Litigation and Consultation in the WTO

10th Anniversary Review

by Stuart S. Malawer

As the tenth anniversary of the World Trade Organization's (WTO) dispute resolution system was on January 1, 2005, it is truly amazing to review its historical emergence as the central pillar of the global trading system and as the WTO's most important contribution to the multilateral trading system. Renato Ruggiero, the former Director-General of the WTO, made this assessment in 1997.[1] Then his statement was premature, but now it is fully born out.

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The dispute resolution system, launched without much fanfare or recognition, has become the most effective system ever to adjudicate and implement global trade rules. The recent report of a committee of experts appointed by current Director-General Supachai Panitchpakdi to assess the WTO on its tenth anniversary declared that "The Dispute Settlement Understanding (DSU) is a significant and positive step forward in the general system of rules-based international trade diplomacy." [2] Indeed, the Director-General in introducing the report proclaimed that "The WTO was now a major player not only in the conduct of trade relations but in global governance."[3]

At the outset of the new system, global leaders hoped that it would develop through the application of rules negotiated and agreed on by consensus within the WTO. It was designed to be a system based not upon power politics or the law of the jungle, but on mutual consent; a global system where unilateralism would be restricted and rules would be adjudicated and enforced through a system of consultation and litigation. The new system would be governed by compulsory jurisdiction, binding decisions and effective sanctions. In other words, the WTO's dispute resolution system would be a truly global legal system benefiting all members. Initially, some diplomats and trade experts from both developing and developed countries feared that importing an American rule-of-law approach to the trading system—or the legalization of the system—would harm them. Even within the United States, concerns were raised over the historical American recalcitrance of recognizing foreign decisions as derogating American sovereignty.

The United States—the system's primary architect—intended for the system to interpret and to apply rules of global trade. As Director-General Panitchpakdi recently stated: "It was the United States, perhaps more than any other nation, which recognized the importance of the rule of law during the Uruguay Round and sought to broaden and deepen its relevance to international trade."[4] Recently, the new European Commissioner for Trade, Peter Mandelson, declared, "Smaller countries … are more protected because the system is based on the rule of law."[5]

The principal objective of this new system was to foster a rule-based trading system through consultations and litigation. The United States pictured a system that would lead to the rule of law within the multilateral trading system as well as, it hoped, in other areas of international relations, not to mention within transitional and developing states. To a great extent, those intentions for the trading system have become a reality. But as the United States has lost more cases recently, changes in the United States's practices have been required and sanctions have been authorized or threatened against it. As a result, challenges to the dispute resolution system have recently emerged, and antagonism toward the system has grown within Congress[6] and has influenced U.S. negotiations during the current Doha round of trade negotiations.[7]

This article reviews the evolution of litigation and consultation within the WTO during this ten-year period.[i] The evaluation is primarily from an empirical basis, relying heavily on statistical studies from the Office of the United States Trade Representative (USTR),[8] the WTO[9] and my prior statistical analysis appearing in the *Virginia Lawyer*.[10]

This article focuses on the general experience of the United States. The period covered begins with the first decision ever rendered by the WTO against the United

States in an action concerning importation of oil and U.S. environmental regulations[11] and ends with the adverse decision in November 2004, which involved Internet gambling.[12] (The U.S. case against the European Union concerning genetically modified foods[13] is yet to be determined as is the newer *Airbus-Boeing Cases*[14].) The article concludes with observations concerning the importance of WTO litigation to fostering better global governance in this era of global trade and worldwide economic integration.

Background

The dispute resolution procedure is fairly simple but detailed. The *Dispute Settlement Understanding (DSU)*,[15] one of the family of integrated agreements negotiated and concluded by countries during the Uruguay Round of trade negotiation in 1994, provides that states with a trade dispute may pursue a process of consultation, review by a panel and, if necessary, an appeal to the Appellate Body (AB). A decision is finalized when the Dispute Settlement Body (DSB), comprised of the entire membership of the WTO, adopts the report of the panel or the AB (if an appeal occurs).

As enunciated in Article 3 of the *Dispute Settlement Understanding,* the aims of the dispute resolution system are to provide security and predictability to the multilateral system. The system also attempts to provide prompt settlements as well positive solutions and the withdrawal of offending measures. Trade sanctions and retaliation are the last resort. With its launch in 1995, the system accomplished three historical achievements: compulsory jurisdiction, binding decisions and sanctions. Unlike many domestic legal systems providing for disjointed proceedings to decide the merits of a case and enforcement of the court's judgment, the WTO system retains competence to supervise the implementation of its decisions and to render additional determinations concerning compliance and sanctions ("post-judgment procedures"). This authority is a regular and permanent feature. The substantive determinations and enforcement proceedings are not disjointed but are one continuous process.

Article 19 of the DSU requires parties to bring an offending measure into conformity with the WTO agreement deemed applicable. The WTO does not override a domestic law, but requires the losing party to change the offending measure or eventually face sanctions. Thus, a state could continue to pay (in the form of higher tariffs on its exports) if it refuses to change the offending practice or law.

Article 21 of the DSU provides for surveillance of implementation. Recognizing the necessity for prompt compliance, parties must inform the WTO of their intentions to comply. Most importantly, an arbitration procedure is built into this process to determine a reasonable period for implementation if the parties cannot agree. And once compliance is accomplished, the WTO can determine whether the action is consistent with the decisions. (The EU recently announced it is filing a new action to determine if the 2004 corporate tax law, really lifts the offending export subsidies that the WTO ruled as invalid in the *Foreign Sales Corporation Case*[16].)

Article 22 of the DSU provides for the multilateral authorization of sanctions by the WTO, specifically by the DSB. Winning states must return to the WTO and request authorization, if implementation does not occur within a reasonable period. Unilateral decisions are prohibited. Most often this trade sanction is an authorization to impose tariff surcharges on imports from the offending country, technically known as a withdrawal or suspension of concessions. These tariff surcharges are being aimed at imports determined by the winning party. However, an arbitrator may decide the size or amount of sanctions. The genius of this system is that the imposition of sanctions would normally be targeted against selected imports to cause the maximum domestic political pressure within the targeted state and, thus, hopefully, the removal of the offending actions. (For example, the EU planned to target the orange growers in Florida to persuade the Bush administration to lift steel safeguard measures after the WTO ruled the measures to be invalid in 2003.)

U.S. Experience within the Dispute Resolution System (1995–2004)

When terms of the dispute resolution system were negotiated during the Uruguay Round, many in the United States were concerned with how it would affect actions brought against the United States. Likewise, many countries were concerned with whether the United States would use the system against them and if the United States would ever comply with decisions against it.

The United States has been involved a broad range of cases as the complaining party and responding party. For example, these cases have involved gasoline refining, fisheries, agricultural subsidies, steel import restrictions, telecommunications and corporate income taxation. Most recent cases have involved e-commerce (gambling), cotton subsidies and geographical indicators for food products. Newer and pending ones involve genetically-modified organisms, textile quotas and potentially outsourcing of information technology services. These issues are far removed from the traditional trade matters involving tariffs and quotas on goods and

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commodities.

With ten years of experience, we can now assess the experience of the United States more fully. (For a chart of cases the U.S. was a party to see addendum.[ii])

The USTR's most recent data released on January 14, 2005, offers the following highlights for the ten-year period (January 1, 1995–January 1, 2005) under the dispute resolution system:

- The United States has gone through the full litigation process as a complainant 26 times. It won 22 cases and lost 4 cases.[17]

- The United States served as a respondent in 36 cases that went through the full litigation process including compliance procedures. It lost 26 cases and won 10. (Two decisions are still in the appellate stage.) **See chart 1.**

The statistics indicate that that the United States is extremely active as a complainant and respondent. In cases it initiated, the United States won most of the cases. In cases filed against it, the United States won about one-third. Not a bad record. This record is consistent with my evaluation for nearly the same period, published previously.[18]

But litigation is not the primary purpose of the dispute resolution system. The primary purpose is to resolve trade disputes, which involves the other part of the system—the required pre-consultation stage. Here the numbers are quite instructive. The following is the USTR data for when the United States was the complainant:

- The United States filed 75 complaints—meaning only 26 went through the litigation process. Therefore, about two-thirds of the cases filed (49) were resolved at the consultation stage, pending or are inactive.

- Exactly 22 of the cases addressed in the consultation stage were resolved in favor of the United States. Thus, almost half in consultation were resolved favorably to the United States. For example, the claim by the United States against China concerning its taxation of foreign produced integrated circuits was recently settled favorably to the United States.[19] This dispute had the potential of being the first litigated disputed between China and the United States in the WTO. The consultation cases settled favorably join the large number of cases the United States won after going through the full litigation process. (Since the consultation process is confidential, conducted in a traditional diplomatic context, and parties often do not disclose the outcomes, it remains unclear what happened to the balance. Probably most cases were dropped, and some remain pending.) **See chart 2.**

The USTR data further discloses the following when the United States was the respondent:

- The United States was a respondent in 102 cases, with less than one-third (36) requiring the whole litigation process. (Eight cases are still in the panel

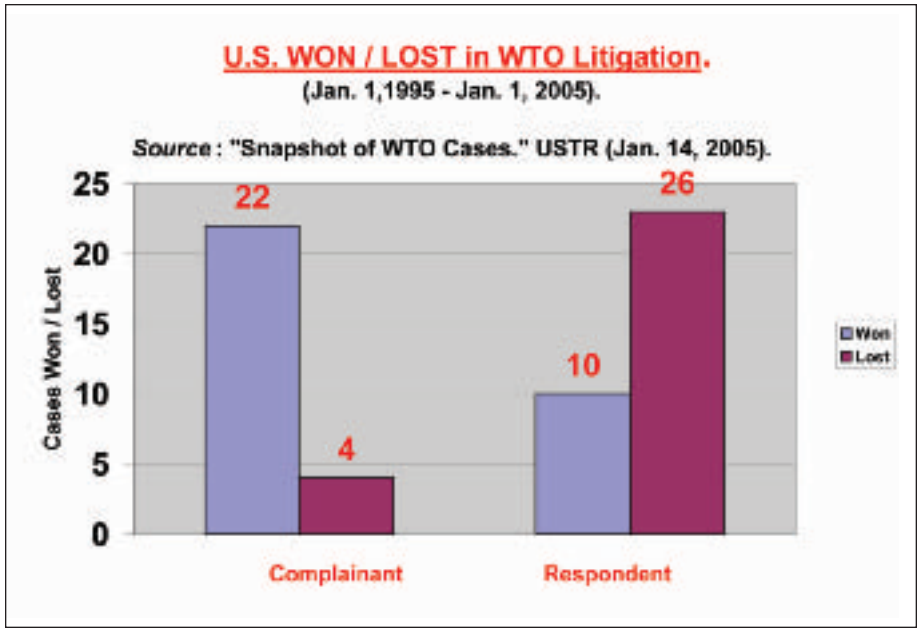


chart 1

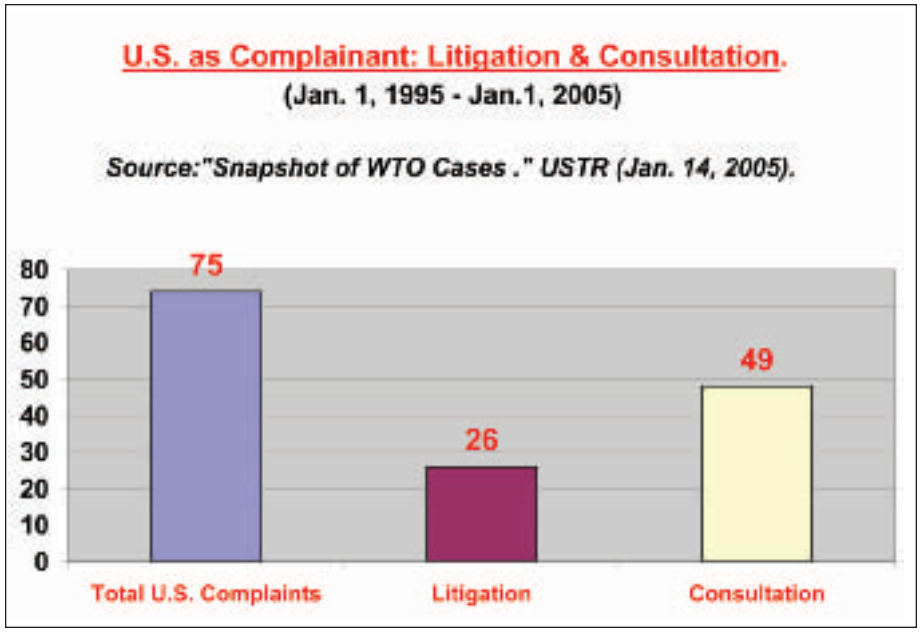


chart 2

process.) A total of 50 cases never made it out of consultations—or are inactive or in the panel process. The United States was served in more cases (102) than it brought (75). So much for the concern that other countries would not try to hold the United States accountable. **See chart 3.**

These last two numbers are the most enlightening. The United States filed 75 complaints; yet more than 102 complaints were filed against it. This trend clearly demonstrates that the trading community is not hesitant to enforce its WTO obligations against the most economically powerful member of the trading system. The recent panel decision this November against the United States concerning restrictions on Internet gambling, brought by Antigua and Barbuda, demonstrates that the smallest WTO members will bring actions to enforce WTO obligations against the United States.[20] How things have changed in ten years, from where developed and developing countries doubted the usefulness of the dispute resolution system in bringing actions against the United States to where they file more actions against United States filed than were filed against them. **See chart 4.**

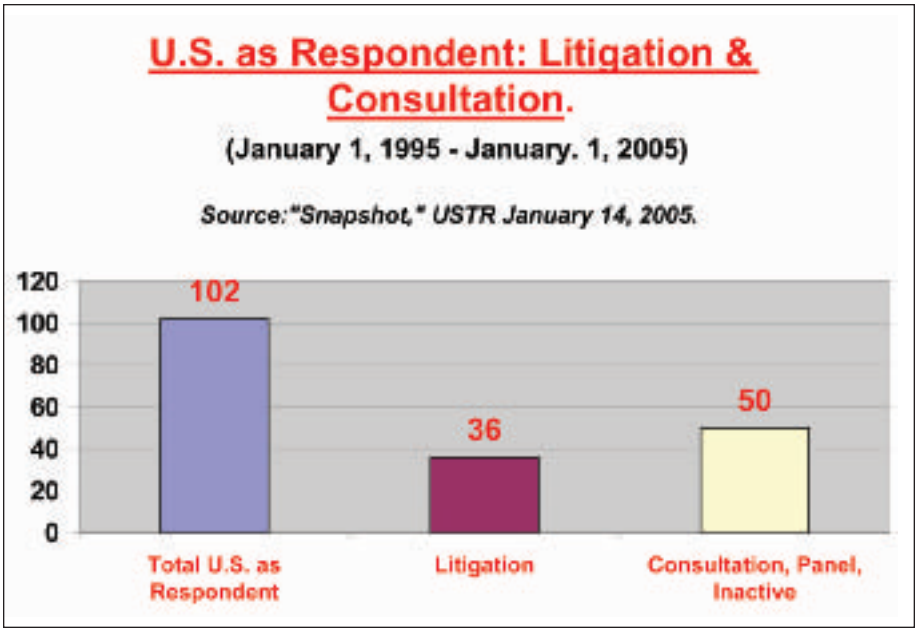


chart 3

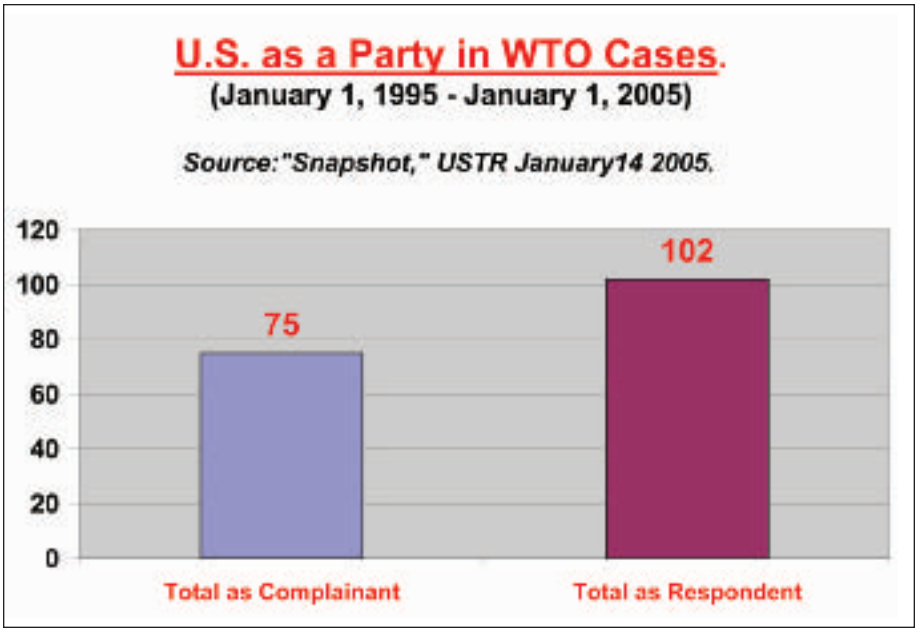


chart 4

The United States filed an action this October against the EU concerning subsidies provided Airbus. The EU immediately filed an action claiming invalid the United States and the State of Washington's subsidies to Boeing. In addition, the EU filed a new proceeding questioning the sufficiency of the recent removal of export subsidies by the United States. President Bush had signed new tax legislation designed to satisfy the WTO's decision in the *Foreign Sales Corporation Case* that declared various United States tax subsidies in violation of its WTO obligations. The United States has claimed that such EU actions are an unfortunate linkage of trade cases and in bad faith. WTO litigation seems to have gotten nastier, especially in transatlantic relations. But litigation is never viewed as a friendly act. Global trade litigation is beginning to look more like any mature system where parties become aggressively adversarial. But it is better to argue in court and have the issues settled in that forum then to have them unsettled.

Use of the Dispute Resolution System by the Trading Community

WTO statistics, released on October 14, 2004, indicate that 315 complaints have been filed in just under ten years since the inception of the dispute resolution system. The complaints resulted in 82 panel or Appellate Body decisions, meaning 233 cases were resolved, pending or considered inactive. As a result, we can infer that many cases are resolved outside of the strict litigation process and its harsh glare. Yet it is difficult to fully prove this conclusion, since the consultation process is a diplomatic one and extremely confidential. Little record exists on which to determine the motives of states in not pursuing litigation, resolving cases or dropping cases at the consultation stage. **See chart 5.**

The same WTO statistical release indicates that arbitration was used in 12 compliance procedures to determine consistency of

conforming actions and in another 16 instances to determine the amount of sanctions. However, the DSB actually authorized sanctions in only 7 cases—in ten years. (Sanctions were authorized in an additional case, the *Byrd Case against the United States*, after this statistical release and sanctions are being imposed.[21]) Sanctions were authorized against the EU in *The Banana Case*[22] and in *The Beef-Hormone Case*[23], and against both Canada[24] and Brazil[25] in their mutual actions regarding aircraft subsides. (However, neither Canada nor Brazil has imposed such sanctions.) In *The Banana Case* the sanctions were lifted, but Latin American countries have now gone back to the WTO under special provisions of the Doha declarations.[26] The sanctions in the beef case remain and the EU has filed a new case to remove them.[27] **See chart 6.**

In only two cases have sanctions been authorized against the United States—in the *Foreign Sales/ETI Case* and in the *Byrd Amendment Case,*[28] which involved payments for collected antidumping and countervailing duties to industry. In late 2004, the United States enacted legislation (American Jobs Creation Act) in order to comply with the WTO decision in the *Foreign Sales Case*. No legislation has yet been enacted to comply with the *Byrd Amendment Case*. The EU and Canada have recently imposed sanctions on the U.S. for its failure to repeal the Byrd Amendment.[29] However, the United States also in late 2004 enacted the "Trade Corrections Act" to comply with the WTO decision concerning the *1916 Antidumping Act Case*.[30]

A deadline for avoiding sanctions in the *Cuban Rum Case*[31], where the United States refuses to recognize certain Cuban trademarks as being illegally expropriated, expires shortly is causing concern in the Congress. This adds to Congressional angst over threatened sanctions by Canada in its lumber disputes with the United States.[32] Of course, Congress is already unhappy with the administration's recent refusal to bring an action against China because of its currency regulations that are viewed as restricting United States exports and encouraging more Chinese exports to the United States.[33] Congress is also concerned about the administration's failure to bring an action contesting China's labor practices as well as stopping the current surge of textile imports from China as a result of lifting its textile quotas on January 1, 2005.[34]

Greater analysis of the recently released case data by the WTO discloses that of the total number of cases filed, developed countries filed about two-thirds (195) while developing countries filed about one-third (120), including several that were filed jointly. Considering that most trade is between developed countries, this almost two-to-one ratio seems fairly balanced. It is interesting to note that developed countries filed 120 actions against other developed countries and 75 against developing countries, representing—a similar 2-to-1 ratio. Developing countries filed 66 actions against developed countries and 48 against other developing countries. This record is not surprising since much trade occurs between developing countries and they also maintain

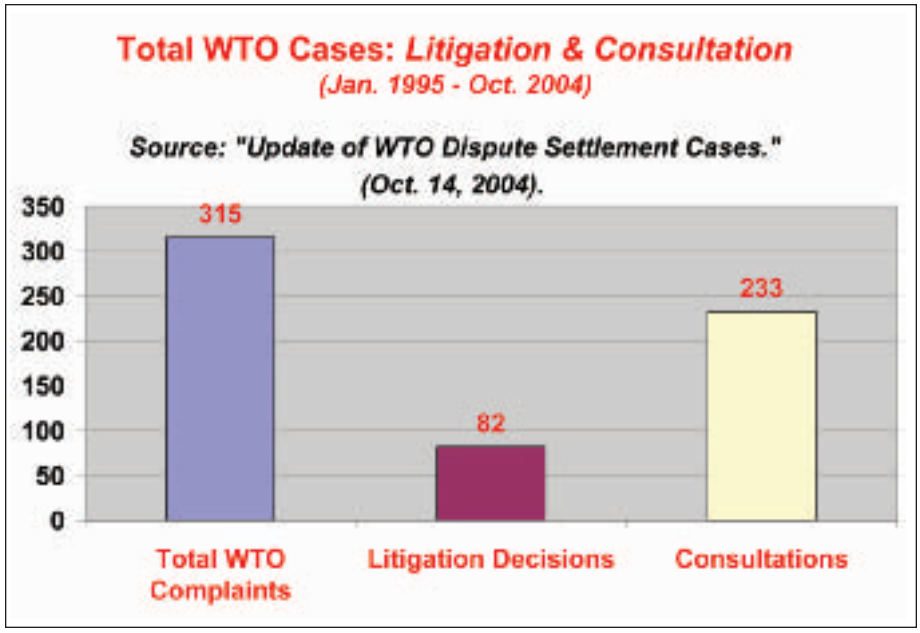


chart 5

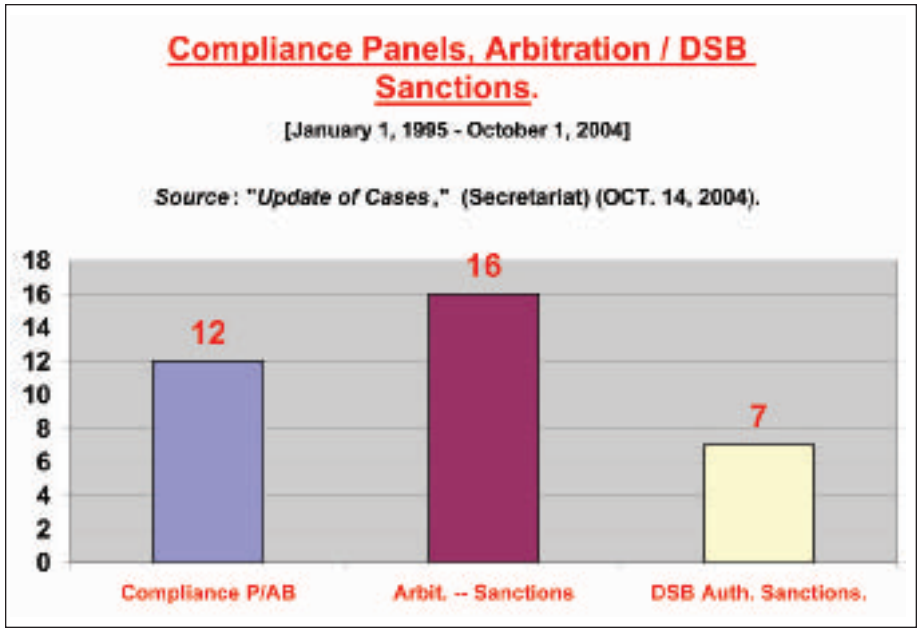


chart 6

significant trade barriers. Developing countries have become very aggressive in utilizing the dispute resolution system. In 2004 Brazil won two historical agricultural cases—one against the United States concerning its cotton subsidies[35] and one against the EU relating to its sugar subsidies[36]. The EU is now revamping its sugar regime. **See chart 7.**

Statistics recently released by the Appellate Body examines the ten-year history of appealing panel reports and offers additional valuable insight.[37] The early years (1996 and 1997) saw an appeal rate of 100 percent. By 2004, the appeal rate dropped to 75 percent. (In 2002, the appeal rate was at 50 percent.) **See chart 8.**

The system has matured into an effective means of resolving trade disputes among a wide range of parties over ever-increasing types of issues.

This data indicates that parties are becoming more accepting of the panel decisions, perhaps indicating a greater acceptance of substantive trade rules once they are more fully defined, and a greater acceptance of the legitimacy of the dispute resolution system. The data also indicated that the United States, the EU, Japan, India, Mexico and New Zealand appeared the most often in the appeals process.[38] **See chart 9.**

An assessment of the appeals and agreements relied upon in them, as indicated in the recent annual report of the DSB, disclosed that were primarily relied upon were those relating to goods, subsidies, antidumping and safeguards.[39] **See chart 10.**

Observations & Suggestions:

When the dispute resolution system commenced on January 1, 1995, it was a historically innovative idea with a number of skeptics in the United States and throughout the global trading system. Ten years later, many of the concerns expressed have largely disappeared. The system has matured into an effective means of resolving trade disputes among a wide range of parties over ever-increasing types of issues. However, some concerns remain, especially in the United States Congress as the United States continues to face existing sanctions and threatened new ones. Those concerns, as well as lingering ones from other states using the system, should be alleviated in light of the following, which is based on the experience and data collected about the dispute resolution system:

- Many countries from the developed world and the developing world use the system.

- Cases deal with a wide spectrum of issues, from traditional trade matters (such as dumping and subsidies) to

chart 7

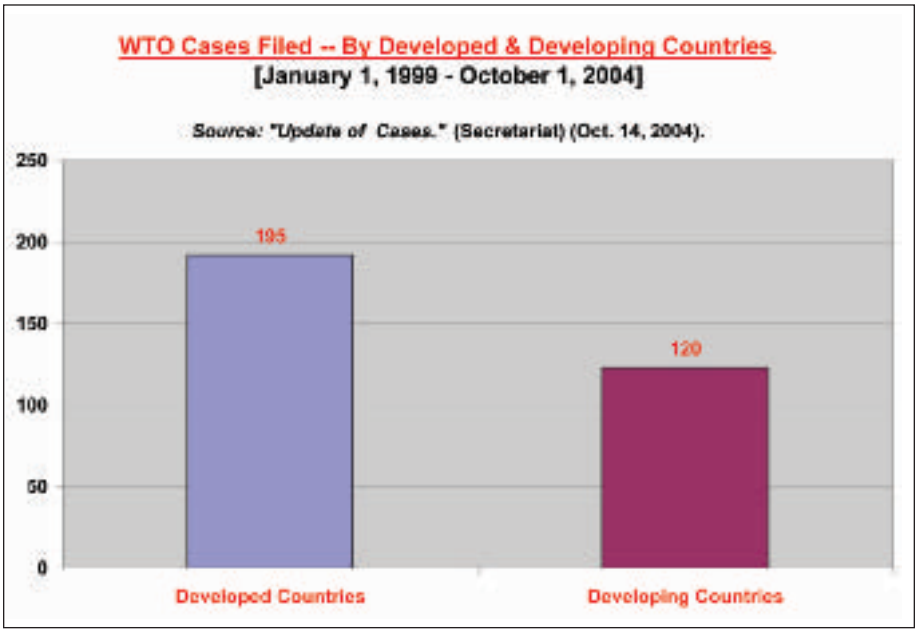
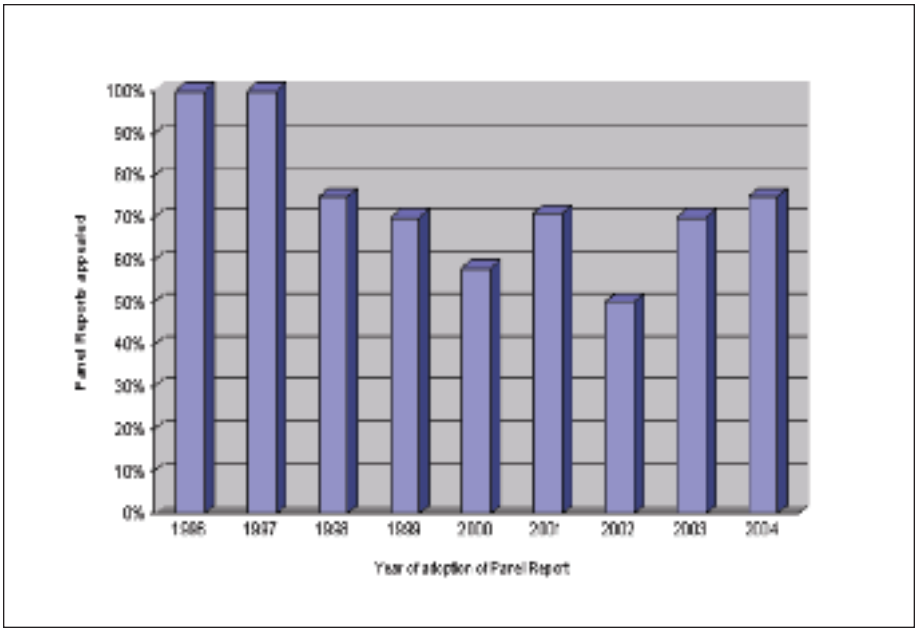


chart 8



newer ones (Internet gambling, intellectual property rights, telecommunication and science-based trade actions).

- Few cases cause serious implementation problems.
- Even fewer cases lead to sanctions, and in those cases that lead to sanctions parties attempt to comply with decisions and at times do not even ask for or implement sanctions.
- The United States employs the system more than any other state and it wins most of these cases.
- Many cases are brought against the United States, which wins a significant number. Moreover, its winning has increased.
- Litigation plays a large role in the United States's wins, as do consultations. In fact, more cases are resolved successfully at that stage, thus eliminating the need to go through the full litigation process.
- To fully understand the system, we must learn more about the conduct and resolution of cases within the consultation process.

chart 9

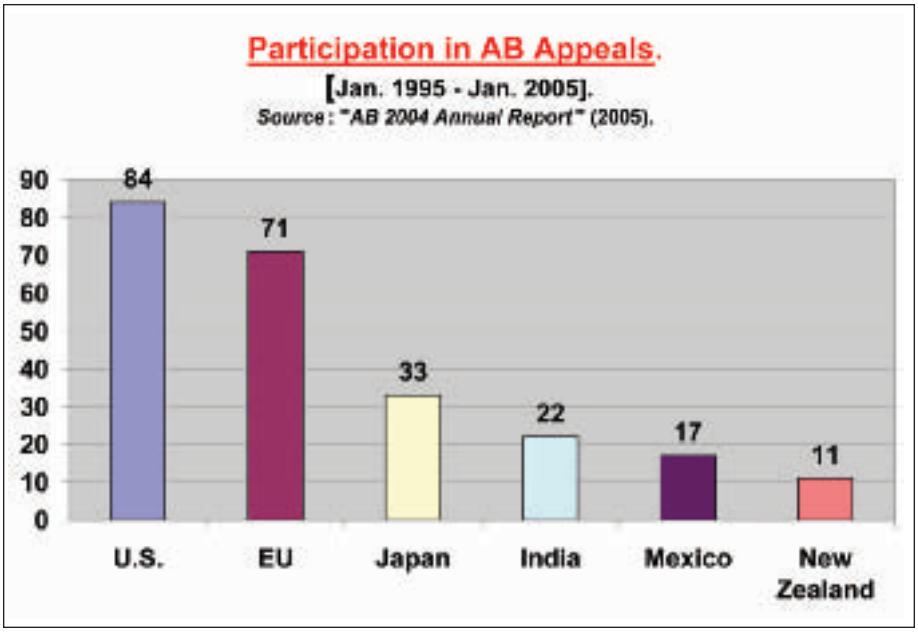
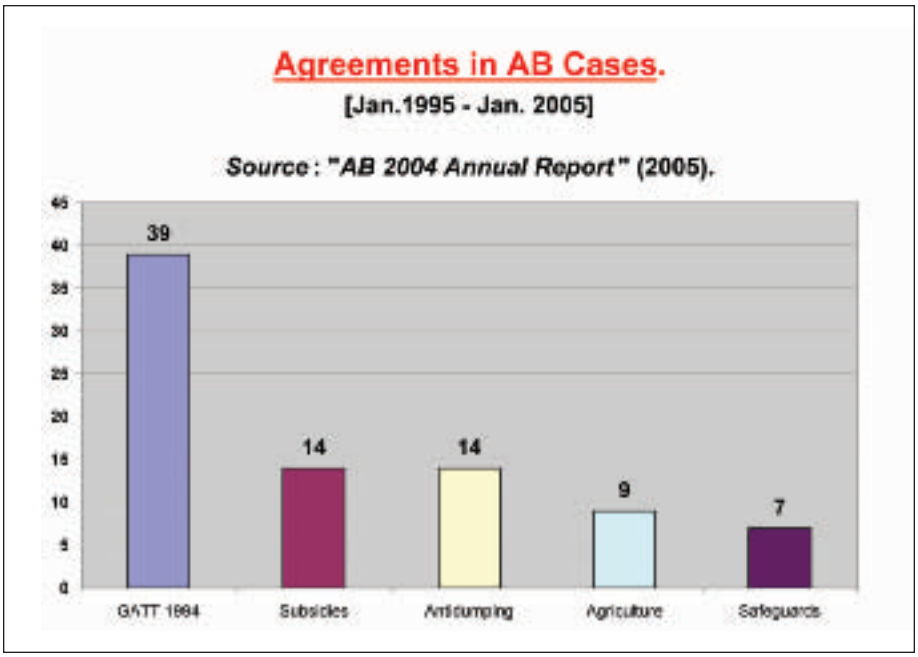


chart 10



What happens at consultations unfortunately remains unclear. The consultations are crucial to resolving disputes, but, unlike litigation, consultation outcomes are normally made public only if there is a mutually agreed solution under Article 3(6). It is most important to discover and to assess the full data concerning consultations. Only when this information is made public can a more accurate picture of the effectiveness of the WTO's dispute resolution system be ascertained. Unlike the cases that go through the full litigation process, which are eventually fully reported and disclosed, the results of consultation proceedings are much more difficult to unearth, since they are often shrouded in diplomatic secrecy and only disclosed by parties at their discretion. Yet, a further assessment of the number of litigation cases with the larger number of consultation proceedings is essential.

An ongoing tension exists between the traditional diplomatic aspects of trade negotiations and the newer legalization of trade dispute resolution. In the area of trade dispute resolution, it is in the interests of all parties to extend the rule-based system. This extension can occur by strengthening the consultation process and increasing its transparency, at least toward favorable conclusions.

It is important to emphasize that the dispute resolution system does not only settle cases between the immediate parties, but it further develops rules for the entire system. States change their practices in response to a binding decision; all other states benefit directly from that change. Other states might change their own rules to avoid violating WTO disciplines if they could accurately determine what is resolved in consultations. As a result, both the United States's and the global trading system's ability to further resolve conflicts would grow. At a minimum, all consulta-

tions leading to resolutions must be made public so they can be used by all parties and benefit every state taking part in the system.

Some states view linking trade disputes as an abuse of the system. For example, the EU contends that the filing of the Airbus case by the United States was caused by the United States's loss in the *Foreign Sales Corporation Case*. The EU argues that cases should be decided on their own merits and should not to be filed merely to gain leverage in another case. Likewise, the United States contends the recent EU case seeking review of the 2004 corporate tax legislation enacted by the United States to comply with the earlier FSC/ETI decision was an improper linking of cases. However, such linkages between trade cases, as well as trade cases and nontrade issues (for example, related foreign policy concerns), should not be viewed necessarily as an abuse of the system. In early January 2005, after filing initial pleadings, the EU and the United States decided to forego litigation in the Airbus-Boeing dispute and resort to international commercial diplomacy outside of the WTO framework. However, litigation was resumed shortly thereafter.

Time periods governing the litigation process within the WTO are short. Raising related issues within this context can result in a prompt resolution. Domestic litigation strategy has always included linkages between various issues involving private parties. Given the premise that resolving outstanding trade issues is the objective of the WTO, broadening the ability of states to resolve interrelated issues is an important goal whether the issues be trade or nontrade related (such as possible concerns over competition regimes and environmental matters). This approach expands rather than restricts the scope of dispute resolution in the trade arena and closely related matters of international relations generally.

States should also have a wide discretion whether to file cases. This discretion is a hallmark of any mature legal system. For example, the United States refused in November to file a WTO complaint concerning China's currency regulation. On the other hand, taking a questionable action and then defending a "losing case" sometimes has a certain merit. While some might view it as an abuse of the system, it serves a greater purpose: it allows the losing state to show domestic interest groups a good-faith attempt to defend its position in advance of modifying it to conform to WTO disciplines—thus, using the WTO as cover in order to make necessary domestic changes. To a certain extent this can be said of President Bush's use of safeguard measures on steel in 2002–2004 and his quick compliance with an adverse decision[40].

Conclusion.

A close examination of the WTO's record for dispute resolution should allay the fears expressed since its inception. The system's wide usage and acceptance, when implementation was required and in the few cases where sanctions were imposed, show it effectively addresses the most critical issues of international relations today. The system is restraining protectionist and unilateral measures. The system supports a rapidly globalizing system with great promises for resolving disputes concerning a growing range of global trade issues far beyond those that were known just ten years ago.[41] The United States should strengthen the global dispute resolution system to further its own interest in fostering a rule-based trading system with the intent of expanding such an approach as trade incorporates new issues.

Since post-World War II, trade has involved the shipping of goods and commodities between countries. The vision of lowering cargo into the hulls of ships is a fairly accurate characterization of early postwar trade. At that time issues of trade law primarily involved tariffs, quotas, dumping and export subsidies. These issues seem limited today. Global trade over the last sixty years has evolved quickly from containerization to bits and bytes over the Internet. Global trade today has moved from trade in goods to trade in services, such as financial services, information technology and telecommunications.

Newer issues of law have arisen concerning nontariff barriers (such as market access restrictions and commercial bribery) and a host of newer ones traditionally not considered related to trade law at all such as intellectual property rights, currency restrictions, direct investment, environmental, labor, corporate governance and antitrust. As technology has rapidly developed, new areas of trade relations have evolved, such as e-commerce and Internet trade. Each of these raises unique and novel questions in a multijurisdictional trading environment.

Global trade is the arena for entrepreneurial enterprises of the twenty-first century to strike out and to generate wealth for themselves and the global economy. Global trade has "transformational power" essential for economic growth, development of civil society and peaceful international relations.[42] Global trade serves as the principal engine of global change when there is a leveled playing field.[43] The WTO serves as the enhancer and enabler of global trade and as multiplier agent for the entrepreneurial and commercial drive of individuals and companies globally. The WTO dispute resolution system provides that mechanism for the global system. This system is a critical aspect of foreign affairs and international relations today.

The challenge is now for the United States and the global system to further develop rules and institutions to manage the expansion of global trade and to provide better global governance while recognizing the one principle that should guide their efforts: A stronger dispute resolution system is clearly in everyone's best interest. A stronger global institution is necessary to better manage economic globalization. The great success of the dispute resolution system reaffirms the earlier American vision. This success reaffirms the traditional reliance of American diplomacy of actively engaging in global institutions. Only through visionary leadership by the United States can the global community

successfully confront the critical issues posed by economic globalization. Greater trade today is the foe to greater disorder and a friend to greater prosperity. As terrorism is a threat to peace trade is a threat to terrorism.

> "There is no doubt that this jurisprudence will have an effect on general international law broader than the borderlines of the WTO system … . It is self evident that the better informed are diplomats, government officials and legislators on the fundamentals of international dispute settlement the better."
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> . . . . *The Future of the WTO—Addressing Institutional Challenges in the New Millennium* 51, 81 (by the WTO Consultative Board, 2005).

Addendum i

Important Summaries and Statistical Studies of WTO Cases.

"Snapshot of WTO Cases Involving the United States." (January 14, 2005) (by USTR).	http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/asset_upload_file287_5696.pdf
"Dispute Settlement Update." (January 14, 2005) (by USTR).	http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/asset_upload_file881_5697.pdf
"Update of WTO Dispute Settlement Cases."(October 14, 2004) (by the Secretariat).	http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm
"Overview of the State of Play of WTO Disputes." WT/DSB/37/Add 1 (December 3, 2004) (Addendum to *DSB Annual Report for 2004*).	http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#dsb
"Appellate Body Statistics." In AB *Annual Report* (2004) (Jan. 2005)	http://www.wto.org/english/tratop_e/dispu_e/wt_ab3_e.doc
"Chapter VI—The WTO Dispute Resolution System," *Future of the WTO—Addressing Institutional Changes in the New Millennium.* (2005) (WTO report).	http://www.wto.org/english/thewto_e/10anniv_e/10anniv_e.htm#future

Endnotes:

1 Renato Ruggiero (Director-General of the World Trade Organization), *The Future of the Multilateral Trading System.* (Speech in Seoul, Korea on April 17, 1997). http://www.wto.org/english/news_e/sprr_e/seoul_e.htm

2 *The Future of the WTO—Addressing Institutional Challenges in the New Millennium* 80 (by the WTO Consultative Board, 2005).

3 *Id.* at page 2.

4 Supachai Panitchpakdi, "The WTO After 10 Years: The Lessons Learned and the Challenges Ahead." (March 11, 2005). http://www.wto.org/english/news_e/spsp_e/spsp35_e.htm.

5 Mandelson, "Towards a New Map for World Trade," *Financial Times* 15 (May 3, 2005).

6 *See generally*, Esserman and House, "The WTO on Trial—Global Law and Global Politics," 82 Foreign Affairs 130 (No. 1, January–February 2003). Congress is currently reviewing the U.S. participation in the WTO as part of its previously authorized ten-year review.

7 The U.S. has been addressing the issue of "overreaching" during these negotiations.

8 U.S. Trade Representative "Snapshot of WTO Cases Involving the United States." (January 14, 2005). http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/asset_upload_file287_5696.pdf. *See also*, "Dispute Settlement Update." (January 14, 2005). http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/asset_upload_file881_5697.pdf

9 World Trade Organization (Secretariat), "Update of WTO Dispute Settlement Cases." (October 14, 2004) (WT/DS/OV22). http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm. *See also*, "Overview of the State of Play of WTO Disputes." WT/DSB/37/Add 1 (December 3, 2004) (Addendum to DSB Annual Report for 2004) (covers January 1, 1995 to October 31, 2004). *See also*, Appellate Body Annual Report for 2004 (2005) (WT/AB/3) and its various statistical annexes. http://www.wto.org/english/tratop_e/dispu_e/wt_ab3_e.doc

10 Malawer, "The U.S. and the WTO: Lessons Learned for Trade Litigation and Global Governance," 51 *Virginia Lawyer* 12 (No. 9, April 2003). For an earlier version of this article, *see* Malawer, "World Trade Organization After 10 Years: Litigation and Consultation," 232 *New York Law Journal* 4 (No. 110) (December 18, 2005).

11 *Brazil & EU v. U.S.* (WT/DS2/9) (AB) (May 20, 1996).

12 *Antigua & Barbuda v. U.S.* (WT/DS285/R) (Panel, November 10, 2004).

13 *U.S. v. EU.* (WT/DS291) (filed 1993 and pending).

14 *EU v. U.S.* (WT/DS317) (WT/DS316) (filed October 6, 2004)).

15 "Understanding on Rules & Procedures Governing Settlement of Disputes." (Annex 2 of WTO Agreement). http://www.wto.org/english/docs_e/legal_e/28-dsu.doc

16 *EU v. U.S.* (WT/DS108/RW) (AB January 14, 2002).

17 USTR data doesn't include the recent U.S. win concerning geographical indicators against the EU in December 2004. (This is not indicated in the statistics in this article.) The final report was issued on March 15, 2005 (WT/DS174/R) at http://www.wto.org/english/tratop_e/dispu_e/174r_e.doc. The AB reversed much of the panel decision in *E-Gambling Case* in 2005. *See* note 20. The AB reversed a panel decision against the U.S. in the action by Korea concerning countervailing duties relating to DRAMS. *Korea v. U.S.* (WT/DS296/AB/R) (June 27, 2005). [This was in the panel stage in late 2004.]

18 Malawer, "The U.S. and the WTO: Lessons Learned for Trade Litigation and Global Governance," 51 *Virginia Lawyer* 12 (No. 9, April 2003) (excluded *compliance procedures* generally).

19 *U.S. v. China.* (WT/DS309) (July 14, 2004 settlement notified).

20 The Appellate Body upheld only a very limited portion of the panel on April 7, 2005. *Antigua and Barbuda v. U.S.* (WT/DS285/AB/R). While finding some violation by the U.S. under the GATS the AB found that U.S. and state restrictions on Internet gambling were within the "public morals exception." "U.S. Limits on Internet Gambling are Backed," *New York Times* C:14 (April 8, 2005). This case raises the crucial issue of the *federal-state issue* in international agreements and the WTO agreements in particular. State laws and practices are subject to the WTO disciplines. However, the federal government may not made able to change them. The United States itself may be found to violate its international obligations because of the inconsistent state laws. Portman, "Trade Agreements and States." (Press Release, USTR April 14, 2005). In early 2005 this issue has became even more important since states (such as Maryland and New Jersey) were in the process of enacting restrictions on outsourcing of information technology and other services to India and elsewhere.

21 "EU to Impose Sanctions on Certain U.S. Products." *Wall Street Journal* (April 1, 2005).

22 *U.S. v. EU.* (WT/DS27/49) (WT/DS27/59).

23 *U.S. v. EU.* (WT/DS28/AB/R) (WT/DS48/AB/R) (AB January 16, 1998).

24 *Brazil v. Canada.* (WT/DS46/10).

25 *Canada v. Brazil.* (WT/DS70/6).

26 "Banana Producers go to WTO Over EU Dispute." *Financial Times* (March 31, 2005).

27 *WTO News Items* (February 17, 2005).

28 *EU v. U.S.* (WT/DS217/Arb/EEC) (Arb. August 31, 2004).

29 "Duties to Rise on Some Items from U.S." *New York Times* (April 1, 2005).

30 *EU & Japan v. U.S.* (WT/DS136, 162) (AB August 28, 2000).

31 *EU v. U.S.* (WT/DS176/AB/R) (AB January 2, 2002).

Addendum ii

U.S. — Won / Loss in WTO / DSU (January 1, 1995 – January 1, 2005)

Case	Body / Date	Subject	Pl.	Won	Loss	Def.	Won	Loss
Won as Complainant [Country - Issue]								
Japan - Liquor Taxes	AB 1996	Agriculture	x	x				
Canada - Periodical Imports	AB 1997	Entertainment	x	x				
EU - Banana Imports	AB 1997	Agriculture	x	x				
…. Compliance Procedure			x	x				
EU - Beef (Hormones)	AB 1998	Agriculture	x	x				
India - Patent (Drug & Agriculture)	AB 1998	Pharmaceuticals	x	x				
Argentina - Textiles Tax	AB 1998	Textiles	x	x				
Indonesia - Automobile	AB 1998	Manufacturing	x	x				
Korea - Liquor Taxes	AB 1999	Agriculture	x	x				
Japan - Agriculture (Testing)	AB 1999	Agriculture	x	x				
Canada - Dairy Sector	AB 1999	Agriculture	x	x				
…. Compliance Procedure			x	x				
Australia - Auto Leather	Panel 1999	Manufacturing	x	x				
…. Compliance Procedure			x	x				
India - Import Licensing (Textiles)	AB 1999	Textiles	x	x				
Mexico - A/D (Corn Syrup)	Panel 2000	Agriculture	x	x				
…. Compliance Procedure			x	x				
Canada - Patent Law	AB 2000	Intellectual Prop.	x	x				
Korea - Beef Imports	Panel 2000	Agriculture	x	x				
India - Auto Sector	AB 2002	Manufacturing	x	x				
Japan - Apples	AB 2003	Agriculture	x	x				
Mexico - Telecom	Panel 2004	Telecommunications	x	x				
Loss as Complainant [Country - Issue]								
EC - Computer Classification	AB 1998	Customs / High Tech	x		x			
Japan - Film Imports	Panel 1998	Film	x		x			
Korea - Airport Procurement	Panel 2000	Gov't Procurement	x		x			
Canada - Wheat	AB 2004	Agriculture	x		x			
Won as Respondent [Country - Issue]								
EC - Section 301 ("Retaliation")	Panel 2000	Trade Law				x	x	
India - Shrimp Turtle (Compliance)						x	x	
Canada - Subsidies (Exports SAA)	Panel 2001	Subsidies				x	x	
India - Steel	Panel 2002	Steel				x	x	
EU - German Steel (CVD)	AB 2002	Steel				x	x	
Canada - 129[c]1 of URAA	Panel 2002	Trade Law				x	x	
India - Textiles (Rules of Origin)	Panel 2003	Textiles				x	x	
Japan - Sunset Review (A/D)	AB 2003	Steel				x	x	
Canada - Lumber (Final)(CVD)	AB 2004	Lumber				x	x	
Canada - Lumber (Final) (A/D)	AB 2004	Lumber				x	x	
Loss as Respondent [Country - Issue]								
Venezuela) - Gasoline	AB 1996	Oil / Gasoline				x		x
Costa Rica - Textiles (Cotton)	AB 1997	Textiles				x		x
India - Textiles (Wool Shirts)	AB 1997	Textiles				x		x
India - Shrimp / Turtle (Fisheries)	AB 1998	Environment				x		x
Korea - Semiconductors (DRAMS)	Panel 1999	Computer Chips				x		x
EU - U.K. Steel	AB 2000	Steel				x		x
EC - Sec. 110[5] Copyright Act (Music)	AB 2000	Entertainment				x		x
Japan - 1916 A/D Act.	AB 2000	Trade Law				x		x
EU - Bonding Requirements (Customs)	AB 2001	Trade Law				x		x
EC - Wheat Glutten (Safeguards)	AB 2001	Agriculture				x		x
Korea - Stainless Steel	Panel 2001	Steel				x		x
New Zealand - Lamb Meat	AB 2001	Agriculture				x		x
Japan - Steel	AB 2001	Steel				x		x
Pakistan - Cotton Yarn (Safeguards)	AB 2001	Textiles				x		x
EC - Section 211 of 1998 Trade Act.	AB 2002	Trade Law				x		x
EU - Foreign Sales Corp. (CVD)	AB 2002	Tax & Trade Law				x		x
…. Compliance Procedure						x		x
Korea - Lind Pipe (Safeguard)	AB 2002	Steel				x		x
Canada - Lumber (Preliminary)	Panel 2002	Steel				x		x
EU - Steel (CVD)	AB 2003	Steel				x		x
Australia / EC Offset Act, 2000 ("Byrd")	AB 2003	Trade Law				x		x
EU - Steel (Safeguards) ("Bush" Tariffs)	AB 2003	Steel				x		x
Canada - Softwood Lumber (Injury)	AB 2004	Lumber				x		x
Argentina - A/D	AB 2004	Steel				x		x
Brazil - Subsidies (cotton)	Panel 2004 (appealed)	Agriculture				x		x
Antigua & Barbuda (E-Gambling)	Panel 2004 (appealed)	Entertainment				x		x

*Includes compliance procedures.
Source: "USTR Snapshot …" (2005) and "WTO Update" (2004).

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32 The recent loss by the U.S. in an action brought by Korea concerning countervailing duties on DRAM chips further adds to this congressional concern. *Korea v. U.S.* (DS296) (Panel February 21, 2005).

33 "Senate Slams China Currency Policy," *Wall Street Journal* A2 (April 7, 2005).

34 The U.S. has started the process of applying safeguard measures as provided for in the China Accession agreement. "U.S. Begins Steps to Limit Import Surge From China," *New York Times* (April 5, 2005).

35 *Brazil v. U.S.* (Panel WT/DS267/R) (September 8, 2004). The Appellate Body upheld the panel report with minor modification in early 2005. WTO/DS/267/AB/R (March 3, 2005). In response to this decision a U.S. representative stated, "Negotiation, not litigation, is the most effective way to address distortions in global agriculture," "WTO Backs Ruling on U.S. Cotton Programs," *Washington Post* E3:1 (March 4, 2005).

36 *Brazil v. EU* (Panel WT/DS266/R) (October 15, 2004). The Appellate Body fully upheld the panel report and even found that the panel erred by relying incorrectly on the notion of "judicial economy" in not deciding additional issues. WTO/DS265/AB/R (April 28, 2005). The Brazilian tactics in the WTO's dispute resolution system have been proclaimed as astute. "Astute Tactics Highlights the Role of the WTO," *Financial Times* 13 (June 23, 2005).

37 "AB Statistics" in the *AB Annual Report 2004* (January 25, 2005) (WT/AB/3) also published online by the Appellate Body (2005) at **http://www.wto.org/english/tratop_e/dispu_e/stats_e.htm**.

38 *Id.*

39 *Id.*

40 *EU v. U.S.* (WT/DS212). (AB January 8, 2003).

41 "The record of compliance has encouraged countries to become ever bolder in the disputes they refer to the WTO, reaching further down into politically sensitive issues of domestic taxation, regulatory and environmental issues." *See also*, "Tough Decisions Ahead on World Trade Rules," *Financial Times* (December 31, 2004). However, the future of globalization if far for ensured. Ferguson, "Sinking Globalization." *Foreign Affairs* (March / April 2005).

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42 "Overview," in the 2005 Trade Policy Agenda/ 2004 Annual Report of the USTR 19-20 (2005) at **http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Trade_Policy_Agenda/asset_upload_file454_7319.pdf**.

43 "When you have to make things with your hands and then trade … it inevitably broadens imagination and increases tolerance and trust." T. Friedman, *The World is Flat—A Brief History of the Twenty-First Century* 462 (2005).