines. Records in these cases typically run to thousands of pages and, in some jurisdictions, can run to hundreds-of-thousands or even millions of pages. Those who use the rules under national law have expressed at least two concerns about the standard of review currently in place: (1) that it permits reviewing bodies to, essentially, substitute their judgment as to what the facts are or show (despite the fact that the panelists did not hold factual hearings, conduct verification, or question the industry participants), and (2) that it allows panels to create constructions of obligations that flow from silence in the agreements. Moreover, it makes little sense to apply one standard of review to certain administrative investigations but another standard to other administrative investigations where there is no inherent or distinguishing difference in the conduct of the administrative proceedings that would justify disparate standards.

Additionally, there appears to be little consideration for whether or not the interpretations adopted, and the requirements deemed existing on Members, are reasonable from an administration perspective. If countries which have administered these types of laws for decades, with their highly-developed and sophisticated approaches to handling investigations, are repeatedly found to be doing so improperly and are further found to be providing insufficient justification for their actions, what hope is there for the many Members setting up systems for the first time which have neither the infrastructure in place nor the resources to conduct investigations at the same level of thoroughness? And what of those which have smaller staffs in the agencies administering their laws? As noted above, fully 70% of Safeguard actions in the first six years have been brought by developing countries. The rules must work not only for the developed countries but for developing countries, least developed countries, and countries in transition. Yet, to date, no rules challenge (other than an initial case where transition rules indicated the case was brought in the wrong forum) has failed. Apparently all countries are unable to administer laws in a manner consistent with their agreements. This record indicates that something is seriously wrong.

Finally, a number of countries expressed concerns over actions taken by the Appellate Body that appear to exceed the scope of its authority yet remain unsusceptible to review by the

Members. The flap that has been created by the Appellate Body decision to authorize *amicus curiae* briefs would be one example of such a situation.⁶² Another example would be an early decision by the Appellate Body in which, because it lacked remand authority, it essentially applied facts to its construction of the law on a matter that had not been resolved by the panel.⁶³

Members will obviously embrace the current resolution of some of the above issues while being concerned about others. The breadth of the challenge in the dispute settlement system to address the needs of Members and their constituencies suggests that much needs to be done, and soon, on the dispute settlement system.

II. RULES THAT NEED TO BE MAINTAINED

A. *Anti-dumping*

Article VI of the GATT 1947 (same language in GATT 1994) addresses anti-dumping and countervailing duties. As stated in Article VI:1:

The Contracting Parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.

The terminology "is to be condemned," found in Article VI:1 of the GATT 1947 and now GATT 1994, is the harshest language in the GATT, although some practices (e.g., export subsidies) are prohibited. While developed countries have historically been the major users of anti-dumping laws, consistent with the relatively high percentage of imports subject to tariff bindings in developed countries and relatively low percentage of bindings in many developing countries, as more developing countries undertake significant market liberalization, they have found need to have national laws implementing the WTO rights for fair trade conditions represented by Article VI when price

62. See, e.g., Daniel Pruzin, *WTO Appellate Body Under Fire For Move on Acceptance of Amicus Briefs*, INT'L TRADE DAILY, NOV. 27, 2000.

63. See *Canada—Certain Measures Concerning Periodicals*, Report of the Appellate Body, WT/DS31/AB/R (June 30, 1997).

discrimination by imports has caused material injury to their domestic industries.

Anti-dumping laws originated in Canada at the turn of the last century, and, later, were enacted in South Africa, Australia, the United States and parts of Europe by the 1920s.⁶⁴ The anti-dumping provisions of Article VI, the various anti-dumping Codes, and now, the Agreement implementing the provisions of Article VI have been important elements in the willingness of countries to liberalize, as they provide some assurances that communities, companies and their workers will not be destroyed by false market signals.

While the use of anti-dumping laws is controversial in some circles, historically, relatively small volumes of trade have been addressed by anti-dumping cases at any given time (typically less than one or 2% for the major users).⁶⁵ During the Uruguay Round of trade negotiations, countries negotiated a very detailed agreement to implement Article VI, although some issues of importance to countries needing to use anti-dumping laws have not been resolved, such as the problem of circumvention. There has now been, at most, five to six years of experience under the modified national laws. One sees a growing use of the law by non-traditional users. This should be good news to supporters of the rule of law and a liberalized trading system. Typically, there are relatively few cases brought by any particular country, and the cases cover a relatively small portion of trade.

Concerns about compliance with the agreement reached can, of course, be pursued through consultations and dispute settlement. An increasing number of anti-dumping disputes have been brought. Subject to the concerns raised in the prior section on the functioning of the dispute settlement system, se-

64. See UR TREATISE, *supra* note 1, at 1389-1404.

65. See, e.g., the following statement by former Commerce Secretary William M. Daley:

In 1998, total U.S. imports were approximately US\$900 billion. Only about US\$4 billion of those imports were covered by anti-dumping duty orders. That means that 0.44% - less than one-half of one percent - of our worldwide imports were covered. Even if imports covered by countervailing duty orders were added in, the figure only increases to 0.50%.

William M. Daley, Secretary of Commerce, Before the Senate Finance Committee, (Sept. 29, 1999), available at <http://www.ogc.doc.gov/ogc/legreg/testimon/106f/daley0929.htm>.

lected review of decisions is a good thing as it ensures compliance with agreed norms.

For a number of years efforts have been underway to examine certain technical issues, to exchange views on how the issues are addressed by various nations and, hopefully, to reach some common approaches to construing certain terms. In fact, since April 1999, the WTO's Ad Hoc Group on Implementation has discussed six topics with the goal of developing an understanding on these issues.⁶⁶ These six issues are:

1. Practical issues and experience in applying Article 2.4.2;
2. Termination of investigations under Article 5.8 in cases of *de minimis* import volume;
3. Practical issues and experience in cases involving cumulation under Article 3.3;
4. Practical issue and experience with respect to questionnaires and requests for information under Articles 6.1 and 6.1.1;
5. Practical issues and experience in providing opportunities for industrial users and consumer organizations to provide information under Article 6.12; and
6. Practical issues and experience in conducting "new shipper" reviews under Article 9.5.⁶⁷

While certain external events (e.g., the financial crisis in Asia, and the collapse of demand in the former Soviet Union) have created fundamental equilibrium problems for certain industries which have resulted in a large number of dumping and countervailing duty actions, the relatively heavy recent use of the laws to address these phenomena reflects both a satisfaction of the criteria of Article VI and the Anti-dumping Agreement and the lack of alternative tools within the WTO to address structural excess capacity problems, an issue addressed in a later section.

Similarly, while there have been requests as part of the implementation examination within the WTO to rebalance the agreement by certain countries, there is no demonstration that any rebalancing is in fact appropriate at this stage. An examination of the use of the agreement since 1995 is illuminating. As of November 3, 2000, the WTO Committee on Anti-Dumping Prac-

66. See *Report (2000) of the Committee on Anti-Dumping Practices*, G/L/404 (Nov. 8, 2000).

67. See *Committee on Anti-Dumping Practices*, Note from the Secretariat, G/ADP/W/410 (Aug. 6, 1999).

tices reported that some sixty-four Members (the EU being one Member) notified anti-dumping legislation including the following countries:

Developing countries (46):			
Argentina	El Salvador	Mauritius	Singapore
Barbados	Fiji	Mexico	South Africa
Bolivia	Ghana	Morocco	Thailand
Brazil	Guatemala	Nicaragua	Trinidad and
Chile	Honduras	Pakistan	Tobago
Colombia	India	Panama	Tunisia
Costa Rica	Indonesia	Paraguay	Turkey
Cuba	Jamaica	Peru	Uganda
Cyprus	Kenya	Philippines	Uruguay
Dominica	Korea	Saint Lucia	Venezuela
Ecuador	Malawi	Senegal	Zambia
Egypt	Malaysia		Zimbabwe
Countries in transition (9):			
Bulgaria	Kyrgyz Republic	Poland	Slovak Republic
Czech Republic	Latvia	Romania	Slovenia
Hungary			
Developed and other (9):			
Australia	Iceland	Japan	Norway
Canada	Israel	New Zealand	United States
EC			

Source: *Report (2000) of the WTO Committee on Anti-Dumping Practices*, G/L/404 (Nov. 8, 2000).

Twenty-four Members indicated that they do not have an anti-dumping law:

Bahrain	Benin	Botswana	Brunei Darussalam
Burkina Faso	Chad	Cote d'Ivoire	Dominican
Estonia	Rep. of Guinea	Haiti	Republic
Liechtenstein	Macau	Maldives	Hong Kong
Mongolia	Namibia	Qatar	Malta
Suriname	Swaziland	Switzerland	Sri Lanka
			United Arab
			Emirates

Source: *Report (2000) of the WTO Committee on Anti Dumping Practices*, G/L/404 (Nov. 8, 2000).

And, thirty-six Members had not provided notifications:

Albania	Dem. Rep. of	Kuwait	Oman
Angola	Congo	Lesotho	Papua New Guinea
Antigua & Barbuda	Djibouti	Madagascar	Rwanda
Bangladesh	Gabon	Mali	St. Kitts & Nevis
Belize	Gambia	Mauritania	St. Vincent &
Burundi	Georgia	Mozambique	Grenadines
Cameroon	Grenada	Myanmar	Sierra Leone
Central African	Guinea Bissau	Niger	Solomon Islands
Rep.	Guyana	Nigeria	Tanzania
Congo	Jordan		Togo

Source: *Report (2000) of the WTO Committee on Anti-Dumping Practices*, G/L/404 (Nov. 8, 2000).

It is known that some countries (e.g., Nigeria) have anti-dumping laws although not necessarily modified to conform to the Uruguay Round Agreement while other countries (e.g., Estonia) are in the process of adopting laws. Similarly, some of the major countries seeking to join the WTO also have anti-dumping laws in place (e.g., China, Russia, and the Ukraine).

Since the creation of the WTO, there has been a significant increase in the number of cases brought by developing countries, including cases against other developing countries. For example, a compilation of measures taken (versus cases initiated) through 1991 showed that Australia, the United States, the EC, and Canada accounted for just under 90% of all anti-dumping measures (through 1991, 1621 out of 1841, or 88%).⁶⁸ Developing countries, by contrast, accounted for just 5.9% of all measures taken. Between July 1, 1994 and June 30, 2000, these four developed country Members (Australia, US, EC, Canada) accounted for 48.6% of the cases brought and 55.8% of measures in effect on June 30, 2000 (this may overstate the actual percent since a number of users other than the four historic users did not report total measures in effect on June 30, 2000).

Developing countries have become the largest users in most years and accounted for 52.3% of all cases initiated in the last six years (July 1, 1994 through June 30, 2000).⁶⁹ Indeed, between June 30, 1995 and June 30, 2000, reported measures in effect for the four historic users declined from 660 to 626 and from 79.9% to 55.8% (in the same period, all developed countries (including New Zealand, Japan, and Israel in addition to the four other

68. See UR TREATISE, *supra* note 1, at 1695-97.

69. It should be noted that reference to the number of cases initiated does not equate to the number of cases that result in orders. A large percentage of anti-dumping initiations do not, in fact, result in the imposition of anti-dumping duties or other remedial measures. In the United States, for example, over the last 20 years, less than half of the cases initiated resulted in orders.

[M]ost anti-dumping cases filed have not resulted in the application of duties.

In cases in which a determination was issued, more have been rejected by the Commerce Department or the U.S. ITC than have been granted anti-dumping relief. . . . [F]rom 1980 to 1997, only about 44% of the anti-dumping cases filed have resulted in the imposition of anti-dumping duties.

GREG MASTEL, ECONOMIC STRATEGY INSTITUTE, ANTI-DUMPING LAWS AND THE U.S. ECONOMY 104 (1998). In the period 1980-1997, 732 anti-dumping cases were filed. Of that total, 315 (44%) had resulted in duties being imposed, 17 (2.4%) had resulted in suspension agreements, 383 (53.6%) had been either rejected, dismissed, or withdrawn, and 17 were still pending (as of 1998). *Id.* at 30-31.

Members) went from 684 measures to 643). At the same time, measures reported by developing country Members of the WTO (with a number of developing countries not reporting measures in effect) went from 166 to 494, with South Africa, India and Mexico all having more measures outstanding by mid-2000 than Australia and exceeding or being close to the number of measures outstanding in Canada, even though the latter two countries have substantially greater trade flows. The table below reviews the number of cases initiated during the most recent six-year time period. It shows that thirty-three of the sixty-four countries reporting anti-dumping laws in place used them.

Anti-dumping Cases Initiated (July 1994 - June 2000)

	7/1/99 through 6/30/00	7/1/98 through 6/30/99	7/1/97 through 6/30/98	7/1/96 through 6/30/97	7/1/95 through 6/30/96	7/1/94 through 6/30/95
Australia	18	18	35	22	8	6
Canada	11	17	10	8	6	9
EC	49	41	44	26	16	37
Israel	1	3	5	7	4	NA
Japan	0	0	0	0	0	0
New Zealand	6	4	5	1	9	9
United States	17	43	28	20	16	30
Subtotal	102	126	127	84	59	91
Argentina	23	15	8	18	42	6
Brazil	17	12	12	19	1	12
Chile	1	0	2	2	4	2
Colombia	3	8	0	1	5	1
Costa Rica	0	1	NA	NA	NA	NA
Ecuador	0	NA	1	NA	NA	NA
Egypt	4	1	5	NA	NA	NA
Guatemala	0	0	0	NA	1	NA
India	26	38	11	20	5	9
Indonesia	13	0	11	9	NA	NA
Korea	4	5	5	18	6	3
Malaysia	1	1	8	2	0	NA
Mexico	7	12	8	5	3	18
Nicaragua	0	2	NA	NA	NA	NA
Panama	0	2	NA	NA	NA	NA
Peru	4	5	5	3	4	4

Philippines	4	3	1	2	0	NA
Singapore	0	0	0	0	0	2
South Africa	11	32	23	11	14	9
Thailand	0	0	0	1	0	0
Trinidad & Tobago	0	5	0	NA	NA	NA
Turkey	0	7	0	5	0	2
Venezuela	0	10	7	0	5	1
Subtotal	118	159	107	116	90	69
Czech Rep.	1	2	NA	NA	NA	NA
Poland	0	3	1	NA	NA	NA
Slovenia	0	1	NA	NA	NA	NA
Subtotal	1	6	1	NA	NA	NA
TOTAL	221	291	235	200	149	160

Sources: *Report (2000) of the Committee on Anti-Dumping Practices*, G/L/404 (Nov. 8, 2000); *Report (1999) of the Committee on Anti-Dumping Practices*, G/L/340 (Nov. 1, 1999); *Report (1998) of the Committee on Anti-Dumping Practices*, G/L/268, (Nov. 5, 1998); *Report (1997) of the Committee on Anti-Dumping Practices*, G/L/204 (Nov. 6, 1997); *Report (1996) of the Committee on Anti-Dumping Practices*, G/L/123 (Oct. 29, 1996); *Report (1995) of the Committee on Anti-Dumping Practices*, G/L/34 (Nov. 14, 1995).

Countries typically bring cases against major trading partners, which obviously varies by country and region. Because the United States, for example, is the major exporter to both Canada and Mexico (accounting for 75.6% of imports into Mexico in 1996 and 67.5% of imports into Canada in 1997), although the number of cases is small for the volume of trade between the countries, it is not surprising that a fair proportion of Mexican (eleven of fifty-three initiations) and Canadian (eleven of sixty-one) cases are against imports from the United States. Similarly, Argentina's major trading partner is Brazil. Accordingly, it has a fair number of cases against imports from Brazil (twenty-one of 112 brought in the last six years). The same is true for other countries. At the same time, where there is significant integration of economies in regional arrangements, there is less need for cases against imports as tariff barriers are removed (e.g., NAFTA countries). When integration is sufficiently deep, countries may forego dumping relief altogether on intraregional trade (e.g., EU). Countries with significant trade barriers (tariffs, NTBs, etc.) and substantial exports are subject to a larger number of cases over time.

Generally speaking, many of the major exporters from the developing world continue to have significantly higher tariff

rates than do most developed countries and tend to be subject to somewhat higher levels of trade cases over time. Typically, and similar to the experience of most developed countries, developing countries with wide open markets, including Singapore and Hong Kong, are subject to few cases. Very diversified export platforms will typically see fewer cases than do economies that are heavily dependent on a limited range of products. Some items, such as energy, are typically not subject to trade actions simply because of the need for imports. Hence, regions heavily dependent upon energy for exports do not have a high incidence of dumping cases brought against their exports.

Countries with economic systems that are significantly state-controlled or state-driven, or are in periods of transition from state-controlled to market economies, often find that their producers do not have reliable market signals on true costs of production or existing pricing levels in global markets. In such situations, it is not uncommon for there to be rapid export spurts at very low prices that disrupt markets in a number of countries. The largest subject of cases by WTO Members in the last six years has been, not surprisingly, the People's Republic of China—163 cases around the world, twenty two to thirty-one cases per year. The Peoples Republic of China, which enjoys a rapid expansion of exports across a broad spectrum of products (China's exports, in total, increased 271.4% from 1990 through 1999 compared to world trade increases of 82.1%), typically prices its products far below exporters in any other country and continues to have substantial state involvement in many elements of the economy.

Because of collapsed demand within the region of the Commonwealth of Independent States (or "CIS") (basically, the former Soviet Union), there have been a high number of cases directed at CIS countries for the volume of overall trade in discrete sectors, usually concerning metals involving Russia, the Ukraine and other countries from the region. Thus, there have been 112 cases initiated on non-WTO parts of the CIS with most cases against imports from the Russian Federation (fifty-two) and the Ukraine (thirty). Because the Ukraine has been successful in exporting only a narrow range of products, its exports tend to both be concentrated in a few HS numbers and increase rapidly when entered into new markets, usually at very low prices. Thus, in the last six years, the Ukraine has the highest incidence of

anti-dumping cases initiated for a given export volume of any major exporting nation in the world.

Sixty-five cases were brought against WTO Members from Central and Eastern Europe and those CIS Members that joined the WTO over the last several years. Consider the following ratios for various regions, showing the average amount of trade (in millions of U.S. dollars) per anti-dumping case initiated:⁷⁰

Central and Eastern Europe, Baltic States and CIS: 1,209.2/case	
• Russian Federation:	1,428.8
• Ukraine:	399.3
• Kazakhstan:	465.8
• Bulgaria:	676.7
• Hungary:	2,501.5
• Poland:	1712.8
• Romania:	773.2
• Other:	1,404.4
Latin America (Mexico, Central, and South America): 2,582.6/case	
• Mexico:	5,943.6
• Brazil:	1,021.5
• Argentina:	2,916.6
• Chile:	1,301.3
• Other countries:	2,933.5
USA and Canada: 11,119.1/case	
• USA:	9,394.8
• Canada:	23,844.6
Western Europe: 9,641.5/case - excluding intra-EU trade: 3,966.1/case	
• EU:	10,333.9
— excluding intra-EU trade:	3,770.8

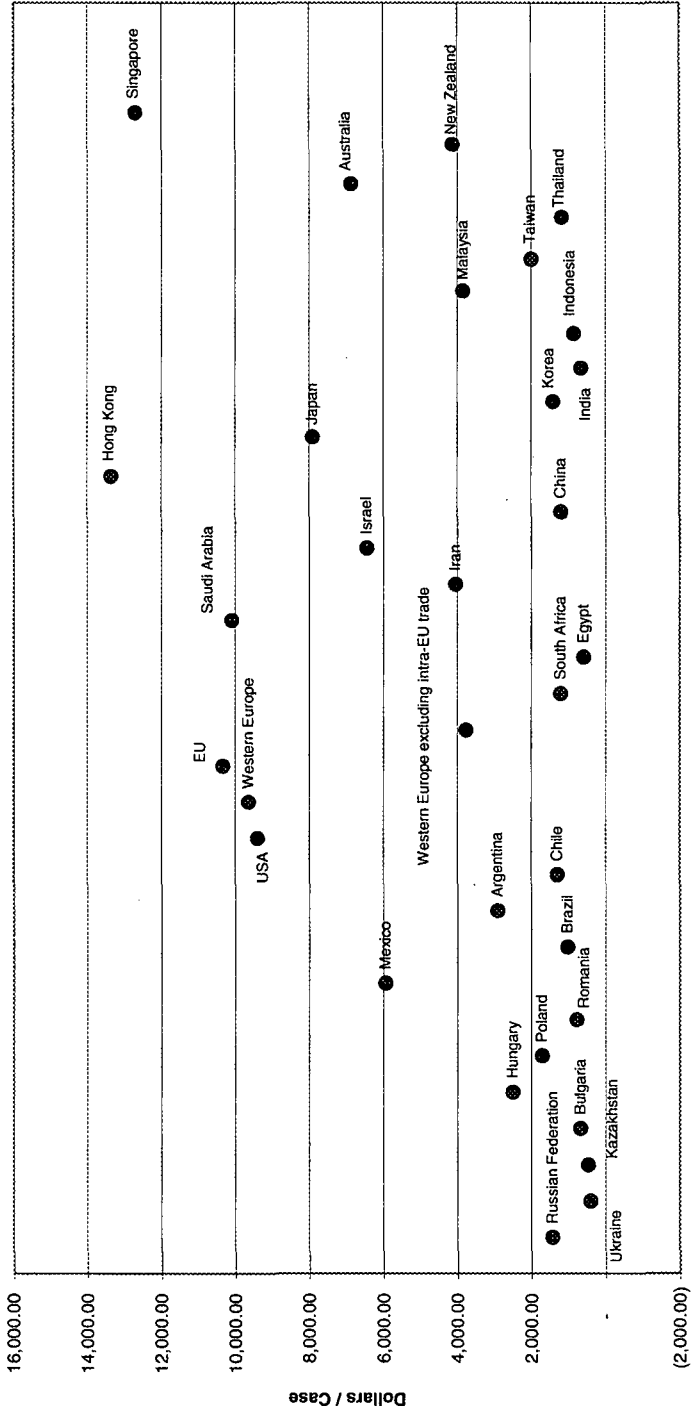
70. The ratios were calculated as millions of dollars of global trade by the region in 1999 divided by the number of cases initiated against imports from countries within the region by WTO members between July 1, 1994, and June 30, 2000. The 1999 export trade data was taken from WTO, ANNUAL REPORT 2000, INTERNATIONAL TRADE STATISTICS 164-67, tbl. A-3 (World merchandise exports by region and selected economies, 1989-1999).

Africa: 3,503/case (only 5 countries have had cases filed; only South Africa and Egypt face many cases)	
• South Africa:	1,214.0
• Egypt:	593.2
• Other Africa:	20,458.5
Middle East: 12,150.0/case	
• Saudi Arabia:	10,100.0
• Iran:	4,050
• Israel:	6,448.5
• Other:	77,606
Asia: 2,655.8/case	
• People's Republic of China:	1,197.2
• Hong Kong:	13,416
• Japan:	7,912.5
• Korea:	1,523.6
• India:	761.1
• Indonesia:	954.2
• Malaysia:	3,838.9
• Taiwan:	2,027.3
• Thailand:	1,242.4
• Australia:	7,010.0
• New Zealand:	4,150.7
• Singapore:	12,743.2
• Other:	6,084.9
World: 4,507.2/case	
World (excluding intra-EU trade): 3,420.2/case	

The foregoing data are also graphically presented in the chart, on the following page.

As the foregoing data demonstrates, the frequency of anti-dumping cases correlates closely with expected behavior. Producers that export aggressively and operate behind closed markets will be subject to anti-dumping cases more frequently than exporters operating in highly open markets. The existence of the anti-dumping remedy provides a strong basis for governments of developed countries, developing countries, and coun-

Millions of Dollars in Trade 1999, versus
Number of Antidumping Cases filed Against July 1, 1994 through June 30, 2000



tries in transition to support further liberalization of trade in goods. Producers that perceive that they are losing in the marketplace because of false market signals can address them with existing rules. The data does not suggest any need to reopen the Anti-dumping Agreement at the present time. While there was an increase in anti-dumping activity during the severe financial crisis in Asia and the Russian Federation (with resulting surges in the exportation of many product categories), it is exactly the existence of the remedies under Article VI that prevents internal pressures from building to the point at which broader restraints that are not rules-based are sought.

At the same time, there is no demonstrable need for special treatment for developing countries. There have been almost no cases against the least-developed countries. Such countries' trade volumes normally would not qualify under existing anti-dumping provisions and consequently would face no activity. Malawi and Zimbabwe, two WTO Members in Africa with smaller economies against whom cases were brought, faced cases only from South Africa, a neighboring developing country.

Indeed, seventy-three countries—sixty-nine of which were developing or least-developed countries within the WTO (and four of which were either developed (Iceland), a country in transition (Albania), or essentially energy exporters (Oman, Brunei)—have faced no initiation of an action in the last six years. Of the sixty-seven Members (developed, developing, and in transition) who did face one or more actions, only twenty-eight (fourteen developed and fourteen developing) faced more than one case per year. The developed countries were Canada, Australia, Japan, the United States, and various countries within the EU. The fourteen developing countries against which more than one case was filed were major developing countries:

Anti-dumping cases: 1995-2000

Developing Country Member	Number of cases filed against Member	Average Number of cases per year	1999 Export Trade Data (Millions US\$)	Average Applied Tariff ⁷¹
Korea	96 cases	16.0 cases	144,745	7.9
Hong Kong	13 cases	2.2 cases	174,408	0

71. The average applied tariff rates listed are derived from the most recent WTO Trade Policy Review ("TPR") for each country. It should be noted that the average

Malaysia	22 cases	3.7 cases	84,455	8.1
India	48 cases	8 cases	36,560	35.0
Indonesia	51 cases	8.5 cases	84,455	9.5
Singapore	9 cases	1.5 cases	114,689	1.1
Thailand	45 cases	7.5 cases	58,392	18.4
Turkey	18 cases	3 cases	26,028	12.7
South Africa	23 cases	3.8 cases	26,707	15.1
Chile	12 cases	2 cases	15,616	11.0
Venezuela	7 cases	1.2 cases	19,852	12.0
Brazil	47 cases	7.8 cases	48,011	12.5
Argentina	8 cases	1.3 cases	23,333	13.5
Mexico	23 cases	3.8 cases	136,703	13.6
TOTAL	422 cases ⁷²	70.3 cases	993,954 ⁷³	

Sources: *Report (2000) of the Committee on Anti-Dumping Practices*, G/L/404 (Nov. 8, 2000); *Report (1999) of the Committee on Anti-Dumping Practices*, G/L/340 (Nov. 1, 1999); *Report (1998) of the Committee on Anti-Dumping Practices*, G/L/268, (Nov. 5, 1998); *Report (1997) of the Committee on Anti-Dumping Practices*, G/L/204 (Nov. 6, 1997); *Report (1996) of the Committee on Anti-Dumping Practices*, G/L/123 (Oct. 29, 1996); *Report (1995) of the Committee on Anti-Dumping Practices*, G/L/34 (Nov. 14, 1995); WTO, ANNUAL REPORT 2000, INTERNATIONAL TRADE STATISTICS, 164-67, tbl. A-3 (World merchandise exports by region and selected economies, 1989-99); and the most recent WTO Trade Policy Reviews for the listed countries.

These fourteen developing countries initiated 161 of the

tariffs were not all calculated in the same manner or on the same basis. The sources were as follows: WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW—Korea, 27, WT/TPR/S/19 (1996) (“simple tariff” average for 1994); WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW—Hong Kong, China, 26, WT/TPR/S/52 (1998) (applied tariff); WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW—Malaysia, 41, WT/TPR/W/31 (1997) (“*ad valorem*” duties); WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW—India, 45, WT/TPR/S/33 (1998) (“simple average ‘effective’ (i.e., applied) m.f.n. tariff”); WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW—Indonesia, 50, WT/TPR/S/51 (1998) (“simple average” MFN tariff); WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW—Singapore, 35, WT/TPR/S/137 (1996) (average collected rate); WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW—Thailand, 38, WT/TPR/S/63 (1999) (“simple average” applied tariff); WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW—Turkey, 40, WT/TPR/S/44 (1998) (“simple average” MFN tariff); WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW—South Africa, 41, WT/TPR/S/34 (1998) (“simple average” MFN import tariff); WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW—Chile, 43, WT/TPR/S/28 (1997) (*ad valorem* tariff based on c.i.f. value); WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW—Venezuela, 52, WT/TPR/S/27 (1996) (*ad valorem* tariffs); WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW—Brazil, 41, WT/TPR/S/21 (1996) (“simple average” applied tariff); WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW—Argentina, 46, WT/TPR/S/34 (1999) (average applied tariff); WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW—Mexico, 43, WT/TPR/S/29 (1997) (“simple average” applied MFN tariff).

72. The total number of cases filed against these fourteen developing countries (422) represents 33.6% of all anti-dumping initiations over the 1995-2000 period.

73. The total value of the 1999 exports of these fourteen developing countries (US\$993,954,000) equals 23.4% of world trade (excluding intra-EU trade).

422 cases (38.2%) against each other. Cases brought by other WTO Members that are also developing countries account for an additional 8% of cases against the fourteen developing countries mentioned above. This means that 46.2% of all cases filed against these fourteen developing countries were filed by other developing countries.⁷⁴

In addition, developed countries with outstanding orders for products produced within their borders find the bulk of such orders to be limited to industries where there are significant excess-capacity problems, such as steel. For example, in the semi-annual report submitted by the United States to the WTO anti-dumping committee, the United States reported that it had fourteen anti-dumping orders outstanding on imports from Korea, ten of which were steel mill products.⁷⁵ Similarly, one of two orders for South Africa, one of three for Singapore, four of seven for Mexico, three of six for India, the only order on Venezuela, two of four for Thailand, all five for Argentina, and seven of thirteen for Brazil were for steel mill products.⁷⁶ Development of rules on structural excess capacity could dramatically reduce the cases brought by all countries and, in particular, cases brought against leading developing countries by developed countries.

As the WTO's work program moves ahead, the Committee's work on anti-dumping issues should focus on completing its work on the open anti-circumvention concerns, continuing review of individual Member laws and regulations to ensure conformance with international obligations, and continuing the technical work needed to determine different nations' approaches to the construction of the same provisions. An examination of the appropriate type of technical assistance needed for

74. In addition, nearly 30% of the cases filed in the last six years involved countries who are not WTO members, although many were against countries that are at various stages of the accession process.

75. *Committee on Anti-Dumping*, Semi-Annual Report Under Article 16.4 of the Agreement—United States, G/ADP/N/65/USA (Oct. 6, 2000).

76. *Id.* at 26-32. See also *Committee on Anti-Dumping*, Semi-Annual Report Under Article 16.4 of the Agreement—Europe Communities, G/ADP/N/65/EEC (Aug. 17, 2000) (India, 8 of 14 cases involve steel mill products); *Committee on Anti-Dumping*, Semi-Annual Report Under Article 16.4 of the Agreement—Canada, G/ADP/N/65/CAN (Aug. 30, 2000) at 6-8 (cases involving steel mill products: Argentina, 1 of 1; Brazil, 3 of 4; India, 3 of 4; Indonesia, 1 of 2; Korea, 3 of 4; Mexico, 1 of 1; South Africa, 1 of 1; Thailand 2 of 3; and Venezuela, 1 of 1).

new user nations will ensure a speedy learning curve and compliance with existing obligations. Reopening the Anti-dumping Agreement, however, would be premature.

B. *Subsidies and Countervailing Measures*

More sensitive to many governments than remedies for international price discrimination is the effort to regulate, in certain circumstances, the actions of nation states or their regional and local governments in the provision of benefits to businesses. Governments routinely raise money from a wide variety of sources for the support of government services and other programs. Many governments encourage the development of industries or regions by addressing economic or physical emergencies. They also encourage the building of infrastructure, the underwriting of costs of certain foods and medicines to portions of the population, and many other activities that can result in the provision of advantages for domestic producers over foreign competitors. Governments are frequently torn between their allegiances to both sides of the issue: wanting the freedom to conduct national policy in a manner necessary to the welfare of the nation but at the same time, not wanting those domestic producers which participate in international commerce to be disadvantaged due to the deep pockets of other governments. Thus, nation states provide both a wide array of subsidies themselves and, for more than one hundred years, remedies to address adverse effects from subsidies provided by others. For example, sugar subsidies provided by the Russian government were the targets of the first countervailing duty law in the United States, which was enacted in 1890.⁷⁷

Articles VI and XVI of GATT 1947 address the question of subsidies and the remedies that governments could provide. The wide prevalence of export subsidies on primary commodities and agricultural goods led to a split approach to export subsidies for much of the life of the GATT, and, most recently, the WTO. Consider the language of Article XVI of GATT 1947, as modified and incorporated as GATT 1994 (under the WTO, there are no longer "Contracting Parties" but "Members"):

Section A - Subsidies in General

77. See UR TREATISE, *supra* note 1, at 812-13.

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the contracting parties in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization,¹ the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties, or with the contracting parties, the possibility of limiting the subsidization.

Section B - Additional Provisions on Export Subsidies

2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.
3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.
4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 Janu-

ary 1955 by the introduction of new, or the extension of existing, subsidies.

5. The contracting parties shall review the operation of the provisions of this Article from time to time with a view to examining its effectiveness, in the light of actual experience, in promoting the objectives of this Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties.⁷⁸

Article VI of the GATT 1947 and 1994 provides nations with a domestic remedy similar to those of anti-dumping actions when imported products benefit from subsidies through actions. The practice investigated is the subsidization of the exported product and material injury to a domestic industry.

Subsidy concerns have seesawed back and forth over the years in terms of GATT's, and now the WTO's, focus. In the 1970s and 1980s, the United States aggressively pursued the subsidization practices of trading partners, but did not have a material injury standard for cases involving dutiable merchandise, a practice "grandfathered" under the GATT prior to the Tokyo Round agreements. This led many trading nations to seek clearer rules on what was actionable in fact and to require the United States to apply a material injury test in its domestic legislation. The Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Subsidies Code) recognized "that subsidies are used by governments to promote important objectives of national policy."⁷⁹

Many major developed agricultural exporting nations used significant financial resources to promote their agricultural products in export markets. Similarly, the crisis in the steel industry resulted in massive, global infusions of money by state treasuries to keep companies and facilities afloat or to expand capacity. Again, major civil aircraft producing nations raised accusations of substantial subsidization of foreign producers as did lumber industries concerned about national policies restricting access to materials. These major subsidization issues led to the Uruguay Rounds' adoption of limitations and initial reductions

78. GATT 1994 art. XVI.

79. Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Preamble, *reprinted in* GATT, 26th Supp. BISD 56 (1980).

on agricultural export subsidies and potentially trade-distorting domestic subsidies.⁸⁰ The creation of a new subsidy agreement provided, for the first time, a definition of a subsidy and defined categories of subsidies (i.e., prohibited, actionable, and non-actionable).⁸¹ It identified ways of addressing valuation issues, examples of serious prejudice and defenses to such a finding.⁸² In short, the Uruguay Round Agreements continued the process of clarifying the type of government intervention that was likely to be viewed as trade distortive. It expanded on the notion of prohibited subsidies, and provided fairly clear guidelines as to how governments could take actions that would not be subject to international interference.

The Agreement on Subsidies and Countervailing Measures (or “SCM Agreement”) requires Members to provide “new and full” notifications periodically and annual updates on the types and levels of subsidies provided. These requirements, however, did not enjoy a high rate of compliance. As reviewed in the Report (2000) of the Committee on Subsidies and Countervailing Measures:

6. *1998 new and full notifications.* Pursuant to Article 25.1 of the Agreement and Article XVI:1 of GATT 1994, all Members of the Committee were required to submit a new and full notification of subsidies to the Committee by 30 June 1998. As of 7 November 2000, only 28 WTO Members (the EC is counted as one Member) had notified subsidies pursuant to Article 25 of the Agreement and Article XVI of GATT 1994. In addition, 18 Members had notified that they maintain no subsidies notifiable pursuant to these provisions. These notifications may be found in document series G/SCM/N/38/. . . . Seventy-four Members had submitted no notification as of the close of the period covered by this Report. A table indicating the status of 1998 notifications is reproduced in Annex A to this Report.⁸³

Some important trading nations, including Colombia, Hungary, Indonesia, Malaysia, Nigeria, Peru, the Philippines, Romania,

80. See generally Agreement on Agriculture; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.html [hereinafter SCM Agreement].

81. SCM Agreement arts. 1, 3, 5, 8.

82. *Id.* at Annex IV, Annex V.

83. *Report (2000) of the Committee on Subsidies and Countervailing Measures*, G/L/408 (Nov. 10, 2000).

South Africa, and Venezuela, did not provide the 1998 “new and full” subsidy notifications. The remaining non-notifiers are typically smaller players in international trade, including many of the least developed countries.⁸⁴

A “peace clause”⁸⁵ found within the Agreement on Agriculture results in a relatively small number of cases on agricultural subsidies actually brought to the WTO. There was, however, significant activity within the WTO dispute settlement body on subsidy practices, particularly export subsidies, in the first six years of the WTO’s existence. For example, there were panel reports and, in many cases, Appellate Body rulings on nine cases, six of which involved allegations of prohibited subsidies (as defined in Article 3 of the SCM Agreement):

Subsidy Disputes at the WTO (1995-2000)

	Dispute	Issue	Panel & AB Reports
1	<i>Brazil—Measures Affecting Desiccated Coconut</i> , WT/DS22	Whether Brazil’s imposition of countervailing duties on Philippine coconut fruit was consistent with Article VI of GATT 1994.	WT/DS22/R (Oct. 17, 1996) WT/DS22/AB/R (Feb. 21, 1997)
2	<i>Indonesia—Certain Measures Affecting the Automobile Industry</i> , WT/DS54, 55, 59 & 64	Whether Indonesia extended the scope of tariff and tax subsidies in a manner inconsistent with Article 28 of the SCM Agreement; whether subsidies under the National Motor Vehicle Programme have caused serious prejudice or a threat thereof to the interests of other Member states according to Articles 6 and 27 of the SCM Agreement.	WT/DS54R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998)

84. *Id.* at 5. Although the 2000 Report indicated that Brazil had not submitted notifications for 1998, in fact, Brazil did submit a “new and full” notification on November 21, 2000 (not published until January 2001) covering the period 1996-1999. See *New and Full and Updating Notifications Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the SCM Agreement—Brazil*, G/SCM/N/25/BRA, G/SCM/N/38/BRA, G/SCM/N/48/BRA, G/SCM/N/60/BRA (Jan. 8, 2001).

85. See Agreement on Agriculture art. 13.

3	<i>Brazil—Export Financing Programme for Aircraft</i> , WT/DS46	Whether Brazil's PROEX interest equalization payments, in general, or in respect to particular transactions are export subsidies within the meaning of Article 3 of the SCM Agreement that are not covered by the exception in item (k) of the Illustrative List of Export Subsidies or exempted by the developing country exception in Article 27.2(b) of the SCM Agreement).	WT/DS46/R (Apr. 14, 1999) WT/DS46/AB/R (Aug. 2, 1999)
4	<i>Canada—Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70	Whether Canada's benefits provided to corporations established to facilitate the export of civil aircraft and/or to the aircraft industry were export subsidies within the meaning of Article 3 of the SCM Agreement.	WT/DS70/R (Apr. 14, 1999) WT/DS70/AB/R (Aug. 2, 1999)
5	<i>Australia—Subsidies Provided to Producers and Exporters of Automotive Leather</i> , WT/DS126	Whether Australia's loan to or grant payments to an Australian automotive leather producer were export subsidies within the meaning of Article 3 of the SCM Agreement.	WT/DS126/R (May 25, 1999)
6	<i>Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> , WT/DS103, 113	Whether Canada's subsidies on dairy products were consistent with Article 3 of the SCM Agreement.	WT/DS103/R, WT/DS113/R (May 17, 1999) WT/DS103/AB/R, WT/DS113/AB/R (Oct. 13, 1999)
7	<i>United States—Tax Treatment for "Foreign Sales Corporations,"</i> WT/DS108	Whether U.S. tax exemptions and special administrative pricing rules for foreign sales corporation were subsidies within the meaning of Article 3.1(a) and 3.1(b) of the SCM Agreement.	WT/DS108/R (Oct. 8, 1999) WT/DS108/AB/R (Feb. 24, 2000)
8	<i>United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138	Whether U.S. imposition of countervailing duties on certain hot-rolled lead and bismuth carbon steel products from the United Kingdom I three administrative reviews was consistent with Articles 1.1(b), 10, 14, 19 of the SCM Agreement.	WT/DS138/R (Dec. 23, 1999) WT/DS138/AB/R (May 10, 2000)
9	<i>Canada—Certain Measures Affecting the Automotive Industry</i> , WT/DS139, 142	Whether Canada's import duty exemption on motor vehicles was inconsistent with Articles 3.1(a), 3.1(b) and 3.2 of the SCM Agreement.	WT/DS139/R, WT/DS142/R (Feb. 11, 2000) WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000)

A number of the decisions are highly controversial in those countries that lost the cases (e.g., Brazil aircraft, U.S. foreign sales corporations, and U.S. on the countervailing duty case on

lead bismuth where the question was whether the sale of a company for "market value" eliminates subsidies previously received). Nonetheless (and subject to the concerns reviewed in the dispute settlement portion of this Essay), the attention being paid to subsidy questions is not surprising considering their ability to distort trade flows.

Currently there are a host of other matters involving potential subsidy issues that are either under consultation or working their way through the dispute settlement process.⁸⁶ Consequently, the area will remain highly charged and the subject of

86. See the following list:

List of Pending Cases Involving the SCM Agreement.

	Dispute	DS No.
1.	Brazil—Countervailing Duties on Imports of Desiccated Coconut and Coconut Milk Powder from Sri Lanka	WT/DS30
2.	Brazil—Certain Automotive Investment Measures	WT/DS51
3.	Brazil—Certain Measures Affecting Trade and Investment in the Automotive Sector	WT/DS52
4.	Australia—Textile, Clothing and Footwear Import Credit Scheme	WT/DS57
5.	Brazil—Certain Measures Affecting Trade and Investment in the Automotive Sector	WT/DS65
6.	Canada—Measures Affecting the Export of Civilian Aircraft	WT/DS71
7.	Brazil—Certain Measures Affecting Trade and Investment in the Automotive Sector	WT/DS81
8.	United States—Countervailing Duty Investigation of Imports of Salmon from Chile	WT/DS97
9.	European Communities—Measures Affecting the Exportation of Processed Cheese	WT/DS104
10.	Peru—Countervailing Duty Investigation Against Imports of Buses from Brazil	WT/DS112
11.	Belgium—Certain Income Tax Measures Constituting Subsidies	WT/DS127
12.	Netherlands—Certain Income Tax Measures Constituting Subsidies	WT/DS128
13.	Greece—Certain Income Tax Measures Constituting Subsidies	WT/DS129
14.	Ireland—Certain Income Tax Measures Constituting Subsidies	WT/DS130
15.	France—Certain Income Tax Measures Constituting Subsidies	WT/DS131
16.	Argentina—Countervailing Duties on Imports of Wheat Gluten from the European Communities	WT/DS145
17.	Japan—Tariff Quotas and Subsidies Affecting Leather	WT/DS147

frequent dispute. That being said, there is no reason (other than an individual nation's desire to modify adverse rulings) to reopen the Subsidy and Countervailing Measures Agreement at this point. Many of the matters that have been litigated have been outstanding issues of concern to Members for a number of years.

Countervailing duty laws tend to be used much less frequently than anti-dumping laws due in part to the fact that historic active users (e.g., the United States) have adopted constructions of "actionability" which makes it possible in most cases for other nations to modify their laws to avoid actionability under the importing nation's law. It is also due to nations' desires not to go after practices of trading partners that may be reflected in their domestic policies as well. The result is far fewer users (where the 2000 report of the Anti-dumping Committee reports 33 users, the 2000 report of the Subsidies Committee reports 11 users), far fewer initiations in any given year (e.g., twenty countervailing duty investigations in the period between July 1, 1999 and June 30, 2000 versus 221 dumping investigation in the same period), and far fewer measures in effect on June 30, 2000

18.	United States—Countervailing Duty Investigation with respect to Live Cattle from Canada	WT/DS167
19.	EC—Measures Relating to the Development of a Flight Management System	WT/DS172
20.	France—Measures Relating to the Development of a Flight Management System	WT/DS173
21.	United States—Measures Treating Export Restraints as Subsidies	WT/DS194
22.	United States—Measures Treating Export Restraints as Subsidies	WT/DS194
23.	Philippines—Measures Affecting Trade and Investment in the Motor Vehicle Sector	WT/DS195
24.	United States—Anti-Dumping and Countervailing Measures on Steel Plate from India	WT/DS206
25.	United States—Countervailing Measures Concerning Certain Products from the European Communities	WT/DS212
26.	United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany	WT/DS213

For a full review of the first six years of the WTO's dispute settlement system with a focus on disputes concerning trade remedies (i.e., anti-dumping duties, countervailing duties, safeguards), see *TERENCE P. STEWART & AMY S. DWYER, HANDBOOK ON WTO TRADE REMEDY DISPUTES: THE FIRST SIX YEARS (1995–2000)*, (forthcoming 2001).

(ninety-five countervailing duty measures versus 1141 anti-dumping duty measures, with a number of countries not reporting measures outstanding on dumping).⁸⁷

Similarly, countervailing duty measures in effect are largely limited to steel and certain agriculture products, as the following table reviews:

Definitive Countervailing Duties in Force (As of June 30, 2000)

Argentina	3 agricultural products from the EU
Australia	5 agricultural products from member nations of the EU
Brazil	6 agricultural products (5 on powdered coconut and one on coconut milk (Cote d'Ivoire, Indonesia, Malaysia, Philippines, Sri Lanka))
Canada	7 measures, of which 3 on agricultural products from the EU or its Members, three on steel mill products (India, Indonesia, Thailand) and one on memorials from India
EU	12 measures, of which 1 on agricultural products from Norway, 5 on steel mill products (India, Taiwan), 3 on synthetic polyester fibres (Australia, Indonesia and Taiwan) and three miscellaneous (India and Taiwan)
Mexico	2 agricultural products from the EU or member nations of the EU
United States	46 measures, of which 31 on steel mill products (EU nations, Brazil, Canada, India, Mexico, South Africa, Korea, Turkey), 6 on agricultural products (EU, EU Members, Iran, Norway, Turkey), 9 miscellaneous (Brazil, Canada, EU member nations, Pakistan, Venezuela, Korea, Taiwan)
Venezuela	3 agricultural products from the EU
New Zealand	2 agricultural products from the EU or member states of the EU

Sources: G/SCM/N/62/ARG (Aug. 11, 2000); G/SCM/N/AUS (July 13, 2000); G/SCM/N/62/BRA (Aug. 1, 2000); G/SCM/N/CAN (Aug. 29, 2000); G/SCM/N/62/CHL (Sept. 19, 2000); G/SCM/N/EEC (Nov. 9, 2000); G/SCM/N/62/MEX (Sept. 22, 2000); G/SCM/N/NZL (Aug. 21, 2000); G/SCM/N/62/USA (Sept. 21, 2000); G/SCM/N/VEN (Oct. 30, 2000); G/SCM/N/62/ZAF (Sept. 25, 2000).

The focus of activities within the WTO in the near future should be on the improvement of the notification process, including prioritizing work with significant trading nation Members who have not provided the 1998 "new and full" notification. For many of the other nations who have not provided notifications, technical assistance may be required and should be made available on an export trade volume basis or some other means that will give as complete a picture as early as possible.

87. *Compare Report (2000) of the Committee on Subsidies and Countervailing Measures*, G/L/408 (Nov. 10, 2000), with *Report (2000) of the Committee on Anti-Dumping Practices*, G/L/404 at 15-18 (Nov. 8, 2000).

III. RULES TO BE ADDED

A. *Perishable Agriculture*

The Uruguay Round negotiations were notable in part because they established some disciplines on agricultural subsidies, an agreement to eliminate many non-tariff barriers, minimum market access commitments and the first steps in tariff liberalization. From the beginning the difficulties with the treatment of agricultural trade on a comprehensive basis were clear. Food security, the portion of the population in many countries still engaged in agriculture, the peculiarities of agriculture (price volatility, perishability, and seasonality), past experience with drought, armed-conflict and resulting human suffering, tremendous disparity in the ability of national governments to subsidize export and domestic production all led to extraordinarily difficult negotiations. Farmers took to the streets in many countries to demonstrate their concerns, some Agricultural Ministers resigned based on liberalization ultimately agreed to, countries which historically have benefited from liberalization in trade of manufactured goods found themselves needing special breaks for critical agricultural products—typically including dairy in the West and rice in the East—with duties rising after tariffication of then existing non-tariff measures in some countries to a breathtaking level, some as high as 600%! The Agreement on Agriculture that finally emerged recognized that the initial accomplishments were only the first step in agricultural trade liberalization. Hence, Article 20 of the agreement calls for “Continuation of the Reform Process:”

Recognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations for continuing the process will be initiated one year before the end of the implementation period, taking into account:

- (a) the experience to that date from implementing the reduction commitments;
- (b) the effects of the reduction commitments on world trade in agriculture;
- (c) non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and

concerns mentioned in the preamble to this Agreement; and

- (d) what further commitments are necessary to achieve the above mentioned long-term objectives.⁸⁸

Thus, agriculture is one of the major areas where there has been a built-in agenda for further liberalization.

To date, the second phase of liberalization negotiations, which started in 2000, focuses on both the breadth and speed of future liberalization and the extent to which non-trade concerns should be addressed. Little attention is spent, however, on the question of whether existing rules should be modified or expanded in order to address the special nature of agricultural trade, including places where perishability and seasonality of production are major issues.

Agricultural producers at the farm level continue to be characterized, by and large, as highly fragmented in most economies, suggesting that farmers typically have limited negotiating clout in selling their product. Unlike manufactured goods, these producers typically have limited control over the volume of product produced other than the decision on how much acreage to plant and what type of product to grow. Weather can have an overwhelming effect on actual production in any given year—drought and major storms can greatly diminish production volumes while good weather can result in bumper crops.

Moreover, for many agricultural products, the farmer has limited ability to hold the product in inventory in an effort to even out offerings in the market and to prevent price collapses. Fruits and vegetables are good examples of farm products that must be sold within a very short window of time or they perish and become unmarketable. Similarly, cattle have a relatively short window of time in which to be sold before the returns on the product drop sharply due to the additional cost of feed, or conversely reduction in weight gain and the consequent diminished returns from the purchasers. Thus, large parts of agriculture in many countries can be characterized as subject to tremendous volatility in prices, often regardless of the actions of the producers.

The U.S. Commodity Futures Trading Commission describes the condition of price volatility that characterizes agricul-

88. Agreement on Agriculture art. 20.

tural markets, especially for seasonal and perishable products, as follows:

Agricultural prices are structurally prone to fluctuations because of the short-run inelasticities of supply and demand for agricultural products. Production of an agricultural commodity, for the most part, is fixed in the short run and is highly dependent on growing conditions, which can vary greatly from one year to the next. This can create periods of under or over supply. Similarly, the demand for basic commodities tends to be stable and generally is more responsive to changes in income and taste than to changes in price. In this situation, a small shift in supply or demand conditions can have a major impact on market prices. As a result of these price swings, farm incomes can be highly variable from one year to the next.

In addition, the supply of agricultural commodities within any one crop year or production cycle is seasonal in nature. Crops are abundant at harvest, and supplies fall during the remainder of the market year. Animal production, though more continuous, is also predisposed to production cycles due to animal birth rates and feeding schedules. Demand for most raw agricultural commodities, however, is steady throughout the year. This contrast can give rise to seasonal cycles of low prices at harvest or production peaks, followed by higher prices as stocks are drawn down.⁸⁹

A specific example of price volatility is demonstrated in the following table. It shows prices received by U.S. farmers for tomatoes for fresh market, monthly for 1996. The data presented demonstrate the volatility in prices, which is typical of all perishable agricultural products. The price volatility shown would be even greater if prices were examined on a daily basis.

89. U.S. Commodity Futures Trading Commission, Division of Economic Analysis, *Policy Alternatives Relating to Agricultural Trade Options and Other Agricultural Risk-Shifting Contracts*, (May 13, 1997), available at <http://www.cftc.gov/ag/ag8.htm>.

Prices Received - Monthly 1996 Tomatoes for Fresh Market

	Dollars per cwt
January	18.4
February	40.0
March	81.7
April	50.5
May	24.4
June	24.2
July	26.0
August	22.1
September	23.4
October	28.3
November	29.7
December	30.4

Source: "Agricultural Prices 1997 Summary"
 USDA, National Agricultural Statistics Service
 (July 1998).

Over time, individual governments have had various ways of reacting to the swings in profitability that affect farmers and ranchers, including such measures as (a) large economic transfers (though often in the form of loans), (b) establishment of minimum prices, (c) enactment of laws to permit producers to control production volumes to some extent through grade and other measures, and (d) laws to waive antitrust concerns when farmers band together in cooperatives or other forms to market their product collectively.⁹⁰ Presently, there are no multilateral

90. The United States provides special rules that partially protect certain fruit and vegetable growers from wide price fluctuations in the market. The Agricultural Marketing Agreement Act ("AMAA") of 1937, 7 U.S.C. § 601 et seq., authorizes the Secretary of Agriculture to establish marketing orders and agreements. While marketing agreements and marketing orders are similar, the Secretary of Agriculture is an actual party to marketing agreements, which he or she enters into with processors and producers of agricultural commodities. *See id.* at 7 U.S.C. § 608b(a). Marketing orders are more common than marketing agreements; they are issued by the Secretary of Agriculture and apply to "processors, associations of producers, and others engaged in the handling of any agricultural commodity." *Id.* at 7 U.S.C. § 608c(1).

According to the U.S. Department of Agriculture, marketing orders and marketing agreements are intended "to help stabilize market conditions for fruit and vegetable products." *See* Agricultural Marketing Service, U.S. Department of Agriculture, *What are Marketing Orders and How Do They Operate?*, at <http://www.ams.usda.gov/fv/moview.html>. These programs let farmers act collectively to address problems they face in the market. *Id.* At present, some 36 active marketing agreements and marketing orders exist. *Id.*

The AMAA, at § 608c(6), provides several regulatory controls that, by setting certain conditions for the sale of fruits and vegetables, promote price stability. These

rules addressing these same concerns, nor even plurilateral rules in most regional agreements such as NAFTA.

At the same time, many farmers are subject to seasonality limitations that make the traditional notion of a domestic industry or regional industry under existing multilateral rules, at least, questionable. For example, in a large country like the United States, production of fresh vegetables during the winter months is concentrated in Florida. Producers in that part of the United States do not compete with producers of the same product during the summer or fall where production occurs in other parts of the United States. The same is true in Mexico where the Sinaloa region produces in much the same time period as Florida, while Baja has production in a different time frame. For these products, regional considerations under the anti-dumping agreement are not applicable because the products can be, and are, shipped long distances. Yet, because of perishability, the health of regional producers may very well depend on imports from a

mechanisms of marketing orders and marketing agreements include limiting or allotting the quantity of an agricultural commodity that can be marketed; limiting the size, grade, or quality of products that can be sold; and providing for the control and disposition of surpluses and the creation of reserve pools. See 7 U.S.C. §608c(6)(A)-(E). Imported fruits and vegetables are required to meet the same grade, size, quality, or maturity standards as domestically produced commodities covered by marketing orders. See *id.* at § 608e-1.

The AMAA does not explicitly permit the establishment of minimum prices for fruits and vegetables. However, recognizing that the AMAA "was devised as a means for combating chronic fluctuation of prices due to overproduction of certain commodities," courts have permitted the setting of minimum prices under marketing orders when disposing of reserve commodities. *Prune Bargaining Ass'n v. Butz*, 444 F. Supp. 785, 793 (N.D. Cal. 1975), *aff'd*, 571 F.2d 1132 (9th Cir. 1978); see also *Cal-Almond, Inc., v. U.S. Dept. of Agric.*, 14 F.3d 429 (9th Cir. 1993). Importantly, the AMAA grants an antitrust exemption for activities conducted under a marketing agreement. See 7 U.S.C. § 608b. While § 608b mentions only marketing agreements, and not marketing orders, the U.S. Supreme Court has held that the antitrust exemption applies to both. See *United States v. Borden Co.*, 308 U.S. 188, 201-02 (1939). Federal appeals courts have assumed the same. See *Chiglades Farm, Ltd. v. Butz*, 485 F.2d 1125, 1134-35 (5th Cir. 1973); *Wileman Bros. & Elliot v. Giannini*, 909 F.2d 332, 334-35 n.4 (9th Cir. 1990).

The Capper-Volstead Act, 7 U.S.C. §§ 291-92, like the AMAA, provides a mechanism for fruit and vegetable growers to stabilize prices in the market. Similar to the AMAA, the Capper-Volstead Act provides a limited exception for agricultural cooperatives from antitrust laws. In *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*, 413 F. Supp. 984 (N.D. Cal. 1976), *aff'd*, 580 F.2d 369 (9th Cir. 1978), the Court held that a cooperative's policy of fixing vegetable prices was protected by the antitrust exemption of the Act. The Capper-Volstead Act does not mention the treatment of imported commodities.

particular region of a foreign country during the period when production is occurring.

Moreover, with price volatility and short production periods available to farmers, there is a compelling need for rules that permit a correction of a market problem quickly. Safeguard actions under the Agreement on Safeguards are not timely for the needs of many sectors within agriculture. While Article 5 of the Agreement on Agriculture provides for special safeguard provisions for a small subset of agricultural products, and paragraph 6 recognizes perishable and seasonal considerations, Article 5 is not available on all products from all countries or to a uniform subset of products whose characteristics would make Article 5 a potentially appropriate rule.⁹¹

There is also some effort to address the special needs of perishable goods within the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). At the consultations stage, in cases of urgency (which include those concerning perishable goods), Members are required to enter into consultations within ten days of the receipt of the request. If the consultations fail to settle the dispute within twenty days of the receipt of the request, the complaining party may request the establishment of a panel.⁹² Additionally, in urgent cases, including those concerning perishable goods, the parties to the dispute, the panel, and the Appellate Body should make every effort to accelerate the resolution of the dispute.⁹³ Under the panel's procedures, in urgent cases (which include those involving perishable goods), panels are urged to expedite their procedures and issue their report to the parties within three months instead of the usual of six months.⁹⁴ Although the Appellate Body is urged to accelerate the resolution of the dispute, no timeframe is suggested for issuing their report in cases of urgency (which include perishable products). While these provisions are potentially helpful, countries have been frustrated in their use, and the timeline of even expedited DSU proceedings offers little actual help to producers facing a problem today.

The above comments reflect an existing opportunity for the

91. See Agreement on Safeguards art. 5.

92. See DSU art. 4.

93. See *id.*

94. See *id.*

trading system to improve support within agriculture for expanded liberalization—the opportunity to review the need for and negotiate rules within the Agreement on Agriculture, which will address the special needs of agricultural producers because of perishability and seasonality. Without such special rules, trade liberalization will tend to exacerbate divisions within nations on the need for and wisdom of expanding trade opportunities in agricultural products. In the United States, for example, as part of NAFTA, U.S. vegetable producers were promised tools to address surges in imports. The mechanism provided has proven unusable for domestic producers, undermining these producers' support for further liberalization within the WTO or within the hemisphere.

Interestingly, there has been significant interest in addressing some or all of these issues by various governmental and private sector groups, although no nation has yet put the issues onto the negotiating table in Geneva. A review of some of the views within the United States, Mexico, and Canada follows.

1. U.S. Proposals For Treatment of Perishable Products

Since the Uruguay Round, various organizations have recommended the development of special trade rules for perishable and seasonal products. In the past three years, the American Farm Bureau Federation has testified several times before Congress. On at least three of these occasions, the American Farm Bureau has repeated its recommendation to modify DSU provisions involving perishable products.⁹⁵ The American Farm Bureau has suggested that the dispute settlement process for perishable agricultural products should be modified so as to allow the procedure to be used where only the aggrieved party proposes its use. Under the current system, the WTO requires both parties to a dispute to agree to use the perishable-products pro-

95. See *United State Negotiating Objectives for the WTO Seattle Ministerial Meeting: Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 106th Cong. (1999) (statement of Dean Kleckner, President, American Farm Bureau Federation); see also *The Administration's Preparations for the 1999 World Trade Organization Ministerial: Before the House Comm. on Agric.*, 106th Cong. (1999) (statement of Al Christopherson, President, Minnesota Farm Bureau, on behalf of American Farm Bureau Federation); *Implementation of Fast Track Authority: Before the Sucomm. on Trade of the House Comm. on Ways and Means*, 105th Cong. (1997) (statement of Bob Rice, President, California Farm Bureau on behalf of American Farm Bureau Federation).

cedure.⁹⁶ The American Farm Bureau believes that promptly enacting this change would address the fundamental problem of a dispute settlement process that requires too much time and prevents market access for several marketing seasons before a resolution is reached.⁹⁷ For its part, the Seattle Round Agricultural Committee⁹⁸ articulated a similar concern when it recommended that negotiators accelerate resolution of agricultural trade disputes.⁹⁹ Although it did not provide the negotiators with specifics, one source did point out that the requirement that both sides must agree to use an expedited schedule should be reworked to mandate an expedited schedule.¹⁰⁰

Various state government officials also have testified before Congress on the need for special rules for perishable agriculture. The State of Florida, for instance, has urged that the United States support reform of the Agriculture Agreement to address effectively the problem of price volatility in perishable agricultural commodities.

Issues important to seasonal and perishable or specialty agriculture were not fully addressed during the last round of multilateral trade negotiations. We have requested that these issues be addressed on the agenda in the upcoming Ministerial Round. We must have some mechanism to address price collapses in perishable commodities. We desire specific rules to deal with seasonal and perishable agricultural products, as well as enforcement of scientifically based sanitary and phytosanitary issues, workable and timely safeguard mechanisms, rapid dispute settlement resolutions, open market access, and elimination of tariff and non-tariff barriers to trade.

96. See *United State Negotiating Objectives for the WTO Seattle Ministerial Meeting: Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 106th Cong. (1999) (statement of Dean Kleckner, President, American Farm Bureau Federation).

97. See *id.*

98. The Seattle Round Agricultural Committee ("SRAC") is a coalition of more than seventy U.S.-based commodity groups and associations representing agricultural producers, processors and agribusinesses. Its goal is to demonstrate U.S. agricultural and food sector support for the launching of a comprehensive round of multilateral trade negotiations and the need for free and fair trade in agricultural commodities and products. See *Agriculture Coalition Sets Priorities for WTO, Sidesteps Radical Reform*, INSIDE U.S. TRADE, May 21, 1999 [hereinafter *Agricultural Coalition*].

99. See *id.* The National Association of State Departments of Agriculture (or "NASDA") has also endorsed a change in international trade rules for perishable goods. See Policy Statement, NASDA, International Marketing and Trade of Agricultural Products (Sept. 26, 2000).

100. See *Agriculture Coalition*, *supra* note 96.

We, along with other states with similar interests, pledge to work with USTR, USDA and our Congressional Delegation to affect policy matters both in the international WTO Ministerial negotiations and to forge needed changes in domestic law to gain a conducive situation to trade in out agricultural products.

* * *

No specific rules exist to deal with general trade or dispute resolution involving perishable and seasonal commodities. The former head of the Uruguay Round agriculture negotiating team when asked, at the AG Forum immediately preceding the FTAA Business Forum in Belo Horizonte, if specific rules for perishable commodities were needed, agreed that specific rules could be helpful and may be advisable. Florida has sought recognition that trade remedies should be available on perishable and seasonal agricultural products that reflect the commercial realities of these products. The Agreement on Agriculture already recognizes the need for separate treatment or timelines. We request that the U.S. consider adding discussion of the need for rules for perishable and seasonal commodities as an item on the agenda for the upcoming ministerial in Seattle. Similarly, the U.S. should include in the negotiations consideration of what, if any, special rules may be needed to cope with commodity price collapses such as have been experienced in livestock and grain.¹⁰¹

101. *United State Negotiating Objectives for the WTO Seattle Ministerial Meeting. Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 106th Cong. (1999) (statement of Bob Crawford, Commissioner of Agriculture).

In addition, in comments submitted to the Trade Policy Staff Committee, Florida suggested specific reforms that would help to address the needs of perishable and seasonal agricultural products:

Florida's agricultural industry has been deeply disappointed in the inability of existing U.S. trade laws and international agreements to address the needs of perishable and seasonal products. While Article 5 of the Agriculture Agreement recognizes both perishable and seasonal products in the context of the Special Safeguards Provisions, there is nothing in the Agriculture Agreement which otherwise defines the issues or identifies rights and obligations with regard to these products. One such right should be that for purposes of rules based actions (anti-dumping, countervailing duty, safeguard), a seasonal product can be a separate industry to the extent that relief is provided for only that season. This change could arguably be accomplished within the Agriculture Agreement or could be included in each of the other Agreements in the industry definition section. Similarly, the nature of perishable agricultural products is such that price volatility is extreme and consumers are not benefited by the gyrations in price and volume from the farms. Consideration of approaches that can permit producers across borders to better stabilize supply and maintain sustainable pricing should be pursued. One such approach

Similarly, on behalf of the State of Arizona, the Director of the Arizona Department of Agriculture has testified that the current avenues for dispute resolution in the WTO inadequately suit the needs of producers of perishable and seasonable commodities because the very nature of such commodities requires trade mechanisms that provide timely solutions.¹⁰² He noted that special rules are necessary to ensure that perishable shipments are not lost due to bureaucratic or political mechanisms.¹⁰³ The Arizona Department of Agriculture also suggested that in the new round of negotiations, the United States should seek clarification of the dispute settlement process with the goal of a strong enforcement mechanism, limited settlement appeals, and strict compliance deadlines.¹⁰⁴

Representative Karen Thurman (D-Fla.) also, in testimony before the Subcommittee on Trade, has spoken of the many unique considerations that perishable agricultural products face, pointing out that products such as tomatoes, oranges, and peppers cannot be stored until markets change or trade disputes get resolved.¹⁰⁵ Representative Thurman concluded that international trading rules need to be developed to address the special concerns of producers of seasonal and perishable agricultural commodities.¹⁰⁶

2. International Proposals for Perishable Products

U.S. agricultural organizations and committees are not the only parties for whom changes to the WTO rules for perishable products would be beneficial; indeed, such reforms would benefit all WTO Members.¹⁰⁷ One specific example of international

could be a clarification that Art. 11.1(b) note 4 of the Safeguard Agreement does not apply in the case of agricultural agreements between countries.

Submission of Bob Crawford, Commissioner of Agriculture, State of Florida, *Comments of the Florida Department of Agriculture and Consumer Services (FDACS) Regarding U.S. Preparations for the World Trade Organization's Ministerial Meeting*, at 8 (Oct. 16, 1998).

102. See *United State Negotiating Objectives for the WTO Seattle Ministerial Meeting: Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 106th Cong. (1999) (statement of Sheldon R. Jones, Director, Arizona Department of Agriculture).

103. See *id.*

104. See *id.*

105. See *U.S. Efforts to Reduce Barriers to Trade in Agriculture: Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 105th Cong. (1998) (statement of Rep. Karen Thurman).

106. See *id.*

107. For example, Sheldon Jones, the Director of the Arizona Department of Agri-

cooperation in addressing the problem of perishable agricultural products is seen in the meeting, in 1999, of representatives from State Agricultural Commissions of the United States, Canada, and Mexico to develop common positions for future WTO negotiations. That meeting produced the 1999 State-Provinces Agricultural Accord.¹⁰⁸ These countries agreed that agriculture should be given the highest priority for the new round of negotiations because failure to resolve difficult agricultural issues would be detrimental to future growth and prosperity in the United States, Canada, and Mexico.¹⁰⁹ In addition, the representatives provided recommendations for a common negotiating strategy, including a statement urging the creation of specific rules and processes for trade in perishable and seasonable products that address the unique nature of these products.¹¹⁰

3. Conclusion

As part of the Agreement on Agriculture, Members agreed to initiate negotiations for continuing the agricultural trade reform process one year before the end of the implementation period (i.e., by the end of 1999).¹¹¹ Those negotiations have now begun and, to date, a great deal of work has been undertaken to identify potential issues affecting, approaches to, and concerns with, further trade liberalization in agriculture.

If trade expansion in agriculture is to continue, it is critical

culture, in testimony before the Trade Subcommittee of the House Ways and Means Committee, noted:

Presently, no specific rules exist to deal with the trade of perishable and seasonal commodities. When asked if specific rules for perishable commodities were needed at the Ag Forum immediately preceding the Free Trade Area of the Americas Business Forum in Belo Horizonte, the head of the Uruguay Round agriculture negotiating team agreed that the promulgation of such rules would be both helpful and advisable for *all WTO member countries*.

United State Negotiating Objectives for the WTO Seattle Ministerial Meeting: Before the Subcomm. on Trade of the House Comm. on Ways and Means, 106th Cong. (1999) (statement of Sheldon R. Jones, Director, Arizona Department of Agriculture) (emphasis added).

108. *See* Letter from Cary Peterson, President, National Association of State Departments of Agriculture, Jaime Rodriguez Lopez, Mexican Association of State Departments of Agriculture Development, and Eric Upsall, Chair, Provincial Ministers of Canada (July 17, 1999) (on file with authors).

109. *See id.*

110. *See id.* These issues can be addressed within NAFTA or other regional arrangements in part through expanding marketing orders and Capper-Volstead rights to international producers and having similar legislation in the other NAFTA countries.

111. *See* Agreement on Agriculture art. 20.

that the trading system come to grips with the peculiarities of the sector and adopt rules that will permit the peculiarities to be addressed in a mutually-agreed manner. The ongoing negotiations on agriculture are an important opportunity. Member nations should be sure the opportunity is not lost.

B. *Structural Excess Capacity*

The multilateral trading system's rules typically address problems of one country or, at least, one product at a time. Thus, anti-dumping and countervailing duty actions are brought against imports of a particular product from a particular country. Safeguard actions are brought against particular products imported from all trading partners. Violations of market access rights are brought against specific products. In most circumstances, the existing WTO rules (other than in the agricultural area) work reasonably well and are typically used infrequently.

There are, however, situations where the international trading system is confronted by an international problem that is affecting many Member nations simultaneously. Extraordinary events like the collapse of the former Soviet Union resulted in a massive global imbalance between supply and demand in a number of sectors, an imbalance which has not corrected itself in some sectors despite the nearly ten years that have passed since the original collapse in demand. Because the former Soviet Union controlled a large share of international production resources in various industries and because demand declined precipitously for many of these products within the successor states, there have been worldwide dislocations that have led to a wide variety of efforts at the local level to address the fallout in national markets.

In some industries, such as steel, the structural problems that developed as a result of the Soviet Union's collapse compounded structural excess capacity that had existed for long periods because of national security, job maintenance and other reasons, and which was largely maintained by massive government subsidies. In recent years, these structural problems were similarly exacerbated by the unusual financial crisis in certain parts of Asia, which seriously decreased demand in important markets of the world.

In one sector, aluminum, there was an *ad hoc* plurilateral

effort to address the glut of aluminum production in light of drastically-contracted demand following certain individual nation efforts to address the staggering overproduction. In the EC, quotas were imposed on imports from Russia in 1993.¹¹² The United States sought comments on how to address the situation (amidst indications that the domestic industry was likely to file an anti-dumping case).¹¹³ Finally, six countries reportedly entered a Memorandum of Understanding, which attempted to address the problem on a global basis with reported production cut backs and other actions.¹¹⁴ The *ad hoc* solution was successful in restoring a better balance between supply and demand but raised a variety of concerns under national antitrust laws in, at least, some countries.

The ongoing crisis in the steel sector is a good example of why the WTO should consider adding rules that would permit structural excess capacity to be taken out of the system quickly and according to internationally-agreed rules. The existing tools, which are micro-economic in application, do not address the underlying problem of massive excess capacity in an efficient manner. Producers and consumers alike would be served by providing multilateral solutions to these extraordinary problems.

1. Steel Industry as a Case Study

Many countries believe that a strong domestic steel industry is essential because of its use in a variety of industries. Steel is a major component in automobiles, building construction, major appliances, national defense and other sectors. Historically, countries have wanted to have a steel industry, both for employment reasons and as a resource in time of armed conflict. Thus, it has been common for many nations too small to economically justify the maintenance of steel facilities to nonetheless have steel capacity. Moreover, the large integrated steel mills of the past have been major employers, often in fairly isolated areas of nations with few alternative employment opportunities. In times of economic downturn for the sector, the contraction in de-

112. See Commission Regulation No. 227/93, O.J.L 198/21 (1993).

113. See Request for Public Comment on Strategies To Address Increased Exports of Primary Aluminum From Newly Independent States, 58 Fed. Reg. 50,061 (Sept. 24, 1993).

114. See *Don't Call it a Cartel, But World Aluminum Has Forged New Order*, WALL ST. J., June 9, 1994, at 1.

mand has proven economically unaffordable for the steel mills of countries, either from an employment or profitability basis. This has resulted, over time, in periodic waves of export surges at depressed prices. It has also resulted in many nations being unwilling to let capacity be eliminated for one or more of the reasons reviewed previously. Hence, many nations have funneled billions of dollars into their steel mills to prevent their collapse. Add to this the collapse of the former Soviet Union, the successor states' need for hard currency, the financial crisis in Asia (and elsewhere) amongst countries with significant steel production capacity, and the last few years have seen an unprecedented array of trade cases brought against imported steel from other countries.

a. Structural Imbalances in the Steel Industry: 1970s and 1980s

Serious excess capacity has existed in the global steel industry for some thirty years or more, certainly since the first oil crisis in 1974 when demand decreased sharply.¹¹⁵ The decline of the steel industry continued throughout the 1970s and early 1980s. A combination of factors was responsible for this decline, including a severe economic recession in the 1980s, fundamental changes in steel consumption patterns due to technological advances, intra-industry competition, and an increase in imports.¹¹⁶ Many governments, viewing the decrease in demand as a trough in the cyclical nature of the industry, continued production and often expanded their operations.¹¹⁷

Moreover, governments in developing countries added to this excess capacity by investing in new government-sponsored steel producers.¹¹⁸ This capacity expansion resulted in a tripling of capacity levels in developing countries between 1970 and

115. See Thomas R. Howell, Brent L. Bartlett, *THE NEW CRISIS IN STEEL*, Statement Before the House Ways and Means Subcommittee on Trade, Washington, D.C., at 7 (Feb. 25, 1999).

116. See *UR TREATISE*, *supra* note 1, at 822; see also Thomas R. Howell, Brent L. Bartlett, *THE NEW CRISIS IN STEEL*, *supra* note 113, at 7-8. With demand still flat, the combination of new mills and expansion of the old mills caused excess production capacity to reach 120 million tons by the early 1980s. *Id.*

117. For example, during this time, Europe doubled its output, and, between 1960 and 1975, Japan experienced a sevenfold increase in capacity. See *UR TREATISE*, *supra* note 1, at 822.

118. See THOMAS R. HOWELL, ET AL. *STEEL AND THE STATE: GOVERNMENT INTERVENTION AND STEEL'S STRUCTURAL CRISIS* 252-54 (1998).

1986, at which point steelmaking capacity in developing countries reached 122 million metric tons.¹¹⁹ During this period, many governments intervened in their steel industry to prevent a decrease in employment or production despite stagnant or declining demand in certain markets, exacerbating the imbalance between global demand and supply.

b. Collapse of Demand in the Former Soviet Union

During the 1980s, the Soviet Union had one of the largest minerals and metals sectors in the world.¹²⁰ The metals and minerals sector accounted for about 25% of exports and employed more than 1.5 million people.¹²¹ With the sudden breakup of the Soviet Union in 1991, the multilateral trading system experienced a tremendous change in the supply and demand equation for these minerals and metals. This change in supply and demand resulted in Russian producers exporting a variety of metals and minerals at distressed prices as the collapse in demand within the successor states and the need for hard currency led to contracts being set at virtually any price, typically far below other exporting nations.

What was true for the metals and minerals sector generally was especially true for steel. During the 1980s, the Soviet Union was one of the world's largest steel producers, with its military absorbing a large percentage of production. So heavy was the internal demand for steel within the Soviet Union that the country was a net importer prior to 1991. After the dissolution of the Soviet Union, Russia inherited most of its steel facilities. As was true in some other nations as well, steelmaking facilities had served as major employers of people. The location of facilities often made the region heavily dependent for employment upon the continuation of activity at the steelmaking facility. This situation made it difficult for the Russian Federation to permit the type of layoffs and plant closures that might have been expected based on technology and efficiency levels of many of the facili-

119. *See id.* at 252.

120. *See* U.S. INTERNATIONAL TRADE COMM'N, Pub. No. 3153, *Impediments to Competitiveness in Russia's Minerals and Metals Sector*, in *INDUSTRY TRADE AND TECHNOLOGY REVIEW*, at 1 (1998). These minerals and metals included iron ore, steel, bauxite (aluminum ore), aluminum, copper ore, zinc, nickel, and gold. *See id.*

121. *See id.*

ties,¹²² although there has been some privatization and some downsizing of the steel industry.¹²³ Not only was there a staggering drop in demand from the Russian military following the collapse of the Soviet Union but demand was collapsing throughout the former Soviet Union, as were commercial links.¹²⁴ Despite heavy staffing of facilities and drastic reductions in demand, the Russian government was apprehensive about substantial layoffs for fear of creating a “huge social explosion.”¹²⁵

As reported in the press, many Russian facilities were unable to pay workers for months or paid them in kind. Russian facilities found collecting payments in the internal market to be difficult and instead focused on exporting to obtain hard currency or improve the likelihood of being paid at all. Without well-established outlets in the West for their products, Russian producers often sold through sales agents focused on moving product at any price. The result was that Russia exported record amounts of steel.¹²⁶ Whereas the Soviet Union was a net importer of steel, Russia was exporting 65% of its output by mid-1998.¹²⁷

c. The Current Situation

The U.S. government recently described the excess capacity situation in the global steel industry as follows:

Overcapacity is a relative term, and there is no single agreed-upon definition. Generally, the term is used to describe the fact that global steelmaking capacity has been consistently well-above global steel production over the long term. In the case of steel, this may be attributable to the fact that less than perfect market forces dominate the industry, such that government supports and other activities have sustained uneco-

122. *See id.*

123. *See* U.S. DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, *Report to the President: Global Steel Trade, Structural Problems and Future Solutions* 37 (July 2000).

124. *See* U.S. INTERNATIONAL TRADE COMM'N, *supra* note 118.

125. *See* Thomas R. Howell, Brent L. Bartlett, *THE NEW CRISIS IN STEEL*, *supra* note 113 at 21.

126. *See* U.S. Department of Commerce, International Trade Administration, *Report to the President: Global Steel Trade, Structural Problems and Future Solutions* at 40 (July 2000).

127. *See* Thomas R. Howell, Brent L. Bartlett, *THE NEW CRISIS IN STEEL*, *supra* note 113, at 23. Moreover, some Russian steel mills were actually exporting almost 100% of their production, at prices well below those prevailing in foreign markets. *See id.*

conomic capacity and production. Although there may be different ways to measure global steelmaking capacity and production, most industry experts that have analyzed the issue find a sizeable and consistent gap between capacity and production over the long term.

A 1999 Organization for Economic Cooperation and Development (OECD) report concludes that world steelmaking capacity has remained well-above production between 1985 and 1999. The report states that world steelmaking capacity increased by almost 150 million metric tons (MT) during this time and that by 2001 it will have increased by an additional 45 million MT. However, steel production has increased in "distinctly smaller proportions," resulting in a widening gap between production and capacity. (Efforts are currently under way in the OECD Steel Committee to refine the capacity measurement pursuant to questions raised as to the accuracy of some of the underlying country capacity data.)

Most other steel analysts have also concluded that there is significant overcapacity in the global steel industry. A World Steel Dynamics study of capacity utilization rates reached conclusions very similar to those of the OECD. Moreover, the London-based Iron and Steel Statistics Bureau (ISSB) estimated world excess capacity to be 250 and 275 million MT in 1997 and 1998, respectively.

Comparable findings of overcapacity have been made for specific regions and countries. The ISSB calculated 100 million MT of overcapacity in Eastern Europe and countries of the former Soviet Union, 70 million MT in Asia, 50 million MT in the European Union (mainly in Italy and Spain), and 15 million MT in the United States. The United Nations estimated that overcapacity in Russia and the Ukraine was between 20 and 30 million MT. Analyzing the Japanese steel industry, a 1999 report by a committee sponsored by the Ministry of International Trade and Industry, which took into account domestic and global demand over the long term, estimated that fifteen percent of Japanese steelmaking capacity, about 17 million MT, was "surplus." Finally, one of the conclusions reached by a recent International Monetary Fund report was that "excess production capacity" had been created in the Korean steel industry as a result of government influenced private investment (although the report did not explain how this conclusion was reached). While estimates from various sources indicate that there is substantial unused steelmaking

capacity throughout the world as a whole across many years, high fixed costs and other factors (including, for example, protected markets and subsidies) encourage steel makers to operate facilities at high levels of capacity. Such high capacity utilization, combined with substantial unused capacity overhand, tends to suppress prices world wide.¹²⁸

d. Response of the United States to the Problem of Excess Capacity

With the global excess capacity resulting in wave after wave of distress pricing of imported product into the U.S. marketplace, U.S. producers lost the ability to supply the U.S. market. Indeed, the United States became the only major producing nation with a substantial trade deficit on steel mill products. As a very open and large market, the United States is frequently the destination of choice for excess capacity in other countries.

Problems in the early 1970s and a wave of anti-dumping cases led to the creation of the Trigger Price Mechanism (or "TPM"). The TPM was designed to let the U.S. government self-initiate cases where prices of imports were below the full costs of the most efficient producers at the time (the Japanese steel companies).¹²⁹ In exchange, trade cases were withdrawn or were not filed by domestic steel producers. The TPM was revised once but ultimately collapsed in the face of the major global contraction in the early 1980s.¹³⁰

The U.S. producers filed a large number of steel cases in 1982 and selected cases thereafter and pursued an escape clause case in 1984 on all carbon and alloy steel mill products. The European Union, one of the major targets of the U.S. anti-

128. See U.S. Department of Commerce, International Trade Administration, *supra* note 124, at 3.

129. See, e.g., U.S. INT'L TRADE COMM'N, Pub. No. 1021, *Operation of the Trade Agreements Program*, in 30TH REPORT-1978, at 11 (1979). "In late 1977 the Department of the Treasury announced that it would inaugurate a trigger-price mechanism (TPM) for use in monitoring the prices of imports of steel mill products. . . . The TPM was designed to enable the U.S. Customs Service to initiate anti-dumping investigations on a "fast-track" basis without waiting for receipt of complaints. The purpose is to alert Customs to the possibility of sales at less than fair value." *Id.*

130. "On January 11, 1982, in response to seven domestic steel producers' filing anti-dumping and/or countervailing duty petitions covering many steel mill products from nine countries, Commerce suspended the TPM." U.S. INT'L TRADE COMM'N, Pub. No. 1414, *Operation of the Trade Agreements Program*, in 34TH REPORT—1982, at 240 (1983).

dumping and countervailing duty actions in 1982, preferred voluntary restraints to prevent serious internal dislocations than having the trade cases run their course. Similarly, although large segments of the US steel industry obtained affirmative determinations by the U.S. International Trade Commission under the 1984 safeguard investigation, the President, with support from Congress, preferred voluntary restraint agreements (or "VRA") on a broader array of products with many of the major producers. These VRAs remained in place until 1992, at which point a large round of new steel cases were filed.

The continuance of the steel crisis of 1998 resulted in an ever-expanding number of cases, efforts to pass legislation to impose global quotas, a call for a global safeguard action, and a spate of bankruptcies in the United States. In 2000, the U.S. government, through the U.S. Department of Commerce, conducted a study that resulted in the July 2000 report to the President. The Clinton Administration subsequently announced a program of affirmative steps.¹³¹ The steps taken to date, however, have yet to resolve the U.S. producers' problems, resulting in calls in early 2001 for emergency actions to deal with increasing bankruptcies and other problems.¹³²

e. Response of the European Community

Following the crisis in 1974, the European Community established a variety of measures to assist its steel industry. At the beginning of the crisis in 1975, the Member States of the European Community intervened in the steel industry and provided subsidies to failing producers to prevent a collapse of their steel industries.¹³³ In the next few years they began to establish more comprehensive programs. Between 1978 and 1988, the European Community set up import control measures through negotiation of bilateral agreements with more than twenty countries.¹³⁴ These agreements gave the European Community some

131. See Press Release, U.S. Dep't of Commerce, Commerce News (July 26, 2000), at www.ita.doc.gov/media/STEEL726.htm.

132. See, e.g., *Ukraine, U.S. Explore Restraint Agreement On Steel Imports*, INSIDE U.S. TRADE, Jan. 5, 2000 ("The Administration as recently as last week came under blistering criticism from the domestic industry for its failure to provide import relief, as the LTV Corporation, a major U.S. operator of integrated mills, filed for bankruptcy Dec. 29."). *Id.*

133. See THOMAS R. HOWELL ET AL., *supra* note 116, at 55.

134. See *id.* at 95-96.

time to reorganize its steel industries. Moreover, in 1980, the European Community declared a state of manifest crisis, imposed mandatory production quotas on many steel products, and fined any company that produced steel in excess of the quota or undercut the legal minimum price.¹³⁵ These measures remained in place until 1988 and were reintroduced in a more limited way between 1992 and 1994. Such measures helped the European Community survive the steel crisis of the 1970s and 1980s. As reviewed previously, the EC has seen a spate of trade cases and has established various bilateral arrangements in the last decade to deal with the latest crisis caused by excess capacity.

f. Worldwide

The crisis in the steel industry is not limited to the United States and the European Community. The structural excess capacity situation is global in scope, affecting producers worldwide. Virtually all countries are affected by the steel situation in one form or another. The number of trade cases involving steel arising over the past few years is illuminating. Consider the following examples:

1. INDIA: In the first half of 2000, India completed a round of anti-dumping cases on seamless tube from Austria, the Czech Republic, Romania, the Russian Federation, and the Ukraine, and also had outstanding anti-dumping duty orders on hot rolled coils from Russia and the Ukraine.¹³⁶
2. CANADA: Under the auspices of its countervailing duty law, Canada investigated stainless steel round bars imported from Brazil and India, and hot-rolled carbon steel plates from India, Indonesia, and Thailand.¹³⁷ Canada also had a wide variety of investigations, orders or undertakings in place on various steel mill products from Brazil, Cuba, Finland, France, Germany, India, Indonesia, Japan, Korea, Romania, the Russian Federation, the Slovak Republic, Thailand, Turkey, the Ukraine, the United States, Venezuela, the People's Republic of China, Tai-

135. See Thomas R. Howell & Brent L. Bartlett, *THE NEW CRISIS IN STEEL*, *supra* note 113, at 35.

136. *Committee on Anti-Dumping Practices*, Semi-Annual Report and Article 16.4 of the Agreement—India, G/ADP/N/65/IND (Sept. 19, 2000).

137. *Committee on Subsidies and Countervailing Measures*, Semi-Annual Report and Article 25.11 of the Agreement—Canada, G/SCM/N/62/CAN/Rev.1 (Oct. 24, 2000).

- wan, Italy, Sweden, Spain, Mexico, and the United Kingdom.¹³⁸
3. VENEZUELA: Venezuela had anti-dumping orders on seamed and seamless steel tubes and bars and rods of non-alloy steel from Japan, on seamless steel tubes from Romania, and on hot-rolled and cold-rolled flat products from the Russian Federation, Kazakhstan and the Ukraine.¹³⁹
 4. EUROPEAN UNION: The EU had dozens of steel cases, orders and/or undertakings under its anti-dumping and countervailing duty laws on products from Bulgaria, the People's Republic of China, Taiwan, Croatia, the Czech Republic, India, Iran, Korea, Malaysia, Romania, the Russian Federation, South Africa, Thailand, Turkey, the Ukraine, and Yugoslavia.¹⁴⁰ Also, as shown by the Chart in Attachment 1, the EU had various bilateral arrangements with various countries.
 5. MEXICO: In the first half of 2000, under its countervailing duty law, Mexico had undertakings and orders in effect on various types of steel from Brazil and Venezuela and anti-dumping duty orders in force on various steel products from Brazil, Bulgaria, Canada, Germany, Kazakhstan, the Netherlands, the Russian Federation, the Ukraine, the United States, and Venezuela.¹⁴¹
 6. SOUTH AFRICA: South Africa has anti-dumping orders outstanding on various steel mill products from Korea, Malaysia, the Russian Federation, and the Ukraine.¹⁴²
 7. COLOMBIA: Colombia has investigations underway on hot-rolled sheet from Kazakhstan, the Russian Federation, and the Ukraine, and orders outstanding on tin plate from the Netherlands, cold-rolled sheet from Kazakhstan, the Russian Federation, and the Ukraine, and bars and rods from the Russian Federation and Trinidad

138. *Committee on Anti-Dumping Practices*, Semi-Annual Report under Article 16.4 of the Agreement—Canada, G/ADP/N/65/CAN (Aug. 30, 2000).

139. *Committee on Anti-Dumping Practices*, Semi-Annual Report under Article 16.4 of the Agreement—Venezuela, G/ADP/N/65/VEN (Oct. 25 2000).

140. *Committee on Anti-Dumping Practices*, Semi-Annual Report under Article 16.4 of the Agreement—European Communities—Corrigendum, G/ADP/N/65/EEC (Aug. 17, 2000); G/SCM/N/62/EEC (Nov. 9, 2000).

141. *Committee on Subsidies and Countervailing Measures*, Semi-Annual Report under Article 25.11 of the Agreement—Mexico, G/SCM/N/62/MEX (Sept. 22, 2000).

142. *Committee on Anti-Dumping Practices*, Semi-Annual Report under Article 16.4 of the Agreement—South Africa, G/ADP/N/65/ZAF (Sept. 22, 2000).

- and Tobago.¹⁴³
8. BRAZIL: Brazil had investigations and/or orders on various steel mill products from Taiwan, France, Germany, Italy, Japan, Korea, Mexico, South Africa, and Spain.¹⁴⁴
 9. AUSTRALIA: Australia had investigations and/or orders on certain steel mill products from Thailand and the United Kingdom.¹⁴⁵
 10. EGYPT: Egypt had anti-dumping duty orders in effect on steel reinforcing bars from Latvia, Romania, Turkey, and the Ukraine.¹⁴⁶
 11. INDONESIA: Indonesia had anti-dumping duty orders in effect on steel pipes from the People's Republic of China, Japan, Korea, and Singapore, and on hot-rolled coil from India.¹⁴⁷
 12. KOREA: Korea had a price undertaking in place with the Russian Federation on H-beams.¹⁴⁸
 13. PERU: Peru had anti-dumping orders in effect on hot and cold-rolled steels from the Russian Federation and the Ukraine.¹⁴⁹
 14. PHILIPPINES: The Philippines conducted an investigation on steel mill products from Taiwan and Korea.¹⁵⁰
 15. SINGAPORE: Singapore imposed an anti-dumping duty order on steel reinforcement bars from Turkey.¹⁵¹
 16. THAILAND: Thailand had anti-dumping duty orders in effect on H-sections from Korea and Poland.¹⁵²
 17. TURKEY: Turkey had anti-dumping duty investigations

143. *Committee on Anti-Dumping Practices*, Semi-Annual Report under Article 16.4 of the Agreement—Colombia, G/ADP/N/65/COL (Sept. 25, 2000).

144. *Committee on Anti-Dumping Practices*, Semi-Annual Report under Article 16.4 of the Agreement—Brazil, G/ADP/N/65/BRA (Aug. 1, 2000).

145. *Committee on Anti-Dumping Practices*, Semi-Annual Report under Article 16.4 of the Agreement—Australia, G/ADP/N/65/AUS (July 13, 2000).

146. *Committee on Anti-Dumping Practices*, Semi-Annual Report under Article 16.4 of the Agreement—Egypt, G/ADP/N/65/EGY (Aug. 24, 2000).

147. *Committee on Anti-Dumping Practices*, Semi-Annual Report under Article 16.4 of the Agreement—Indonesia, G/ADP/N/65/IDN (Sept. 1, 2000).

148. *Committee on Anti-Dumping Practices*, Semi-Annual Report under Article 16.4 of the Agreement—Korea, G/ADP/N/65/KOR (Aug. 3, 2000).

149. *Committee on Anti-Dumping Practices*, Semi-Annual Report under Article 16.4 of the Agreement—Peru, G/ADP/N/65/PER (Sept. 20, 2000).

150. *Committee on Anti-Dumping Practices*, Semi-Annual Report under Article 16.4 of the Agreement—Philippines, G/ADP/N/65/PHL (Sept. 21, 2000).

151. *Committee on Anti-Dumping Practices*, Semi-Annual Report under Article 16.4 of the Agreement—Singapore, G/ADP/N/65/SGP (Aug. 24, 2000).

152. *Committee on Anti-Dumping Practices*, Semi-Annual Report under Article 16.4 of the Agreement—Thailand, G/ADP/N/65/THA (Aug. 1, 2000).

and/or orders on steel billets from Moldova, the Russian Federation, and the Ukraine.¹⁵³

18. UNITED STATES: The United States had anti-dumping duty investigations, orders or suspension agreements, countervailing duty investigations, orders or suspension agreements and/or safeguard actions on a wide variety of steel mill products from several countries; these include: Argentina, Australia, Austria, Belarus, Belgium, Brazil, Canada, Czech Republic, Finland, France, Germany, India, Italy, Indonesia, Japan, Korea, Latvia, Malaysia, Mexico, Moldova, Netherlands, the People's Republic of China, Philippines, Poland, Romania, the Russian Federation, Singapore, the Slovak Republic, South Africa, Spain, Sweden, Thailand, Taiwan, Turkey, the Ukraine, United Kingdom, and Venezuela.¹⁵⁴ The U.S. also had a negotiated arrangement with the Russian Federation on a full range of products and was, at the beginning of 2001, in negotiations with the Ukraine for a comprehensive package.¹⁵⁵

Although not exhaustive, this list demonstrates the extraordinary problems facing all major steel producing nations due to the serious imbalance between global supply and demand.

2. Global Rules Should Be Established to Deal With Structural Excess Capacity

Although countries provide temporary measures to respond to problems such as those experienced globally by the steel industry, such nations remain unable to effectively resolve the underlying problem of structural excess capacity. In steel, there has been a nearly continual crisis since the 1970s. The multilateral trading system provides effective procedures to respond to periodic excess capacity. The experiences of industries suffering structural excess capacity, such as steel and aluminum, suggest, however, that the establishment of multilateral rules for restor-

153. *Committee on Anti-Dumping Practices*, Semi-Annual Report under Article 16.4 of the Agreement—Turkey, G/ADP/N/65/TUR (Aug. 30, 2000).

154. See, e.g., *Committee on Subsidies and Countervailing Measures*, Semi-Annual Report under Article 25.11 of the Agreement—United States, G/SCM/N/62/USA (Sept. 21, 2000); *Committee on Anti-Dumping Practices*, Semi-Annual Report under Article 16.4 of the Agreement—United States, G/ADP/N/65/USA (Oct. 6, 2000); *Report (2000) of the Committee on Safeguards*, G/L/409 (Nov. 23, 2000).

155. See *Ukraine, U.S. Explore Restraint Agreement On Steel Imports*, INSIDE U.S. TRADE, Jan. 5, 2000.

ing equilibrium would result in significantly less stress on the system, less destruction of economically efficient operations, and a quicker return to sustainable competition.

It is not the purpose of this Essay to outline what the rules should be for effectively addressing structural excess capacity. The WTO would do well to encourage input from as many industries and Member governments as possible. Such dialogue would encourage a broader understanding of the range of situations that excess capacity develops, and the types of rules that might result in an expeditious and favorable return to normal WTO situations. Considering the WTO's, World Bank's, and the IMF's ability to coordinate, any rules addressing global excess capacity should include opportunities for creative solutions and coordinated actions in an effort to modernize, and develop infrastructure projects reducing the magnitude or timing of capacity reductions. Rules should also include steps leading to a feasible resolution of the problem on terms acceptable to the world. Hopefully, Members of the WTO will not miss the opportunity presented by this current crisis to address this important issue either within a new Round, or as a separate matter on an expedited basis.

CONCLUSION

The trading system has undergone some dramatic challenges since the conclusion of the Uruguay Round and the launch of the World Trade Organization. By and large, the existing rules system and the dispute process has been able to address many of the stresses in the system. Problems have arisen from the construction of obligations under Article XIX of GATT 1994 and the Agreement on Safeguards and with certain aspects of the functioning of the dispute settlement system, that should be addressed as part of a new Round or separately.

In other major rules areas, such as anti-dumping and subsidies, there is much technical work to do to ensure full implementation of obligations and/or exercise of rights. While not exciting to many, the notification exercise, vetting of laws and regulations, and other regular business of the committees is of great importance for the trading system and the securing of all benefits negotiated. Where Member nations are having trouble complying with notification requirements, technical assistance

should be provided either from the WTO or from individual Members. No major problems have been identified that would warrant a re-examination of the agreements themselves at the present time.

Finally, the trading system has an opportunity to increase likely future liberalization by addressing several areas, either as part of the built-in agenda (rules for perishable agriculture), as part of a new round or otherwise (structural excess capacity) that are not presently adequately addressed.

Where rules do not address the market realities in ways that Member nations can accept, the result is an inevitable balking at the pace of liberalization and the search for *ad hoc* solutions to address pressing needs. The WTO, and GATT before it, have recognized the need to have a solid rules-based system for expanding trade liberalization. As we stand at the front end of the 21st century, it is critical that the WTO strengthen its rules and reaffirm the important role rules play in encouraging the furtherance of trade liberalization.

STEEL TRADE LEGISLATION IN FORCE AS AT 31/07/2000

SUBJECT	REFERENCES	LEGAL BASE	VALIDITY	DESCRIPTION
Prior Community Surveillance	Commission Regulation (EC) N° 2727/99, OJ L329, 22.12.99.	Council Regulation (EC) N° 3283/94 and Regulation N° 519/94 as amended by Regulation N° 163/98 (i.e. derived legal basis)	1.1.2000-31.12.2000	Prior surveillance for statistical reasons of certain EC and ECSC steel products originating in third countries.
Zero-duty Tariff Quotas	Commission Decision N° 2788/99/ECSC, OJ L 338, 28.12.99.	Article 71 ECSC.	1.1.2000-31.12.2000	Implements zero-duty tariff quotas granted by the Council in response to requests from Austria, Belgium and Sweden.
Russia	Commission Decision N° 977/42/ECSC, OJ L 300, 4.11.97.	Article 95 ECSC	13.10.97-31.12.2001.	ECSC steel agreement.
	Commission Decision N° 2134/97/ECSC, OJ L 300, 4.11.97.	Article 95 ECSC	13.10.97-31.12.2001.	Implementing legislation for ECSC steel agreement.
	Commission Decision N° 689/2000/ECSC, OJ L 80, 31.3.2000.	Article 95 ECSC	1.4.2000-31.12.2000	Implementing legislation for ECSC steel agreement (sanctions)
	Council Decision (EC) N° 2000/28/ACE, OJ L 96 of 18.4.2000	Article 113 ECT	1.1.2000-31.12.2001	Double-checking system without quantitative limitations for certain EC and ECSC steel products.
Ukraine	Council Regulation (EC) N° 793/2000, OJ L 89, 18.4.2000	Article 113 ECT	1.1.2000-31.12.2001	Implementing legislation for double-checking system.
	Commission Decision N° 4829/7/ECSC, OJ L210, 4.9.97.	Article 95 ECSC	1.7.97-31.12.2001.	ECSC steel agreement.
	Commission Decision N° 46818/7/ECSC, OJ L193, 22.7.97.	Article 95 ECSC	1.7.97-31.12.2001.	Implementing legislation for ECSC steel agreement. Corrigendum: OJ L211, 5.8.97.
	Council Decision (EC) N° 2000/202/EC, OJ L 62, 9.3.2000	Article 113 ECT	1.1.2000-31.12.2001	Double-checking system without quantitative limitations for certain EC and ECSC steel products.
Kazakhstan	Council Regulation (EC) N° 501/2000, OJ L 62, 9.3.2000	Article 113 ECT	1.1.2000-31.12.2001	Implementing legislation for double-checking system.
	Commission Decision N° 662/98/ECSC, OJ L342, 31.12.98.	Article 95 ECSC	1.1.2000-31.12.2001	ECSC steel agreement.
	Commission Decision N° 2744/98/ECSC, OJ L342, 31.12.98.	Article 95 ECSC	1.1.2000-31.12.2001	Implementing legislation for ECSC steel agreement.
	Council Decision (EC) N° 665/99, OJ L342, 31.12.99	Article 113 ECT	1.1.2000-31.12.2001	Double-checking system without quantitative limitations for certain EC and ECSC steel products.
Romania	Council Regulation (EC) N° 2743/99, OJ L342, 31.12.99	Article 113 ECT	1.1.2000-31.12.2001	Implementing legislation for double-checking system.
	Association Council Decision N° 12000, OJ L 67, 15.3.2000.	Europe Agreement	1.1.2000-31.12.2000	Double-checking system without quantitative limitations for certain ECSC steel products.
	Council Regulation (EC) N° 542/2000, OJ L 87, 15.3.2000	Article 113 ECT	1.1.2000-31.12.2000	Implementing legislation for double-checking system.

STEEL TRADE LEGISLATION IN FORCE AS AT 31/07/2000

SUBJECT	REFERENCES	LEGAL BASE	VALIDITY	DESCRIPTION
Bulgaria	Association Council Decision N°2/2000 OJ L 154, 27.6.2000.	Europe Agreement	1.1.2000-31.12.2000	Double-checking system without quantitative limitations for certain ECSC steel products.
	Council Regulation (EC) N° 1335/2000, OJ L 154, 27.6.2000.	Article 113 ECT	1.1.2000-31.12.2000	Implementing legislation for double-checking system.
Czech Republic	Association Council Decision N°1/2000, OJ L 68, 17.3.2000.	Europe Agreement	1.1.2000-31.12.2000	Double-checking system without quantitative limitations for certain EC and ECSC steel products.
	Council Regulation (EC) N° 567/2000, OJ L 68, 17.3.2000.	Article 113 ECT	1.1.2000-31.12.2000	Implementing legislation for double-checking system.
Slovak Republic	Association Council Decision N°1/2000, OJ L 67, 15.3.2000.	Europe Agreement	1.1.2000-31.12.2000	Double-checking system without quantitative limitations for certain EC and ECSC steel products.
	Council Regulation (EC) N° 543/2000, OJ L 67, 15.3.2000	Article 113 ECT	1.1.2000-31.12.2000	Implementing legislation for double-checking system.
Poland	Association Council Decision N°1/2000, OJ L 67, 15.3.2000.	Europe Agreement	1.1.2000-31.12.2000	Double-checking system without quantitative limitations for certain ECSC steel products.
	Council Regulation (EC) N° 541/2000, OJ L 67, 15.3.2000	Article 113 ECT	1.1.2000-31.12.2000	Implementing legislation for double-checking system.
Former Yugoslav Republic of Macedonia	Council Decision (EC) N° 9785/EC, OJ L 348, 18.12.97.	Articles 113 and 235 ECT.	1.1.98-indefinita.	Cooperation agreement with FYROM. Includes a steel protocol (double-checking, ferrous scrap).
	Council Regulation (EC) N° 190/98, OJ L20, 27.1.98.	Article 113 ECT	27.1.98-indefinite.	Implementing legislation for double-checking system.
Turkey	Commission Decision N° 52866/ECSC, OJ L277, 7.9.96.	Article 95 ECSC	1.8.98-indefinita.	Free Trade Agreement for ECSC products (complements Customs Union for EC products estab. by Association Council Decision N° 1/93, OJ L35, 13.2.96).
	ECSC-Turkey Joint Committee Decision N° 1/98, OJ L 66, 13.3.99.	Article 14, ECSC-Turkey steel agreement	23.2.99-indefinita	Establishes the ECSC-Turkey Joint Committee and its rules of procedure.