The U.S. and the WTO: *Lessons Learned for Trade Litigation and Global Governance*

by Stuart S. Malawer

After eight years of litigation before the World Trade Organization, five important lessons have emerged from the global trading system for the United States and for global governance.

In an astonishingly short time, the WTO's dispute settlement system has become central to the world trading system—think of it as a Supreme Court for global trade that decides rules for many nations. The system's drafters did not foresee this historic development; moreover, many within the U.S. opposed its formulation. Yet today, this system of resolving disputes is one of the most momentous developments in the history of international trade relations.

Renato Ruggiero, a former director-general of the World Trade Organization, called the dispute resolution system "the central pillar of the multilateral trading system and the WTO's most individual contribution to the stability of the global economy."[1]

The new director-general, Supachai Panitchpakdi, said that the creation of the dispute resolution system and the legal framework "binds the multilateral trading system together . . . ensur[ing] that trade flows as smoothly, predictably and freely as possible."[2]

A recent treatise on the dispute resolution system stated:

> "For the first time in history . . . (the WTO) applies principles of fairness, open-dealing and mutual benefit by 'law' to trade relations between sovereign economies . . . (It is) a unique global effort to maintain peace in world trade . . . The WTO is the only international body dealing with the rules of trade between nations. Few areas of international relations see more passion, hot tempers and bitter argument than trade and commerce . . . (This is) a new approach to international relations that has never been tried before."[3]

In the 1990s, after the fall of the Berlin Wall and the disintegration of the Soviet Union and the Communist bloc, global trade became one of the most important foreign policy issues in international relations. The WTO became the principal multilateral institution governing global trade. This historically unique dispute resolution process, within the WTO, enforced newly negotiated trade rules. This reliance upon negotiated rules, and utilizing litigation to enforce them, reflected the broad American belief in the rule of law applied to international transactions and global trade. This belief mirrors the notion embedded in American political tradition that open markets and free trade are absolutely necessary for economic development and world peace. Today the divisive debate over globalization is really over the rules governing trade relations and the global economy. The W.T.O. and its dispute resolution system is at the heart of this debate. Both the United States and the European Union have recently posed challenges to that system. There is growing political resentment within the United States.

Background

When the WTO became effective on January 1, 1995, the international trading regime achieved equal status with the great postwar global economic institutions—the World Bank and the International Monetary Fund. The WTO, as the premiere world trade institution, became a full partner with global financial institutions that were envisioned after the Second World War. Now, the global trading regime had its own institutional organization and the United States formally adhered to it. Questions of legitimacy or legality (that plagued the former General Agreement on Tariffs and Trade [GATT])—were laid to rest. Congress delegated authority to the president to negotiate

and conclude the Uruguay Round of Agreements pursuant to "fast track" procedures, which led to the passage of implementing legislation.

Under U.S. Constitutional law, the Uruguay Agreements are not formal treaties, but "international agreements." They are not within the President's inherent authority in foreign affairs. They are executive agreements pursuant to a congressional delegation of authority, viewed under U.S. Constitutional law as binding international agreements and accepted by other countries as firm international obligations.

The GATT system governed global trade since 1947, when the proposed International Trade Organization (Havana Charter) failed to secure U.S. and international acceptance. The WTO system, that emerged in 1995, cured two major defects of the previous system: It created an integrated system binding states to the same set of rules and eliminated an *ad hoc* acceptance of rules by individual states; and it created a binding dispute resolution system applicable to all states. States faced sanctions for failing to follow these rules. The WTO was to negotiate global trade rules and to adjudicate them. States agreed that global trade should be governed by rules, not power.

The United States supported this system because it sought to create a quasi-judicial or quasi-adjudicative system utilizing a litigative approach (when consultations fail) to resolve trade dispute.[4] This new process complemented the development of trade and commerce rules that would be the cornerstone of a new global trading system. The global community has accepted this American vision of enforceable rules as a precondition to fostering greater global trade and national economic development. But the American vision does not stop at trade: It espouses a broader policy goal of promoting free trade as a basic tenet of capitalism and of promoting the critical linkage between liberalizing global trade and democratizing civil society. The WTO system that emerged was a culmination of the market-opening strategy focusing on a multilateral approach. It enforced the principle of non-discrimination in trade that is enshrined in the two cardinal principles governing global trade among nations: the "Most-Favored-Nation-Principle" and the "National Treatment Principle."

The dispute resolution system was not adopted to make case law or to be a relief act for international lawyers. There is a condition of consultation before a panel will hear the case. Many cases end in negotiated settlements and never go to the panel process. The purpose of the WTO system is to negotiate trade rules and enforce them. The challenge for the WTO in the ongoing DOHA round of trade negotiations (those trade negotiations authorized at the Ministerial meeting in Doha, Qatar, in November 2001) is expanding the openness and legitimacy of these two functions. "(T)here has been little progress in making the WTO more transparent. This failure is especially egregious when it comes to the organization's dispute settlement process. There is also a case for greater openness in the way the WTO negotiates new rules."[5] This failure is recognized by most states and the WTO. Protests at the Seattle Ministerial meeting in 1999, concerning the WTO and globalization, galvanized the pace of self-examination. Self-examination is now a part of the DOHA mandate for the current trade negotiation round that is scheduled for completion by January 1, 2005. Some progress has been made, but it has been slow.[6]

The innovative dispute settlement system was viewed as an essential pillar of the new World Trade Organization. "The WTO dispute settlement system is unique among international tribunals for imposing judgments that members have agreed, in advance, to accept. No other international tribunal—including the International Court of Justice (the "World Court")—is in quite the same position."[7] This new dispute resolution system was integrative, compulsory, binding and enforceable. It was given jurisdiction over all the agreements completed at Uruguay. States could not pick and choose agreements to which they wanted to be bound—jurisdiction was compulsory. The WTO was authorized to issue binding decisions. No state could block the adoption of a decision, and the decisions were enforceable by imposition of trade sanctions. A mandatory consultation process—that serves as a precondition to the binding panel process—resolves disputes informally. However, when the informal resolution process fails, the system ensures the resolution of the dispute in an adversarial proceeding that adopts characteristics of both common law and civil law countries.

A panel and appeal process is compulsory for states—they are required to bring their laws into conformity with the rendered decisions.[8] The decisions do not invalidate national laws. If states do not comply, they may face withdrawal of concessions (tariff surcharges on goods) as a trade sanction. "Losing parties are encouraged to comply with the WTO rulings. However, they may accept retaliation or provide compensation . . . as an interim measure."[9] Even after a matter is decided, the WTO retains authority (most likely the original panel that rendered the decision) to supervise or provide surveillance of the implementation of the decision. Additional proceedings have been brought by states, after initial panel decisions. These resolved disagreements relating to the adequacy of measures taken by states to bring their laws into conformity with the decisions concerning the contested measure and the relevant trade agreement.

Significant concerns and fears were expressed during the negotiation and implementation process leading to the creation of the WTO's dispute resolution system. At the outset, the United States was concerned about political and judicial sovereignty. The Europeans feared a failure of the United States to live up to adverse decisions. Trade diplomats in Latin America and Asia felt powerless to prevent the United States from using this new system against them—an extension of the cowboy litigation viewed as pervasive within the United States.

The United States and WTO Litigation

The WTO caseload discloses a boom of trade litigation in which the United States is the most aggressive and successful complainant and most often-sited respondent. It wins most cases when a complainant and loses most when a respondent. Most decisions have been implemented by all parties. But implementation is becoming a problem—on part of the U.S. and the EU.

Between January 1, 1995, and October 29, 2002, the WTO received 273 complaints,

which resulted in 63 appellate body and panel reports being adopted, according to the WTO's most recent statistical study of the dispute resolution system.[10] (This figure of adopted reports or cases does not include cases that were also decided under the "surveillance of implementation" procedures, since they are best viewed as supplemental proceedings.[11]) Many cases are settled during the mandatory consultation stage. In reviewing all decided cases, in 1999, the WTO concluded that the most often cited agreements were those concerning sanitary and technical measures, agriculture, textiles, investment measures, intellectual property and services.[12]

The study I recently completed concluded that for matters reaching the litigation (panel) process from 1995–2003, the United States was involved in 43 cases as a complainant or respondent. The United States was a complainant in 18 cases, winning 16 and losing two cases. As a respondent in 25 cases, the United States won three and lost 22 cases. While the United States brought actions concerning newer trade issues, such as intellectual property rights, it sought adjudication in a considerable number of cases dealing with agriculture issues—a traditional trade concern. At the same time, the United States was subject to a number of actions concerning its steel (anti-dumping), textile and trade law matters (for example, "retaliation" as Section 301 cases).

The cases in the chart at the end of this article are arranged in chronological order and identified by the essential subject matter of the proceeding. The cases include all substantive decisions decided by either a panel or the appellate body. A large number of actions filed were resolved in the consultation stage that is required before a panel is established. Therefore, they are not reflected in this chart. (See **charts 1 and 2** on pages 18 and 19.)

The U.S. was the respondent in the last few years, more so than in earlier years of the WTO. The United States has been the respondent in cases that include "Section 301 Retaliation," criminal anti-dumping legislation, trademark and copyright legislation, the "Byrd Amendment" (concerning anti-dumping proceeds), steel tariffs and export tax subsidies.

On the WTO's fifth anniversary in 2000, the General Accounting Office assessed the U.S. record before the WTO.[13] The report concluded that the United States benefited from litigation within the WTO dispute resolution system. It achieved commercial benefits from most of the cases it filed. The challenges against the U.S. practices had limited impact.

The report noted that the United States filed cases most often involving agriculture/sanitary and phytosanitary measures, intellectual property rights, tax/subsidies, investment measures, textiles and antidumping. The United States was a respondent in cases related to anti-dumping (steel), textiles, Section 301, agriculture/sanitary and phytosanitary measures, environment and tax/subsidies.

The two bar graphs, on page 19, from the 2000 GAO report show the U.S. involvement as complainant and respondent in both settled and litigated cases. The GAO Report highlights how the United States, as a complainant, relied on scientific testing concerning import of foods and intellectual property rights—newer trade issues. The three areas relied upon by states bringing actions against the United States were anti-dumping, textiles and Section 301 matters ("retaliation")—traditional trade issues. (See **charts 3 and 4** on page 19.)

In 2002 and early-2003, the United States lost high-profile cases dealing with the "Byrd Amendment" (allowing anti-dumping and countervailing duties to be paid to the affected domestic producers) and the "Foreign Sales Corporation" legislation (providing export tax subsidies). The United States is, unfortunately, slow in conforming to the WTO decisions. I wrote, "In the case of U.S. export subsidy legislation, off-the-books and offshore entities are utilized to avoid reporting income. Are the tax-trade actions of the United States concerning export subsidies ultimately self-defeating by deprecating the legal rules of the global trading system?"[14] Questions remain about whether the United States will implement these major decisions. In many ways, this situation has become a litmus test for the continued adherence to the WTO's structure and multilateral approach to global trade championed by the United States.

Most recently, the European Union restricted the importation of genetically modified foods into the European Union. This restriction led Ambassador Robert Zoellick, the U. S. trade representative, in early-2003, to threaten the EU with new litigation. "President Bush's trade representative blasted the European Union for its moratorium on U.S. biotech crops and said he favors taking the fight to the World Trade Organization, in what would be one of the biggest trade disputes in years between the U.S. and Europe."[15] The EU is now threatening the imposition of sanctions already authorized by the WTO unless the U.S. complies with the decision in the Foreign Sales Corporation case against tax legislation providing export subsidies for the largest U.S. multinational corporations. The new director-general of the WTO, Supachai Panitchpakdi, criticized both the U.S. and the EU for setting poor examples for less developed countries and inadvertently encouraging trade disputes.[16] Some EU and other trade officials fear the U. S. may be defaulting to a more unilateral approach to trade relations. A recent treatise described the policy issue:

> "[T]he central question that needs to be addressed is what wise policy makers ought to do to preserve the strengths of the rules-based trading regime while responding to the pressures on it."[17]

Lessons that the United States learned through litigation in the dispute resolution system of the WTO offer insights into possible policy options that must be further developed as the DOHA round of trade negotiations proceeds.

Lesson 1: When the U.S. Sues, It Wins—and When Sued, It Loses

The United States brings cases dealing with agriculture and high-tech issues. Other nations seek relief from the United States on textile, agricultural and environmental restrictions. The United States has been, by far, the most aggressive complainant, followed closely by the European Union. Other major complainants have been Canada, Japan, Mexico and Thailand. The United States and the European Union have been the most often-cited respondents, followed by Japan, Korea, India and Brazil. The WTO litigation system is in the forefront of producing an equitable global trading system, where enacted rules are applied and enforced. A wide range of countries has used the system to resolve trade issues.

The United States almost always won when it brought a matter to a panel. The U.S. won 16 of 18 cases as the complainant. It won significant cases against Japan and the EU concerning market access of agricultural products. The U.S. almost always lost when other nations sought action against it, especially in cases concerning anti-dumping and textiles. It won only three and lost 22 cases as a respondent. For the United States, the first lesson is (as with most countries) it tends to win cases it files, and conversely, loses cases where it is the respondent. In almost all cases, the challenged trade restrictions were eventually removed—benefiting both the winning and losing parties and the global trading system.

Lesson 2: Global Trade Law Affects Core Environmental and Economic Legislation

Interestingly, the first case decided by the WTO was a case Venezuela filed against the United States, in early-1995, the first year of WTO operations. The United States lost that case, which involved the validity of the Clean Air Act regulations in relation to foreign imported oil. The Environmental Protection Agency's (EPA) regulations were found to be discriminatory against foreign refineries. The United States brought its regulations into conformity with the WTO decision. Subsequently, the United States lost two cases concerning textile restrictions. In 1998, the WTO ruled against the United States' regulations concerning the banning of shrimp not harvested in accordance with the regulations of the Endangered Species Act. Actions against the United States concerning its steel tariffs, including Presidents Bush's recent actions, are routinely taken to the dispute resolution system. In 2002, the United States lost another case concerning the "Foreign Sales Corporation"—a long-standing dispute concerning export tax subsidies going back to the DISC (Domestic International Sales Corporation) legislation of the 1970s. It was determined on appeal that such corporate income tax legislation amounted to an illegal export subsidy. Thus, the second lesson is that WTO disciplines apply not only to traditional issues of trade, such as tariffs and quotas (including textiles), but impact highly important areas of national economic legislation relating to environment and corporate taxation.

Lesson 3: Many Countries Utilize the Dispute Resolution System, Involving Varied Issues, to Develop a Clearer Body of Rules that are More Acceptable to All States

An examination of cases brought against the United States discloses that a wide range of countries, such as Venezuela, Brazil, Costa Rica, India, Korea and the European Union, have brought actions. These actions have involved a broad range of issues: energy, textiles, fisheries, computer chips, antidumping, trademarks and taxation. Most interestingly, the recent GAO study determined that among the frequently cited agreements or subjects forming the bases of complaints were those involving anti-dumping and textiles.[18] Meanwhile, the United States, in its complaints, relied upon agreements concerning scientific testing relating to food imports and intellectual property rights. Thus, the third lesson is that many countries have used the dispute resolution system to adjudicate various issues, involving both traditional trade issues (agriculture and textiles) and newer trade issues (computer chips, corporate income taxation, scientific testing and intellectual property rights). While decisions apply only to losing parties when implemented they benefit all states. WTO rulings create a body of decisions that provides a consistent interpretation of WTO obligations and principles applicable to all states. States now find it easier to understand their obligations and are more willing to implement them.

Lesson 4: Both the United States and the EU have Recently Resisted Implementation

As noted previously, the United States brought its regulations into conformity with the WTO decision concerning importation of foreign oil under the Clean Air Act. The United States also took measures to bring its legislation into conformity in other cases. However, the United States resists making its export tax legislation conform to the decision of the WTO. The United States continues to espouse Section 301, even though the Uruguay Round intended to restrict unilateral actions. The United States continue to apply the "Byrd Amendment" in order to make payments directly to some producers involved in dumping or subsidy cases. The European Union moved slowly to implement adverse decisions in the banana and beef-hormone cases. This delay is ironic, because the EU was concerned about possible U.S. implementation during the negotiations. A compromise that was reached with the United States required offending measures to be brought "into conformity," rather than negated. Nevertheless, lesson four is that the both the United States and the EU need to conform promptly to adverse decisions if the WTO is to be effective in avoiding trade tensions and to set an example for other trading nations.

Lesson 5: WTO Decisions Clarify Global Trade Obligations that Bolster a Rule-Based Global Economy and Domestic Civil Society.

A WTO dispute resolution decision clarifies international obligations and, when implemented, new national law that is binding within countries. This system bolsters the rule of law in trade relations among states and within individual countries, thus fostering global trade and economic development. Failure to create a predictable and rule-based system halts the flow of capital. Furthermore, it stalls investment and trade transactions—witness Russia. (To the contrary, witness China's accession to the WTO, and, after only one year, the rush of new foreign direct investment into its telecom, wireless and financial services industries.) The importance of the new dispute resolution system is not limited to deciding trade cases. Its decisions influence domestic fields of law such as intellectual property rights, administrative law and judicial review.

Even more important for countries not accustomed to upholding legal and individual rights, the observance of global

trade rules influences the development of a governing mindset and culture—restricting governance by bureaucratic whim. This expands the rights of individuals and helps develop democratic institutions. With these goals in mind, the importance of China's admission to the WTO cannot be overstated. When announcing the deal concerning China's accession to the WTO Charlene Barshefsky proclaimed: "And the notion that China will become a member of this rules-based regime is of extraordinary long-term importance, not only on the commercial side, but with respect to the development of a more full body and robust legal system within China."[19] Indeed, China's WTO membership has brought one surprise. An expected flood of complaints against China has *failed* to materialize.[20] Lesson five is that, for both the United States and other countries, the dispute resolution system, by clarifying trade obligations, acts as a critical vehicle and lever to overcome internal pressures to comply with international rules and assists in developing rules and institutions of civil society.

Conclusion

Using the dispute resolution system for contested and decided cases of the WTO is in the U.S. national interest. The United States has aggressively used the system as a complainant, while playing an equally important role—especially to other nations—as a respondent. The United States has won many cases and lost many. It has changed its offending legislation and regulations to comply with WTO decisions. Other countries have also been active litigants. However, implementation is a newer and troubling problem. But guess what? This is also true in purely domestic litigation.

Many of the trade disputes decided by the dispute resolution system were not limited to tariffs or traditional trade issues concerning the movement of merchandise between countries. They have involved newer issues that were once considered to be only domestic and non-trade issues. With the emergence of the WTO in the 1990s, along with the dramatic developments concerning globalization, international lawyers, foreign policy analysts and international relations experts are focusing on global trade relations and the way global trade rules are negotiated and implemented. Issues concerning implementation and openness of the dispute resolution system have become obvious. The Ministerial Declaration in DOHA, in November 2001, acknowledges this and commits the WTO to address these and related issues during the DOHA round of trade negotiations.[21] The United States has already made suggestions increasing transparency and public access to the DSU settlement proceedings,[22] even though much of the trading community still views the negotiation and adjudication functions of the WTO in a more traditional, diplomatic context. Previously, trade was always viewed as part of the secretive diplomatic scene.

Nevertheless, for the United States and the global trading system, the dispute resolution system has already proven central to U.S. and global trade policy. It is possible that this system can have an even a greater effect on creating a more efficient global economic system—something akin to the integrative role that the United States Supreme Court or the European Court of Justice.

A recent article in *Foreign Affairs* used such phrases as "ascendant legalism," "improper judicial activism" and "deep ambivalence" to describe the new dispute resolution system.[23] This is unfortunate. This system holds the promise of removing the theatrics from trade disputes and ratchets down a notch the noise level that has surrounded all too many trade disputes between some of our closest allies.

> "Conducting world trade according to multilateral agreed rules has been a major contributor not only to the enormous expansion of the world economy over the half-century, but also to the avoidance of international conflict."[24]

A seminal treatise assessing the WTO's dispute resolution system correctly highlights the larger issues of global governance and peaceful relations:

> "[T]he entrenchment of a working system of international law . . . protects the world economy from arbitrary political interference and governments from narrow sectional interests . . . {This is} a basis for peaceful relations among–and within states. Although rule-governed trade may not guarantee peace, it does remove a potent cause of conflict."[25]

What has emerged since 1995 has been different from what was feared. Many countries are using the system. The United States is complying with adverse decisions, and the decisions being made are providing the impetus for changing questionable domestic trade regulation. Cases are brought and litigated, and decisions are implemented. Sometimes cases are not brought nor implementation sought as a matter of foreign policy. A new institution impacting global transactions in this digital era of global trade and commerce has developed. Disputes are being settled peacefully in a multilateral and quasi-judicial setting, which is better than in a divisive and highly politicized, unilateral context. This successful method for resolving conflicts among states is essential for global trade and is good for law, among and within states.

> "[E]conomic globalization is feeding the rule-of-law imperative by putting pressure on governments . . . [The] aim [is] the deeper goal of increasing government's compliance with law . . . "[26] ⚖

Endnotes

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23 Esserman and Howe, "The WTO on Trial," 82 *Foreign Affairs* 130 (January/February 2003).

24 Sampson at vii.

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Dr. Malawer at the Great Wall of China.

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chart 1

U.S. LITIGATION IN THE WTO / DSU—Won/Loss (1995–2003).

by Stuart S. Malawer

Case*	Subject	Pl.	Won	Loss	Def.	Won	Loss
Gasoline (U.S. restr.)	Energy				x		x
Japan Alcohol	Agriculture	x	x				
Costa Rica Cotton (U.S. Restr.)	Textile				x		x
EC Hormone-Beef Restr.	Agriculture	x	x				
EC Banana Restr.	Agriculture	x	x				
Canadian periodicals	Entertainment	x	x				
India wool (U.S. Restr.)	Textile				x		x
Fuji-Kodak (Panel)	Film	x		x			
India Patent Regime	IPR (Drugs)	x	x				
Indonesian Auto	Autos	x	x				
Argentina Textile Tax	Textile	x	x				
U.S. Shrimp-Turtle	Environment				x		x
EU Computer Classification	High Tech	x		x			
Korea Liquor Tax	Agriculture	x	x				
Japan Testing (Agriculture)	Agriculture	x	x				
India (Textile)	Textile	x	x				
U.S. (Drams from Korea)	High Tech				x		x
Canada (Dairy)	Agriculture	x	x				
U.S. (FSC)	Tax				x		x
Australia (Auto leather)	Manufacturing	x	x				
Mexico (A/D)	Agriculture	x	x		x		x
U.S. (CVD / U.K.)	Steel				x		x
U.S. (Section 301)	Trade Law				x	x	
U.S. (Sec. 110[5] Copyright)	Intell. Prop.				x		x
Korean Beef	Agriculture	x	x				
U.S. (1916 A/D)	Trade Law				x		x
Korea (Gov't Procurement)	Gov't K's	x					x
U.S. (Banana Sanctions)	Trade Law				x		x
U.S. (Wheat Gluten)	Agriculture				x		x
Canada (Patents)	Intell. Prop.	x	x				
U.S. (Cuban Trademarks)	Intell. Prop.				x		x
U.S. (A/D Lamb)	Trade Law				x		x
U.S. (A/D Steel)—Korea	Steel				x		x
U.S. (A/D Steel)—Japan	Steel				x		x
U.S. (Safeguard)—Pakistan	Textile				x		x
U.S. (Subsidies)—Canada	Trade Law				x	x	
U.S. (Safeguard)—Korea	Steel				x		x
U.S. (A/D Steel)—India	Steel				x	x	
U.S. (A/D/, CVD)—Canada	Trade Law				x		x
U.S. (CVD Steel)—EC	Steel				x		x
U.S. (CVD Steel)—EC	Steel (Flat)				x		x
U.S. (A/D & CVD)—EC ("Byrd")	Trade Law				x		x
U.S. Record	**Won**	**Lost**	**Cases**				
U.S. as Complainant	16	2	18				
U.S. as Respondent	3	22	25				

*Chronological order of decisions. Doesn't include implementation panels (only substantive proceedings.)

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chart 2

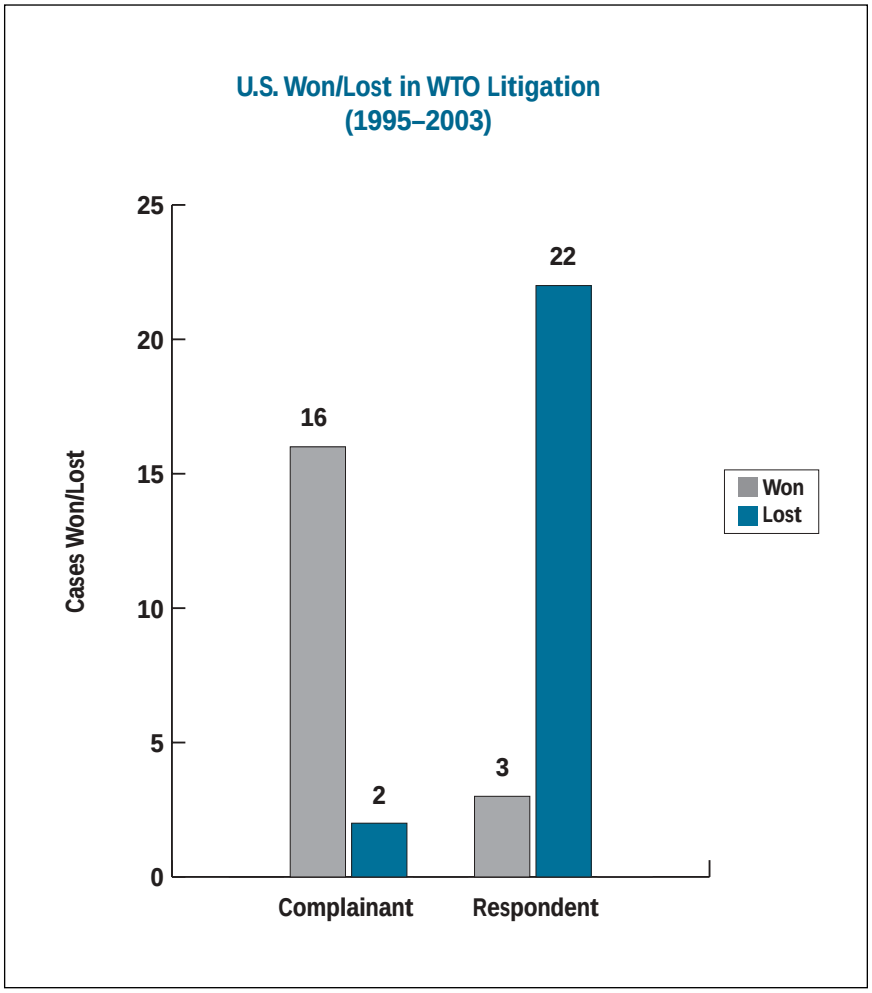
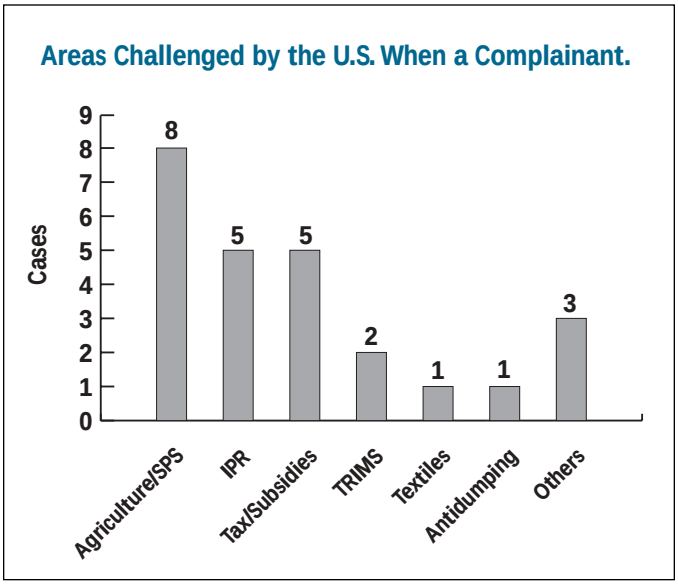
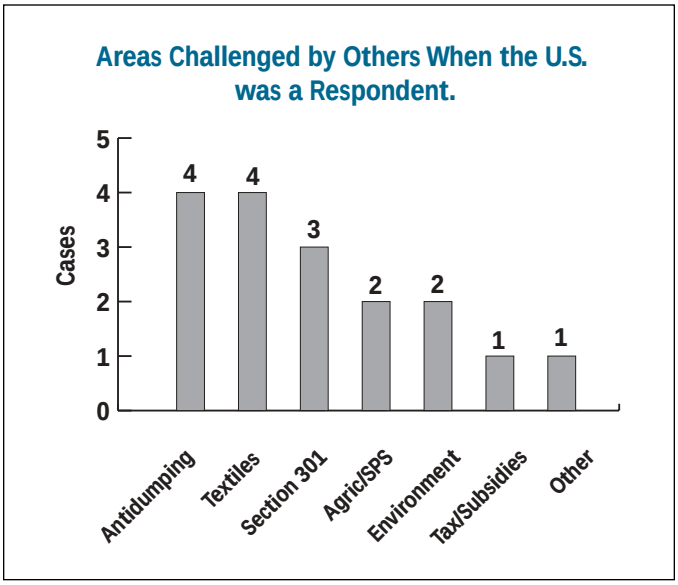


chart 3



Source: GAO 2000.

chart 4



Source: GAO 2000.