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The Background, Requirements, and Future of the GATT/WTO Preshipment Inspection Agreement

Emily Rome

Preshipment inspection (PSI) is a service provided to developing countries to monitor the quantity and quality of their imports. Without such a service, these countries would be unable to adequately monitor imports due to government corruption and a lack of infrastructure, resources, and experience. PSI is usually provided to these countries by specialized private corporations. As PSI was increasingly used by developing countries, larger exporting countries began complaining about the power which PSI companies wielded over the private shipment of goods. In response to these complaints and the perception that PSI presented a threat to free trade, the Agreement on Preshipment Inspection (PSI Agreement, or Agreement)¹ was established as part of the Uruguay Round of negotiations of the General Agreement on Tariffs and Trade (GATT).²

The PSI Agreement sets forth rules and obligations governing both the countries using PSI services and the PSI entities themselves. Specifically, the Agreement obliges non-discriminatory application of PSI, calls for procedural transparency, requires confidentiality of private information learned during the PSI process, and generally addresses the primary concerns held by large exporting countries. The Agreement, unlike other GATT side agreements, is also governed by its own dispute settlement process. The Agreement omits, however, any assurance that countries using PSI will be weaned from those practices in favor of more conventional inspection methods.

This Note explains the historical underpinnings of the Preshipment Inspection Agreement and analyzes both the Agreement's requirements and its effectiveness. Part I briefly outlines

1. Agreement on Preshipment Inspection, Apr. 15, 1994, WTO Agreement [hereinafter PSI Agreement], Annex 1A:10, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 (1994) [hereinafter LEGAL INSTRUMENTS].

2. Final Act Embodying the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994 [hereinafter GATT], in LEGAL INSTRUMENTS, *supra* note 1.

the historical development of PSI and describes the problems associated with its use. Part II summarizes the requirements of the PSI Agreement and describes its dispute settlement mechanism. Part III examines the benefits and problems accompanying a country's decision to change from preshipment inspection to conventional port-of-unloading inspection. Part IV examines the future of preshipment inspection according to both industry experts and the author. Finally, this Note concludes that preshipment inspection is a valuable process which allows developing countries to participate in global trade at increasing levels of effectiveness and efficiency, thereby facilitating growth in their own economies while simultaneously contributing to global trade. Consequently, contrary to the opinions of many exporters, PSI should not be eliminated. Instead, PSI should be retained as an intermediate solution as developing countries attempt to build their foreign trade sectors.

I. PRESHIPMENT INSPECTION HISTORY

A. THE PROCESS AND THE PLAYERS

Developing countries use importing procedures that differ from those used by developed countries. Generally, the practice of developed countries involves first receiving the imports into their own ports of entry and then using customs officials to inspect the incoming products.³ This is usually referred to as port-of-unloading inspection. In developing countries, though, this procedure is either not feasible or not desirable.⁴ Thus, a significant number of developing countries choose PSI as a superior alternative to port of unloading inspection.⁵

3. See, e.g., 19 U.S.C. §§ 1-69, 2071-82 (1912) (describing the port-of-unloading customs procedure used in the United States). Sections 1 through 69 set forth the collection districts, ports, and officers. See *id.* §§ 1-69. Sections 2071-82 deal with the duties and authority of the Customs Service. See *id.* §§ 2071-82.

4. See *infra* notes 34-41 and accompanying text (discussing how corruption and lack of infrastructure make port-of-unloading inspection difficult for developing countries).

5. PSI services cover only about 2% of world trade. Patrick Low, *Preshipment Inspection Services*, in WORLD BANK DISCUSSION PAPERS 278, 8 (The International Bank for Reconstruction and Development/The World Bank, 1995). However, the Sub-Saharan African countries utilizing PSI, excluding the Republic of South Africa, account for nearly half of that region's trade. *Id.* This figure is heavily influenced by the relative size of Nigeria. *Id.*

1. The Process of PSI

In the preshipment inspection process, an importing country⁶ contracts with an independent third party to inspect the goods in the exporting country prior to shipment.⁷ The PSI process consists of two different stages: physical inspection and price verification.⁸ The physical inspection is designed to validate the information the exporter provided on the invoice, in the contract, or in other documents.⁹ This inspection occurs in the exporter's country at the site of the production or storage of the goods.¹⁰

The price verification of PSI requires examination of the invoice price of the goods and comparison with prices of similar goods offered from the same country under similar circumstances.¹¹ Though both the physical inspection and price verification are undertaken for the same goods, the two processes are independent of each other.¹² Even so, price verification occasionally may rely on the physical inspection process to confirm that the description of the goods corresponds to the merchandise being exported.¹³

Although preshipment inspection usually applies to all imports, the country which has contracted for PSI may specifically exempt certain import categories from inspection.¹⁴ It is common for most PSI contracts to impose a threshold value below which goods are exempt from the PSI process.¹⁵ In addition, there are certain categories of goods, including "newspapers and periodicals, personal effects, diplomatic goods, defense supplies, and fresh produce," that are usually excluded from inspection.¹⁶

Each country utilizing the PSI process generally develops a specialized contract with a PSI company to satisfy its particular

6. Though PSI may be used for both imports and exports, this Note focuses on the use of PSI with imports.

7. Low, *supra* note 5, at 8-9.

8. *Id.* at 8.

9. *Id.*

10. *Id.*

11. *Id.* See also PSI Agreement art. 2.20(b).

12. Low, *supra* note 5, at 8.

13. Some contracts provide for a preliminary price verification to be completed before the physical inspection. See *infra* notes 145-148 and accompanying text (explaining the PSI article that addresses preliminary inspections).

14. Low, *supra* note 5, at 8-9.

15. See *id.*

16. *Id.* at 8. Subjecting these time-sensitive items to the PSI process would delay the shipment too much, thereby decreasing or eliminating the economic viability of the goods.

needs.¹⁷ There are, however, some basic elements present in most PSI programs. The following description of the steps of PSI is taken from a comprehensive World Bank report on pre-shipment inspection:

1. Upon deciding to import, the importer completes the necessary documentary formalities of the import authorities, arranges payment procedures with a commercial bank (usually by opening a letter of credit), and notifies the local office of the PSI company of the intention to import. . . .
2. The local office of the PSI company makes a preliminary determination regarding the eligibility of the proposed transaction and transmits an inspection order (usually by electronic means — electronic data transfer, or EDT) to its affiliate in the country from which the goods are being shipped.
3. The affiliate contacts the exporter . . . , seeks relevant information about the proposed shipment, and arranges the time and place for a physical inspection. Such information may include pro forma invoices, price lists, transport costs, copies of letters of credit, technical literature pertaining to the product, packing lists, information about commissions payable to third parties, and shipping details. The affiliate also undertakes price verification, tariff classification, and any other tasks contractually specified
4. Upon satisfactory PSI, and production of the final invoice and proof of shipment by the supplier . . . , the affiliate transmits a Report of Findings (ROF) to the local PSI office in the importing country by EDT. The affiliate also issues an ROF to the seller, which is a negotiable document required in order for the commercial bank in the importing country to authorize release of funds in payment for the goods. In some cases, a customs duty report may be separately furnished. If PSI proves unsatisfactory, the supplier may make the necessary adjustments (for example, to the invoice price in the case of over-invoicing), or the PSI company will issue a non-negotiable ROF. In cases of under-invoicing, there is no reason to adjust the invoice price, and the PSI company will simply indicate a dutiable value different from the invoice price on the ROF.
5. The local office of the PSI company issues the ROF to the importer for duty payment and customs clearance purposes, and also furnishes copies to the importer's commercial bank, and the relevant government authorities (customs, the central bank, etc.).
6. The importer . . . pays customs duties and taxes due (sometimes to a commercial bank as a prior condition of customs clearance) and clears the goods through customs, with the ROF, proof of payment of taxes due, the import entry form, and other required documents.¹⁸

2. *The Preshipment Inspection Industry*

Five firms offer PSI services: BIVAC International of Paris, COTECNA of Geneva, Inchcape Testing Services International

17. *Id.*

18. *Id.*

(ITSI) of London, Inspectorate America of Houston, and Société Générale de Surveillance (SGS) of Geneva.¹⁹

SGS, founded more than 119 years ago,²⁰ dominates the PSI industry. It was the first to enter the PSI business, doing so when the Government of Zaire contracted for services in 1965.²¹ The other PSI companies did not begin to obtain government contracts until the mid-1980s.²² When the issue of preshipment inspection gained prominence in 1986 and 1987,²³ SGS had contracts or licenses with twenty-three of the twenty-five countries using PSI.²⁴ Currently, SGS still dominates the industry, holding contracts for twenty-eight of the thirty-four countries that still use preshipment inspection.²⁵ As the largest PSI company, SGS has more than 130 affiliated enterprises and maintains a presence in more than 140 countries.²⁶ SGS serves countries by inspecting and monitoring exports and imports of a variety of goods, including agricultural and mineral products, petroleum, petrochemicals, industrial equipment, and consumer goods.²⁷ SGS, like the other PSI companies, tries to minimize its clients' risks by providing them with an independent assessment of the imports and corresponding advice as to the accuracy and adequacy of those imports.²⁸

19. *Id.* at 5.

20. *Indonesia Clouds Surveillance (SGS) Prospects*, REUTERS FIN. SERVS., Mar. 17, 1997, at Money Report.

21. Letter from Jeremiah J. O'Neill, Vice President, SGS Government Programs Inc., to Emily Rome, Staff Member, *Minnesota Journal of Global Trade* (Dec. 9, 1997) (on file with author).

22. Low, *supra* note 5, at 5.

23. See *infra* notes 50-51 (discussing how four Florida trade groups' filing of a Section 301 complaint began the critical discussion of PSI).

24. *40 Percent of Exports Subject to Preshipment Inspection in 1986 Delayed, ITC Study Finds*, 4 Int'l Trade Rep. (BNA) No. 34, at 1061-62 (Aug. 26, 1987).

25. As of November 1997, SGS held PSI contracts as the sole provider of services in Angola, Burkina Faso, Burundi, Cambodia, Cameroon, Central African Republic, Senegal, Republic of Congo, Democratic Republic Congo, Guinea, Ivory Coast, Uganda, Malawi, Mali, Mauritania, Philippines, Rwanda, and Zambia. SGS Government Programs Inc., Form Number 14 November 1997/mmc, (Nov. 1997) (on file with the *Minnesota Journal of Global Trade*). In addition, as of November 1997 SGS also shared contracts with other PSI inspection firms in Argentina, Bangladesh, Bolivia, Ecuador, Ghana, Madagascar, Mexico, Paraguay, Peru, and Tanzania. *Id.* Other countries that also employ PSI services, though not those of SGS, include the following: Benin, Colombia, Kenya, Sierra Leone, Somalia, and Zimbabwe. *Id.*

26. *Id.*

27. *Indonesian Clouds Surveillance (SGS) Prospects*, *supra* note 20.

28. *Id.*

In the first fifteen years of PSI use, the focus of PSI companies was almost exclusively on preventing capital flight. Capital flight is one of the oldest forms of corrupt practices in developing countries.²⁹ It occurs when “convertible currency accruing to a home country is conspicuously ‘returned’ to foreign countries with little or nothing coming back to the home country as profit or investment returns.”³⁰ The current concentration on customs work did not develop until Indonesia contracted with SGS for customs services in 1985.³¹ From the late 1980s and continuing until the present, the focus of PSI work has gradually shifted from over-invoicing toward under-invoicing practices such as tax evasion.³² Tax evasion, or import under-invoicing, can take “one of three forms: the under-declaration of the value of a good in collusion with a foreign supplier, the forgery of the invoice independently of the supplier, and the mis-classification of an item under a tariff heading carrying a lower tax rate.”³³

29. Konyin Ajayi, *On the Trail of a Spectre—Destabilisation of Developing and Transitional Economies: A Case Study of Corruption in Nigeria*, 15 DICK. J. INT'L L. 545, 548-49 (1997). In fact, banking experts have cited capital flight as one of the most serious problems exacerbating the debt problems of developing countries. Edwin Unsworth, *U.S. Firms Could Be Aiding Illegal LDC Capital Flight*, J. COM., Apr. 15, 1987, at 1A. Some estimate that from 1977 to 1987 losses to developing countries through capital flight have exceeded \$198 billion. *Id.* Capital flight has traditionally been accomplished through the use of over-invoicing, which allows the home country's currency to be ‘returned’ to the exporting countries, as explained in the following excerpt:

Three separate cases of import over-invoicing can be distinguished in terms of their relation to the exchange regime. The first is a purely economic case, where capital flight takes place through false invoicing only if exchange controls make this necessary. The second case of over-invoicing arises precisely because of exchange controls. The third category occurs irrespective of the exchange regime because the underlying objective can only be met by declaring a false invoice value.

Low, *supra* note 5, at 11. In the purely economic case, the motivations for capital flight may include the desire to protect the value of assets, to increase the rate of return on assets, and to reduce uncertainty. *Id.* The second case occurs because the controls induce the establishment of a parallel exchange market. *Id.* at 12. “By over-invoicing their goods, importers can acquire foreign exchange for sale in the parallel market so as to capture the scarcity premium on foreign currency. *Id.* In the third instance, over-invoicing is the essential way to accomplish the underlying objective, whether that is the desire to transfer ownership of assets, avoid direct taxes, declare profits in a different jurisdiction, or transfer illicit funds. *Id.*

30. Ajayi, *supra* note 29, at 546.

31. Low, *supra* note 5, at 5.

32. *Id.* However, most contracts for PSI services still do include some capital flight work. *Id.*

33. *Id.* at 13.

3. Reasons for Using Preshipment Inspection

a. Corrupt Customs Officials

Some countries use PSI because they do not trust their own customs officials to inspect imports fairly and accurately.³⁴ For example, Indonesia's decision in 1985 to transfer the responsibility of inspecting imports from the Indonesian Customs Department to PSI entities was based in large part on high levels of corruption within the Customs Department.³⁵

Customs corruption causes two separate but related types of problems. First, countries feel that allowing their customs officials the discretion needed to process imports and exports will lead to an increase in under-invoicing for duty evasion, over-invoicing for money laundering, and smuggling via mis-declaration.³⁶ Second, in many countries customs officials have abused their power and accepted bribes in exchange for clearing goods for entrance into the country in a timely manner.³⁷ For example, prior to the implementation of preshipment inspection in Indonesia in 1985, bribes estimated at two million Rupiah per consignment were often paid by importers to speed up the inspections process.³⁸ As so often happens when officials accept bribes, the practice becomes both widespread and well-known. This harms the country in two ways. As the additional cost of the bribes is factored into the cost of doing business in and with a country, that country gains a reputation for having a high-cost and unpredictable business environment.³⁹ In addition, the delays associated with the corruption slow the movement of goods through the country's ports, thereby decreasing the country's

34. Richard Borsuk, *Changes in Indonesia's Customs Systems Worry Importers Recalling the Old Days*, WALL ST. J., Apr. 3, 1997.

35. *Indonesian Firms Wary of Government Decision on Import Inspections*, ASIAN CHEM. NEWS, Feb. 21, 1997, available in 1997 WL 9832233.

36. Frank Reynolds, *Country-Specific Documents Satisfy a Requirement of Buyer's Government*, J. COM., Sept. 18, 1996, at 2C. Some of the reasons for over-invoicing of imports and/or under-invoicing of exports include: (1) capital flight (protecting asset values, increasing returns to assets, or reducing uncertainty); (2) black market arbitrage; (3) transferring ownership of assets; (4) evading direct taxes; (5) evading export taxes; and (6) transferring illicit funds. Low, *supra* note 5, at 11. Two reasons for under-invoicing of imports and/or over-invoicing of exports are to evade taxes on imports and to capture export subsidies. *Id.*

37. *Indonesian Firms Wary of Government Decision on Import Inspections*, *supra* note 35.

38. *Id.*

39. Borsuk, *supra* note 34.

revenue⁴⁰ from import duties and decreasing its manufacturing and production capabilities.⁴¹

b. Lack of Physical Capabilities: Congestion

Many countries lack the physical capabilities to effectively inspect imports at a rate which facilitates trade.⁴² These developing countries often lack essentials such as the funding to run the costly state-sponsored import inspection, adequate storage space, administrative buildings, fast and reliable transport systems, and the large numbers of customs officials needed to effectively inspect imports.⁴³

While some of these countries could conduct post-entry inspections, the time imports would spend waiting to pass the inspection process as a result of the inadequate physical capabilities would both impair the individual importer's ability to do business and decrease the country's overall rate of trade. The congestion that results from an ill-equipped customs department can cause imports to stagnate for days or weeks while the importer waits impatiently for its products to become available.⁴⁴ Inefficiency is one of the major reasons some countries decide to use PSI. Indeed, it was largely for reasons of trade facilitation that Indonesia chose to adopt PSI.⁴⁵

B. PROBLEMS WITH PRESHIPMENT INSPECTION

Though many developing countries view PSI as a safe and manageable way to engage in increasingly higher levels of trade with other countries, many developed countries view PSI as a barrier to free trade.⁴⁶ The use of PSI by developing countries

40. Indonesia was one of the first countries to employ preshipment inspection in an attempt to facilitate trade. *Return of Local Customs Inspections Feared*, JAKARTA POST, Jan. 27, 1997, available in 1997 WL 8100540.

41. *Id.*

42. *Id.*

43. *Indonesian Ports Packed and Stacked, But It's Getting Better*, EAST ASIAN EXECUTIVE REP., Mar. 15, 1997, at 7.

44. Prior to 1985, transactions through Indonesian customs typically meant delays, extra costs, and uncertainty about when importers could expect their consignments to be released. *Id.*

45. *Id.* In fact, the result of Indonesia's decision to hire SGS was a dramatic improvement in the movement of goods through Indonesian ports. Borsuk, *supra* note 34. The use of PSI helped to build the country's non-oil exports and helped boost revenue from import duties. *Id.*

46. *Private Companies' Preshipment Inspection for Caribbean, Latin America Hit in Sect. 301 Case*, 3 Int'l Trade Rep. (BNA) No. 38, at 1156 (Sept. 24, 1986).

began to grow in the 1980s due to their increased concerns about customs work and capital flight.⁴⁷ As developing countries increasingly exposed large exporter countries to this system, it became apparent, at least to these large exporters, that PSI had some serious problems.

1. *Complaints about PSI*

The first critical discussion of PSI took place in September of 1982 at the United Nations Economic Commission for Europe's Working Party on Facilitation of International Procedures (WP.4).⁴⁸ The WP.4 adopted a recommendation discouraging preshipment inspection based mainly on perceived concerns of increased costs and delays.⁴⁹

The PSI debate began in earnest in September 1986, when four Florida trade groups⁵⁰ filed an unfair trade practices complaint with the U.S. Trade Representative (USTR) under Section 301.⁵¹ The complaint stated that five Latin American and

47. Low, *supra* note 5, at 5.

48. *Id.* at 27.

49. *Id.* The Discouragement of Preshipment Inspection said the following: "The present trend towards increased inspection of goods for purposes other than phytosanitary, sanitary and veterinary controls causes serious concern because of its implications in the form of costs and delays. This practice should be discouraged; when there is legitimate need for inspection the authorities concerned should accept certificates issued by official control bodies in the country of export."

Id. (citing Recommended Measure 8.2, "Discouragement of Preshipment Inspection," Item 1.2.9).

50. The four Florida trade groups were the Florida Exporters and Importers Association, the Florida District Export Council, the Florida Customs Brokers and Forwarders Association and the International Center of Florida. Unsworth, *supra* note 29, at 1A. PSI companies were also opposed by the New York Chamber of Commerce, the National Committee on International Trade Documentation, the Chemical Manufacturers Association, the Pharmaceutical Manufacturers Association, the Paper Institute, the National Industrial Traffic League, the National Export Traffic League, the National Association of Export Management Companies, and the Petroleum Institute. Anthony Barone, *Letters to the Editor, Inspection Issue Not Just Regional*, J. Com., May 12, 1987, at 1A.

51. Section 301 of the Trade Act of 1974 gives the President, through the United States Trade Representative (USTR), broad authority to act against the "unreasonable" and "unjustifiable" trade practices of other countries if these practices adversely affect United States interests. 19 U.S.C. §§ 2411-20 (1994). Section 301 claims are usually initiated by American citizens complaining to the USTR, who then investigates the complaint and decides what course of action to pursue. Section 301(a) gives the USTR the authority to take retaliatory action if a trading partner breaks a trade agreement with the United States. Section 301(b), on the other hand, does not require the breach of a trade agreement. This section allows the USTR to take retaliatory action if a trading part-

Caribbean countries (Jamaica, Ecuador, Guatemala, Paraguay, and Venezuela) were using private companies to perform pre-shipment inspection on imports from the United States.⁵² It then alleged that the PSI unnecessarily interfered with U.S. exports to those countries.⁵³ The complaint further alleged that the number of countries and associated dollar volume of affected trade would likely grow because at least eighteen other countries had also adopted the use of private PSI companies.⁵⁴

The Florida trade groups began by noting that the five countries had signed agreements with PSI companies, predominantly with SGS, which provided for the physical examination of the imports and financial analysis of the transaction.⁵⁵ The four trade groups complained that if SGS representatives were dissatisfied with any part of the transaction, SGS issued a negative report which had the effect of voiding the contract between the exporter and the importer.⁵⁶ The complainants alleged that since SGS represented twenty-three or more countries, it would "have unprecedented power to fix the worldwide price of commodities, determine product quality standards, and distort world trade patterns."⁵⁷ The complaint listed five harms which U.S. exports suffered as a result of PSI: increased costs and delays, arbitrary price restrictions, the required disclosure of confidential business information to the third party PSI company, private nullification of contracts without due process rights, and a competitive disadvantage for the United States resulting from the fact that domestic trade within PSI-using countries and imports from some third world countries were exempt from pre-shipment inspection.⁵⁸

The complaint alleged that the administrative costs of compliance with PSI, costs of the delays associated with PSI, and

ner's actions are "unreasonable" or "discriminatory" and also "burden or restrict United States commerce." *Id.* at § 2411(a)(1), 2411(b)(1).

52. *Private Companies' Preshipment Inspection*, *supra* note 46, at 1156.

53. *Id.*

54. *Id.* Countries other than the five listed in the petition that were using PSI at the time of the complaint included: Angola, Bolivia, Burundi, Equatorial Guinea, Ghana, Haiti, Indonesia, Ivory Coast, Kenya, Liberia, Madagascar, Mexico, Rwanda, Surinam, Tanzania, Uganda, Zaire, and Zambia. *Action on Preshipment Inspection Complaints Announced by USTR, Sect. 301 Petition Withdrawn*, 3 Int'l Trade Rep. (BNA) No. 43, at 1304-05 (Oct. 29, 1986).

55. *Action on Preshipment Inspection Complaints Announced by USTR*, *supra* note 54, at 1304-05.

56. *Id.*

57. *Private Companies' Preshipment Inspection*, *supra* note 46 (quoting the section 301 complaint).

58. *Id.*

SGS services' costs surpassed \$150 million in increased expenses.⁵⁹ The exporters claimed that the delays resulting from PSI made U.S. exports less attractive than exports from those countries not subjected to PSI, thus putting U.S. exporters at a competitive disadvantage.⁶⁰ Additionally, U.S. exporters were concerned with perceived arbitrary price restrictions promulgated by SGS and an SGS requirement that certain confidential business information be revealed without any corresponding guarantees as to how the information would be used.⁶¹ It was argued that the ability of a private PSI company to unilaterally nullify otherwise valid contracts denied procedural and substantive due process rights such as would be afforded by an appeal mechanism.⁶² Finally, the exporters stated that existing evidence suggested that the products of third world countries, even when subject to PSI, received more lenient treatment.⁶³

The petition also claimed that the PSI requirements of the five named countries violated several GATT obligations, including the tariff concessions secured in previous negotiations,⁶⁴ the commitment to reduce the paperwork involved in placing goods into the commerce of the importing country,⁶⁵ the elimination of quotas,⁶⁶ and the elimination of discrimination on the basis of national origin in operating quota and licensing systems.⁶⁷

As consequences for the failure to remedy the alleged violations, the petition asked then President Reagan to consider the following: suspending the duty-free imports of Jamaican and Guatemalan goods under the Caribbean Basin Economic Recovery Act,⁶⁸ suspending the duty-free treatment of imports under the Generalized System of Preferences for the five countries, suspending or preventing the application of benefits of trade agreements with the five countries and imposing retaliatory import restrictions on the five countries.⁶⁹ In response to the Section 301 unfair trade practices petition, the USTR implemented

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. GATT art. II:1.

65. GATT art. VIII:1(c).

66. GATT art. XI:1.

67. GATT art. XIII.

68. Caribbean Basin Economic Recovery Act, 19 U.S.C. §§ 2701-07 (1994).

69. *Action on Preshipment Inspection Complaints Announced by USTR*, *supra* note 54, at 1304.

a plan⁷⁰ to address the concerns of the Florida trade groups.⁷¹ The five-point plan committed the USTR to (1) consult with those governments that used PSI and encourage them to follow the GATT Customs Valuation Code⁷²; (2) pursue multilateral solutions; (3) monitor the activities of PSI agents in the United States and look into any U.S. exporters' complaints about the PSI companies' activities; (4) consider possible legislation, regulations, or other action to limit PSI activities within the United States; and (5) ask the International Trade Commission (ITC) to perform a study, pursuant to Section 332,⁷³ that would report the effects of PSI practices on U.S. commerce.⁷⁴ In response to announcement of this plan, the Florida trade groups withdrew their Section 301 complaint.⁷⁵

70. In conjunction with the announcement of the plan, U.S. Trade Representative Clayton Yeutter expressed his concern that PSI requirements impeded United States exports to some developing countries. See *Actions Regarding Preshipment Inspection Practices of Private Inspection Companies on Behalf of Foreign Governments*, 51 Fed. Reg. 37,811 (1986).

71. *Action on Preshipment Inspection Complaints Announced by USTR*, *supra* note 54, at 1304.

72. GATT Implementation of Art. VII - Customs Valuation, Apr. 12, 1979, 34 U.S.T. 1151(1), T.I.A.S. No. 10,402 [hereinafter *Customs Valuation Code*].

73. 19 U.S.C. § 1332, commonly called Section 332 of the Tariff Act of 1930. Section 332 empowers the executive to investigate the customs relations between the United States and foreign countries. 19 U.S.C. § 1332(b).

74. *40 Percent of Exports Subject to Preshipment Inspection in 1986 Delayed*, *supra* note 24, at 1061.

75. After the Florida trade groups filed their Section 301 complaint, the issue of preshipment inspection came under more severe scrutiny. At a National Association of Export Companies (NEXCO) meeting on November 7, 1986, SGS officials found themselves embroiled in a debate over the fairness of SGS's preshipment inspection programs. *Preshipment Inspection Procedures Debated by SGS Official, Attorney in Sect 301 Complaint*, 3 Int'l Trade Rep. (BNA) No. 47, at 1418 (Nov. 26, 1986). According to the then Executive Vice President of SGS, Robert Wareham, the company was under contract with 24 nations in Africa, South America, the Caribbean, and Asia. *Id.* Wareham explained SGS's job under these contracts as twofold: physical inspection and price verification. *Id.*

Tom Travis, the Miami attorney who had filed the Section 301 complaint for the four Florida trade groups earlier in that year, accused SGS and other PSI companies of forcing the disclosure of proprietary business information and of sabotaging freely negotiated contracts by finding that the price was too high. *Id.* Travis explained, "These are non-governmental entities acting like governments . . . but without any established standards." *Id.* As further evidence of the magnitude of this problem, Travis stated that after his request for comments regarding his Section 301 complaint, he was flooded with responses from American corporations who were constrained by the preshipment inspectors. *Id.*

In response to Travis' arguments, Wareham stated that his firm's business had grown out of developing countries' concerns about capital flight. *Id.* Travis

As 1986 ended, more and more exporters began voicing their complaints about PSI.⁷⁶ Some companies became so frustrated with the PSI process that they stopped exporting to countries that used it.⁷⁷ Cincinnati-based Paper Corp. reported that it no longer shipped its products to Venezuela and it had greatly reduced its exports to Ecuador.⁷⁸

2. International Trade Commission's Report

Pursuant to the USTR's five-point plan, the ITC released a report entitled "Preshipment Inspection Programs and Their Effects on U.S. Commerce, on August 17, 1987."⁷⁹ The report surveyed 600 exporters concerning their experiences with the PSI

responded to this argument by opining that these unacceptable business practices would be more effectively addressed through customs agreements between the United States and the countries now employing the services of SGS. *Id.*

Another dispute arose over Wareham's claim that SGS does not compare prices across national boundaries on behalf of its clients; instead, the company only assures that the goods are priced at a level that is reasonable for the country of origin. *Id.* This claim was disputed by a number of exporters present at the meeting who claimed to have personal knowledge to the contrary. *Id.*

Finally, some exporters questioned why SGS could not conduct its price review before the contract was signed, instead of the current procedure which leaves the price review until after the goods are produced and ready for shipment. *Id.* Wareham responded that such early intervention would be considered price fixing and that was something in which SGS would not participate. *Id.*

76. *40 Percent of Exports Subject to Preshipment Inspection in 1986 Delayed*, *supra* note 24, at 1061.

77. *Some Exporters Drop Countries*, J. COM., June 12, 1987, at 12A.

78. *Id.* Judy Stahl, sales service manager for Paper Corp. said, "It's a headache. We had one shipment ready to export and four weeks went by before it could be shipped And we had to pay the warehousing costs." *Id.* Ms. Stahl also reported that French PSI company Bureau Veritas told Paper Corp. that they were not allowed to make more than a 5% profit on a shipment. *Id.*

79. *40 Percent of Exports Subject to Preshipment Inspection in 1986 Delayed*, *supra* note 24, at 1061.

process.⁸⁰ There were 513 responses to the questionnaire, and the ITC was able to collect data from 401 of those participants.⁸¹

Though a number of the responses were incomplete, the ITC was able to gather a large amount of useful data. The ITC found that 40 percent of U.S. exports that underwent PSI in 1986 were delayed by as much as twenty days because of PSI.⁸² Total exports from the sampled exporters to the PSI countries in 1986 were valued at \$1.6 billion, or 8.2 percent of total U.S. exports to those countries.⁸³

The report stated that in 1986, twenty-five developing countries in Africa, Asia, and Latin America required PSI of their imports from the United States and other countries.⁸⁴ Eight of those countries, Mexico, Venezuela, Indonesia, Ecuador, Jamaica, Nigeria, Guatemala, and Haiti, were significant markets for U.S. exports.⁸⁵ Each of these eight countries adopted their PSI programs between 1983 and 1986.⁸⁶

The report cited two main explanations for why so many countries switched to PSI: the lack of hard currency and the lack of customs control operations.⁸⁷ The report opined that these two problems were only exacerbated by the additional

80. The International Trade Commission rejected SGS' May 27, 1987 Freedom of Information Act request for access to the list of the exporters receiving the ITC questionnaires on the practice of preshipment inspection. Keith Rockwell, *Swiss Won't Get List of Exporters in ITC Probe of Cargo Inspection*, J. COM., June 12, 1987, at 1A. According to the assistant general counsel at the ITC, the application was denied because the release of the list would make it more difficult to issue a public version of the report and also because the list had commercial value. *Id.* The ITC obtained the list of exporters by paying the Journal of Commerce \$5,500.00. *Id.* Since the ITC paid for the list, it was under no obligation to make the information on the list public. *Id.* Though they could not be sure retaliation was the reason for the request, exporters could think of no other reason why SGS would want such information. *Id.* Anthony Barone, manager for international transportation at Warner Lambert Co. said, "I can't see any legitimate reason why they would need the names of the companies. The ITC report will speak for itself." *Id.* Attorneys for SGS stated that any charges of retaliation as the reason for the request were completely unfounded. *Id.* According to SGS, its intent in asking for the list was simply to ensure that there was a good balance among the firms questioned. *Id.* Furthermore, SGS emphasized that it did not want the content of the responses, just the names of the companies participating in the investigation. *Id.*

81. *40 Percent of Exports Subject to Preshipment Inspection in 1986 Delayed*, *supra* note 24, at 1061.

82. *Id.*

83. *Id.* at 1062.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

problems of debt, capital flight, and high levels of fraud and corruption in the PSI users' foreign trade sectors.⁸⁸

The majority of U.S. exporters responded negatively to PSI. Of the 401 respondents, 70 percent said they had strong objections to PSI based either on the principles of the program⁸⁹ or on bad experiences with PSI.⁹⁰ Two-thirds of respondents had specific complaints about either the qualifications of those officials actually conducting the inspections, the additional costs occasioned by PSI, or the delays in payments caused by PSI.⁹¹ Yet, a notable 19 percent reported favorable experiences with the PSI program.⁹²

Most exporters cited delays as their biggest concern. Exporters reported that regardless of whether or not their shipments were inspected, shipments to PSI-requiring countries took three times as long, an average of 21 days, as shipments to those countries not requiring the procedure, which averaged 7 days.⁹³ The report acknowledged, however, that the additional time it took to ship to PSI countries could not necessarily be entirely attributed to the PSI process.⁹⁴ Another concern of the responding exporters was that the invoice prices assessed by the PSI companies were too high in 3.5 percent of all inspected shipments.⁹⁵ The ITC estimated that if all the problems reportedly associated with PSI were taken together, "the inspection process would add an additional cost of 2.8 percent of the value of the shipment to the cost of exporting to that country."⁹⁶

The president of SGS's government programs division, Robert Burgess, commented on the ITC report. Though Burgess criticized the survey of U.S. exporters included in the report,⁹⁷

88. *Id.*

89. Some of these objections focused on the alleged hindrance to free trade caused by PSI and on the release of confidential business information during inspections. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* "Comparing these two figures provides a good indication of the additional length of time required overall for shipping to countries requiring PSI, but does not represent the additional length of time required for PSI alone. Other factors may also affect the process of exporting to developing countries requiring PSI's." *Id.*

95. *Id.*

96. *Id.*

97. "The report relies heavily on a survey of U.S. exporters. We already know that many exporters prefer that importing countries have no controls whatsoever. Therefore, the results of the ITC survey are

he stated that the report demonstrated to U.S. officials why developing countries viewed preshipment inspection as one important way to stop capital flight.⁹⁸ Yet, the National Federation of Export Associations president, Ralph Chew, was not persuaded about the veracity of the claims regarding capital flight. He perceived PSI programs as little more than a phony attempt to pretend that the problem of capital flight was being resolved.⁹⁹ Mr. Chew further stated that "the direct and indirect costs of PSI activities are simply out of proportion with any benefit derived from them."¹⁰⁰

II. THE PRESHIPMENT INSPECTION AGREEMENT AND THE INDEPENDENT ENTITY

In 1986, as PSI was being criticized, the eighth round of the GATT multilateral negotiations (the Uruguay Round) was approaching. Negotiators were faced with weighing the benefits of PSI for developing countries against the problems and complaints of those who disliked PSI and believed it to be an unfair barrier to free trade. The Uruguay Round aimed to both further the tariff concessions secured at previous GATT rounds as well as to "reduce the non-tariff barriers to trade in goods that had proliferated as tariff barriers had declined."¹⁰¹ These objectives virtually ensured that PSI and the controversy surrounding it would become a topic of debate during the Uruguay Round.¹⁰²

A. EVALUATION OF THE PSI AGREEMENT

The United States approached the preshipment inspection negotiations of the Uruguay Round with three broad objectives. First, the United States wanted to draft an agreement that would regulate the activities of PSI companies.¹⁰³ Second, the

not particularly new, nor are they unexpected. The fact is, however, that while there were delays in 1986, in 1987 delays have virtually been eliminated for U.S. PSI shippers."

98. *Id.*

99. *Id.*

100. *Id.*

101. Catherine Curtiss & Kathryn C. Atkinson, *United States-Latin American Trade Laws*, 21 N.C. J. INT'L LAW & COM. REG. 111, 114 (1995).

102. PSI was placed on the GATT negotiating agenda in February of 1988. Low, *supra* note 5, at 32. The formal proposal to include PSI on the agenda came from Indonesia. As a PSI-using country, Indonesia worried that "overzealous regulation of PSI at the national level in the exporting country could frustrate the objectives of PSI programs." *Id.*

103. Daniel E. Gardner, *Agreement on Preshipment Inspection; Negotiations in the Uruguay Round of the GATT*, 115 BUS. AM. 24 (Jan. 1994).

United States sought to eliminate, or at least reduce, the trade impediments that U.S. exporters were experiencing as a result of developing countries' use of PSI.¹⁰⁴ A final objective was to develop a dispute settlement mechanism that could quickly resolve disputes between PSI companies and U.S. exporters.¹⁰⁵

After seven years of negotiations, the Final Act of the Uruguay Round was approved on December 15, 1993.¹⁰⁶ Included in the Final Act as one of the annexed agreements was the Agreement on Preshipment Inspection.¹⁰⁷

1. Structure and Notable Elements of the PSI Agreement

The PSI Agreement is broken down into nine articles. Article 1, the definitions section, explains all the necessary terms. Article 2, the heart of the Agreement, lists and defines all the obligations of User Members.¹⁰⁸ Article 3 lists the obligations of Exporter Members.¹⁰⁹ Article 4 establishes a review procedure to expedite the resolution of grievances or disputes that cannot be resolved bilaterally. Articles 5 through 9 address the topics of notification, review of the Agreement, consultation regarding matters affecting the Agreement, settlement of disputes about the Agreement itself, and miscellaneous final provisions.

All nine Articles are informed by the preambular language. The first paragraph of the Preamble states the three broad goals of the Uruguay Round: to bring about further liberalization and expansion of trade, to strengthen the role of GATT, and to increase the responsiveness of the GATT system to the evolving international economic environment.¹¹⁰ However, the PSI Agreement tempers these ambitious goals with the recognition that a number of developing countries still must utilize the PSI system.¹¹¹ The Preamble clearly implies that PSI is not a permanent solution, by stating that PSI will be recognized "for as long and insofar as it is necessary to verify the quality, quantity or price of imported goods."¹¹² Though the temporary nature of

104. *Id.*

105. *Id.*

106. GATT, *supra* note 2.

107. PSI Agreement, *supra* note 1.

108. A "User Member" is defined as "a member of which the government or any government body contracts for or mandates the use of preshipment inspection activities." *Id.* art. 1.

109. *Id.* art. 3.

110. *Id.*

111. *Id.*

112. *Id.*

PSI is strongly implied, the Agreement never identifies any guidelines or timelines to determine when a country has developed the resources and infrastructure that would allow it to stop using PSI and instead rely on its own customs agency.

A second key element of the PSI Agreement is the non-discrimination principle.¹¹³ This principle, set forth in Article 2.1 of the Agreement, is different than GATT's most-favored-nation principle.¹¹⁴ While non-discrimination under Article 2.1 calls for the non-discriminatory application of preshipment inspection, it does not require that all exporters be treated in the same manner.¹¹⁵ As long as the criteria for inclusion and exclusion are objective, some products may be excluded from PSI.¹¹⁶ The question Article 2.1 leaves unanswered is whether particular producers can be excluded, while others are included, on the same basis. Some believe that the text of the Article suggests they can.

A third noteworthy aspect of the PSI Agreement is that it explicitly excludes customs valuation from the mandates of the Agreement.¹¹⁷ Customs valuation will continue to be addressed by the WTO's rules on customs valuation.¹¹⁸ This is partly a result of the Agreement's focus on addressing exporters' concerns and capital flight rather than on the newer customs issues.¹¹⁹

Another important feature of the PSI Agreement is the independent dispute resolution procedure of Article 4. This Article, discussed in detail later, establishes procedures for an independent review of a PSI company's decisions. The decisions resulting from the independent review are binding on the parties to the dispute.¹²⁰ The PSI Agreement's independent review process is "unprecedented in GATT terms, since it involves a dispute settlement procedure in which both protagonists are private entities."¹²¹

113. *Id.* art. 2.1.

114. GATT art. I.

115. PSI Agreement art. 2.1.

116. *Id.*

117. *Id.* at n.4.

118. *See* Customs Valuation Code, *supra* note 72.

119. *Low*, *supra* note 5, at 33.

120. PSI Agreement art. 4(h).

121. *Low*, *supra* note 5, at 35.

2. *Exporter Complaints and the Related PSI Provisions*

The PSI Agreement addresses many of the major concerns U.S. exporters had on the eve of the Uruguay Round. Article 2 addresses most of these concerns. As Article 2's title, "Obligations of User Members," indicates, User Members must ensure that their PSI entities comply with the Agreements' mandates. The most important articles are those on non-discrimination, transparency, protection of confidential business information, conflicts of interest, delays, price verification, appeals procedures, and derogation.

a. Non-discrimination

Article 2.1 states that User Members must ensure that PSI is carried out in a non-discriminatory manner.¹²² This Article was designed to address PSI companies' alleged discrimination among countries and exporters. Non-discrimination, a basic principle underlying all aspects of the GATT/WTO Agreement, "means that signatories may not apply measures that disadvantage imports relative either to each other or to national products."¹²³ Not only must the procedures and criteria of PSI be objective and equally applied, but User Members must also ensure that inspection is uniform.¹²⁴

b. Transparency

Articles 2.5-2.8 deal with exporters' concerns about transparency. Transparency means that the measures and procedures affecting trade must be made known to those who will be affected by them, in this case through notice and publication of the standards and procedures.¹²⁵ Specifically, these provisions require that PSI entities provide exporters with a list of all the information that is necessary for compliance with the requirements, convenient access to the information, and prompt notice of any changes or additions to PSI activities.¹²⁶

122. See *supra* notes 114-16 and accompanying text (discussing the difference between the non-discrimination principle of Article 2.1 of the PSI Agreement and the GATT's most-favored-nation principle).

123. Curtiss & Atkinson, *supra* note 101, at 116.

124. PSI Agreement art. 2.1.

125. Curtiss & Atkinson, *supra* note 101, at 117-18.

126. PSI Agreement art. 2.5-2.8.

c. Confidentiality

Another important exporter concern focuses on PSI companies' requests for the disclosure of confidential business information to be used in their physical and price verifications. Though exporters provided no concrete examples of the misuse of such information, they frequently voiced this concern in pre-Agreement discussions.¹²⁷

The Agreement deals with this concern in two ways: by holding PSI companies accountable for the manner in which they handle the confidential information and by restricting the types of information that PSI companies can request from exporters.¹²⁸ User Members' basic obligation under these sections is to treat all information received in the course of PSI as confidential business information unless the information is not already published, is generally available to third parties, or is otherwise available in the public domain.¹²⁹ For the information that must be provided, the User Members shall, upon request, disclose the measures they are taking to ensure the mandated confidentiality. The Member is not required, however, to disclose confidential information that would jeopardize the effectiveness of the PSI program or prejudice the legitimate commercial interests of particular enterprises.¹³⁰ User Members are under an obligation to ensure that no confidential information is divulged to any third parties except those with which the PSI contract was made.¹³¹ Even the sharing of information with the contracting party, the User Member, must be limited to information that is usually required for letters of credit or other forms of payment, for customs, for import licensing, or for exchange control purposes.¹³²

All the above requirements relate to the information that parties may properly request. As a further precaution, Article 2.12 enumerates the types of information that User Members must ensure PSI entities do not request. These include manufacturing data relating to patented, licensed, or undisclosed processes, unpublished technical data that is unnecessary for demonstration of technical compliance, internal pricing data,

127. *40 Percent of Exports Subject to Preshipment Inspection in 1986 Delayed*, *supra* note 24, at 1062.

128. PSI Agreement art. 2.9-2.13.

129. *Id.*

130. *Id.* art. 2.10.

131. *Id.* art. 2.11.

132. *Id.*

data relating to profit margins, and contract terms not relevant to the inspection.¹³³

d. Conflicts of Interest

Article 2.14 binds User Members to ensure that PSI entities maintain procedures to avoid conflicts of interest in three particular situations. Conflicts of interest are to be avoided between (1) PSI and any related entities of the PSI entities (with an eye toward possible financial conflicts of interest), (2) PSI companies and any other entities (including other entities subject to PSI), and (3) divisions of PSI entities engaged in activities other than the inspection process (for example, appraisal services).¹³⁴

e. Delays

Delays caused by PSI were another point of contention for exporters. Articles 2.15-2.19 address the issue of delays. User Members must ensure that PSI companies avoid unreasonable delays in the inspection of shipments.¹³⁵ Article 2.15 specifically addresses the timing of the inspection. The inspection date is mutually agreed upon between the PSI entity and the exporter.¹³⁶ Failure of the inspection to occur on the prescribed date, can only be for one of three reasons: (1) the inspection has been rescheduled on a mutually agreed basis, (2) the exporter prevents the PSI entity from doing the inspection, or (3) *force majeure*.¹³⁷ To further prevent delay, User Members must make certain that PSI companies issue their Clean Report of Findings¹³⁸ or "provide a detailed written explanation specifying the reasons for non-issuance" within five days following the receipt of the final documents and the completion of the inspection.¹³⁹ In the case of reports recommending non-issuance, the PSI company must give exporters the opportunity to present their views in writing and, if they desire, arrange for re-inspection on a mutually convenient date.¹⁴⁰

133. *Id.* art. 2.12.

134. *Id.* art. 2.14.

135. *Id.* art. 2.15.

136. *Id.* art. 2.15.

137. Footnote three to the PSI Agreement defines force majeure as "irresistible compulsion or coercion, unforeseeable course of events excusing from fulfillment of contract." *Id.* at n.3.

138. *Id.* at 2.18-19. See also *supra* note 18 and accompanying text (describing a Report of Findings).

139. PSI Agreement art. 2.16.

140. *Id.*

f. Preliminary Price Verification

Article 2.17 addresses the exporters' suggestion that PSI companies check the sufficiency of the price before all the goods are produced.¹⁴¹ This Article seeks to prevent a scenario where a price dispute cannot be resolved and the deal subsequently falls through, leaving the exporter with the goods and no buyer for them. It provides that upon the exporter's request, preliminary verification of price and, where applicable, of currency exchange rate will take place prior to the date of physical inspection.¹⁴² This kind of preliminary inspection is undertaken based on the contract between the exporter and importer, the pro forma invoice, and the import authorization.¹⁴³ Subsequent to this inspection, and provided that the goods are in conformity with import documentation, the User Member must ensure that the price or currency exchange rate that has been accepted is not withdrawn.¹⁴⁴

g. Price Methodologies

A large number of exporters also complained of the use of inadequate price methodologies in the price verification stage. There were two basic pricing complaints. The first related to allowable price differences, and the factors that should be considered in accounting for the differences between an invoice price and the PSI company's notion of the comparable export price.¹⁴⁵ The second pricing complaint dealt with establishing which markets could be used in the price comparison analysis.¹⁴⁶

Article 2.20, entitled "Price Verification,"¹⁴⁷ attempts to address this complaint. This Article obligates User Members to attempt to prevent over- and under-invoicing and fraud by ensuring the use of a number of guidelines in making price verifications.¹⁴⁸ A PSI company may reject a contract price only if it can demonstrate that its findings of an unsatisfactory price are based on a verification process that conforms with the following criteria.¹⁴⁹ The price comparison must be based on the prices of identical or similar goods offered for export from the

141. *Id.* art. 2.17.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Low, supra* note 5, at 38.

146. *Id.*

147. PSI Agreement art. 2.20.

148. *Id.*

149. *Id.*

same country of exportation at or about the same time, under competitive and comparable conditions of sale.¹⁵⁰ Specifically, the PSI company may use only prices that provide a valid basis for comparison, shall not rely on the price of goods offered for export to different countries of importation to unjustifiably lower the price of the shipment, shall make appropriate allowances for the terms of the sales contract and for the applicable adjusting factors,¹⁵¹ and at any stage in the process, shall provide the exporter with an opportunity to explain the price.¹⁵² In addition, provisions of Article 2.20 address the verification of transportation charges and list factors that may not be used for price verification purposes.¹⁵³

h. Appeals Procedure

Article 2.21 sets forth an appeals procedure. Like Article 2.17, this Article addresses the situation in which an aggrieved exporter is left without recourse or an appeals procedure. Article 2.21 compels User Members to make certain that PSI entities establish procedures to receive, consider, and decide exporters' grievances.¹⁵⁴ This Article also requires that information concerning these procedures be made available to exporters.¹⁵⁵ PSI companies must have at least one official in each city with a PSI office available during business hours to consider exporters' complaints.¹⁵⁶ In order to use the appeals procedure, exporters must provide the official with a written summary of the facts concerning the specific transaction, the nature of their grievance, and a suggested solution.¹⁵⁷ The duty of the official is to "afford sympathetic consideration to the exporters' grievances" and render a decision as soon as possible.¹⁵⁸

150. *Id.* art. 2.20(b).

151. The adjusting factors pertaining to the transaction include but are not limited to the commercial level and quantity of the sale, delivery periods and conditions, price escalation clauses, quality specifications, special design features, special shipping or packing specifications, order size, spot sales, seasonal influences, license or other intellectual property fees, and services rendered as part of the contract if these are not customarily invoiced separately, and certain elements relating to the exporter's price, such as the contractual relationship between exporter and importer. *Id.* art. 2.20(c).

152. *Id.* art. 2.20(b).

153. *Id.* art. 2.20(2)-(e).

154. *Id.* art. 2.21.

155. *Id.*

156. *Id.* art. 2.21(a)-(b).

157. *Id.* art. 2.21(b).

158. *Id.* art. 2.21(c).

i. Derogation

The final section of Article Two deals with derogation. Article 2.22 states that with the exception of part shipments, shipments whose value is less than a certain minimum value to be specified by User Members shall not be inspected.¹⁵⁹ This minimum value is part of the information that PSI entities must provide to exporters pursuant to Article 2.6.¹⁶⁰

j. Exporter Member Obligations

Article Three of the PSI Agreement states the obligations of Exporter Members. Exporters must ensure that their laws and regulations addressing PSI are applied in a non-discriminatory and transparent manner.¹⁶¹ All laws and regulations must be published promptly and in a manner that allows relevant parties to become familiar with them.¹⁶²

B. OPERATION OF THE INDEPENDENT ENTITY

Article Four provides for the creation and operation of the Independent Entity (IE),¹⁶³ which became operational through the agreement of the General Council on December 13, 1995.¹⁶⁴ The purpose of the Independent Entity is to hear and decide disputes between exporters and PSI entities that could not be resolved either bilaterally or through the internal appeals procedure mandated by Article 2.21.¹⁶⁵

The IE is composed jointly of an organization representing PSI entities, the International Federation of Inspection Agencies (IFIA) and an organization representing exporters, the International Chamber of Commerce (ICC).¹⁶⁶ The IE was established

159. *Id.* art. 2.22.

160. *Id.*

161. *Id.* art. 3.1.

162. *Id.*

163. *Id.* art. 4.

164. World Trade Organization, *Operation of the Independent Entity Established Under Article 4 of the Agreement on Preshipment Inspection, Decision of 13 December 1995* (visited Feb. 13, 1998) <<http://www.wto.org/new/psidoc.htm>> [hereinafter *Operation of IE*].

165. See *supra* notes 154-58 and accompanying text (discussing the PSI Agreement's appeals procedure).

166. *Operation of IE, supra* note 164.

as a subsidiary body of the Council of Trade in Goods,¹⁶⁷ to which it is required to report at least once a year.¹⁶⁸

The WTO was entrusted with the responsibility of establishing the IE¹⁶⁹ and determining the rules of procedure for the independent reviews.¹⁷⁰ The WTO was also given leave to amend both the structure and functioning of the IE, should the need arise.¹⁷¹

Independent review by the IE is limited to establishing whether the parties to the dispute have complied with the provisions of the PSI Agreement in the course of the inspection.¹⁷² Independent review is available only after the exporter has first submitted a complaint to the PSI entity according to the appeals procedure outlined in Article 2.21 of the PSI Agreement.¹⁷³ In fact, an exporter may not request independent review earlier than two working days after the dispute was submitted to the PSI entity's internal appeals procedure.¹⁷⁴

In order to seek an independent review, the complainant must submit a completed Standard Application Form to the IE.¹⁷⁵ The IE must submit a copy of the request and all the ac-

167. At the top of the governing structure of the WTO is a Ministerial Conference which meets at least every two years. JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT* 304 (3d ed. 1995). Below the Ministerial Conference in the governing structure there are four "Councils." *Id.* The General Council, which has overall supervisory authority, carries out the functions of the Ministerial Conference between Ministerial Conference sessions. *Id.* The Council for Trade in Goods, Council for Trade in Services, and Council for Trade-Related Aspects of Intellectual Property Rights are the three remaining councils, one for each of the Annex 1 agreements. *Id.*

168. *Operation of IE, supra* note 164.

169. *Id.* annex I(1).

170. *Id.*

171. *Id.*

172. *Id.* annex III(1.2).

173. *Id.* annex III (2.2).

174. *Id.* annex III (2.3).

175. The Standard Application Form may be submitted in any of the languages of the WTO and must include the following information: the identity of the complainant, address, telephone number, and a contact person in the complainant's office; the name and address of the importer; the name and address of the respondent; PSI inspection entity reference numbers and exporters' contract, order, or invoice numbers; a brief description of the goods; an indication of the provisions of the PSI Agreement which have allegedly been violated and a description of the elements on the basis of which it is alleged that the infringement took place; copies of all relevant documents; details of the submission of the dispute to the PSI entity's internal appeal procedure; complainant's statement as to whether it prefers the dispute to be determined by a single independent trade expert or a three-member panel. *Id.* annex III(4).

companying documents to the respondent for its review.¹⁷⁶ The respondent may submit a reply to the IE on the Standard Response Form.¹⁷⁷ In order to facilitate a reasoned evaluation of the matter, the response includes a statement of the respondent's position with respect to the dispute, as well as any other evidence or material the respondent deems relevant.¹⁷⁸ The IE must then send a copy of the respondent's reply to the complainant. Neither party may submit any further information unless the independent review panel requests it.¹⁷⁹

Either a single expert or a panel of three experts performs the independent review. The IE must establish and annually update a publicly available list of experts which is divided into three sections.¹⁸⁰ One section of the experts is nominated by the ICC, another by the IFIA, and the final section of independent trade experts by the IE itself.¹⁸¹ If the complainant requests that a single independent trade expert decide the matter, then the respondent is obligated to state in its reply whether or not it concurs with this request.¹⁸² Irrespective of whether the parties have agreed upon the use of a single expert or a panel, upon receipt of all the required materials the IE will appoint a single independent expert from the independent trade experts section of the IE list.¹⁸³ If the PSI entity and the exporter cannot agree to use a single expert, this independent trade expert will become the chairperson of the three-member panel. If a three-member panel is being used, the respondent and complainant each provide the names of three trade experts from their section of the list.¹⁸⁴

The IE completes the panel by selecting one expert to represent the exporter from the three names submitted by the exporter and one expert from the three names submitted by the PSI entity. In the selection of the single independent trade expert or the three-member panel, the location of the experts and of the parties, as well as the site of inspection of the goods, are all factors to be considered.¹⁸⁵

176. *Id.* annex III(4.3).

177. *Id.* annex III(4.4).

178. *Id.*

179. *Id.* annex III(4.5).

180. *Id.* annex III(4.2.10).

181. *Id.*

182. *Id.* annex III(3).

183. *Id.* annex III(3.1).

184. *Id.* annex III(5.1).

185. *Id.* annex III(5.3).

Since the expert or experts facilitating the independent review must be compensated, as well as given the resources to accomplish the review, a source of financing is necessary. Advance deposits from both the exporter and the PSI entity finance the independent review process. In order to expedite the initiation of independent reviews, each PSI entity must arrange an automatically renewable bank guarantee to cover the initial costs of one independent review.¹⁸⁶ Termed the Advance Deposit Tariff, this money is used to pay the fees for the service of three panelists for eight days, lump sums for communication costs, and WTO overhead costs.¹⁸⁷ Any party that has not completed this procedure is required to deposit the necessary funds into an IE bank account at the same time the application for independent review is submitted.¹⁸⁸ Unless both parties have either deposited the funds into an IE bank account or maintained an advance bank guarantee, the independent review will not be commenced.¹⁸⁹

The independent panel will base its decisions on the written submissions of the parties, supplemented by any subsequent oral arguments.¹⁹⁰ The review of the independent panel is limited, however, in that parties may not raise issues before the panel that were not previously raised in the internal appeals procedure.¹⁹¹ If a party fails to either participate in the proceedings or respond in a timely manner to panel requests, the panel will nonetheless render its decision based on the information before it.¹⁹² Although two of the members of each three-member panel were nominated by the parties, each panelist is forbidden from acting as an advocate or agent for either of the disputing parties. Instead, panelists must act as independent adjudicators.¹⁹³

IE procedures mandate that submissions and other materials provided to the panel or otherwise reviewed in the course of the proceeding be held in strict confidence by both panelists and

186. *Id.* annex III(6.1).

187. *Id.*

188. *Id.* annex III(6.1).

189. This procedure is subject to one exception. *See id.* annex III(6.3.2) (explaining that notwithstanding the requirements of Annex 6.1, 6.2, and 6.3.1, a panel shall be established upon receipt of a deposit or bank guarantee by only one party, provided that the amount is sufficient, subject to the prior agreement of that party).

190. *Id.* annex III(7.1).

191. *Id.*

192. *Id.* annex III(7.3).

193. *Id.* annex III(7.6).

disputing parties.¹⁹⁴ As a further safeguard for confidentiality, a party can request that certain information submitted to the panel be treated as confidential if it submits a summary of the information.¹⁹⁵

A three-member panel arrives at its decision by a majority vote.¹⁹⁶ IE procedures mandate that each decision be rendered within eight working days after the IE received the request for independent review, unless both parties agree to an extension.¹⁹⁷ The decision must state whether or not the panel believes the parties have complied with the relevant PSI Agreement provisions and be accompanied by a brief explanation of the rationale behind the decision.¹⁹⁸ Panels issue their decisions in both a secret form and a non-confidential form.¹⁹⁹ The former is maintained strictly in the IE confidential record.²⁰⁰ The latter version is issued for publication by the IFIA and ICC and is available to PSI entities and exporters.²⁰¹

At the conclusion of the independent review, the IE prepares a final financial account of the case.²⁰² The panel then apportions the costs based upon the merits of the review.²⁰³

The panel decisions are binding upon both the preshipment inspection entity and the exporter.²⁰⁴ This type of dispute resolution is unparalleled in GATT jurisprudence because the dispute settlement procedure involves two parties that are private entities.

III. COUNTRY APPLICATION: INDONESIA

Many developing countries are faced with the question of whether to employ PSI for customs work. Indonesia's experience, as the first country to do so, followed by its subsequent attempt to operate without PSI, is particularly instructive. Examination of Indonesia's situation before their adoption of PSI reveals some of the common problems suffered by developing countries. Analysis of Indonesia's trade situation after adoption

194. *Id.* annex III(9.1).

195. *Id.* annex III(9.2).

196. *Id.* annex III(10.1).

197. *Id.* annex III(10.2).

198. *Id.* annex III(10.3).

199. *Id.* annex III(10.6).

200. *Id.*

201. *Id.*

202. *Id.* annex III(10.5).

203. *Id.*

204. PSI Agreement art. 4(h).

of PSI demonstrates both the effectiveness and addictiveness of PSI. Finally, the national and international debate sparked by Indonesia's decision to abandon PSI in favor of port-of-unloading inspection highlights the arguments both for and against long term PSI utilization.

A. PSI COMES TO INDONESIA

In 1985, Indonesia was the first country to hire SGS to handle its customs work.²⁰⁵ Several factors motivated the Indonesian officials' decision. Government officials desired to take the responsibility for customs valuation away from Indonesia's own corruption-infested Customs Department.²⁰⁶ Corruption in the Indonesian Customs Department had caused congested ports, endless paperwork, unjustifiable delays, and customs kickbacks and bribes.²⁰⁷ This rampant corruption fostered the perception that Indonesia's business climate was expensive and uncertain, deterring trade. The adoption of PSI was also intended to alleviate congestion and help facilitate the movement of goods, which would ostensibly help facilitate trade.²⁰⁸ Imports remained in the ports for days and sometimes weeks waiting for clearance from customs officials. These delays led to extra costs and uncertainty.²⁰⁹

Indonesia's decision²¹⁰ to contract out its customs work proved to be an excellent one. The PSI system "dramatically improved the movement of goods through Indonesian ports, helping build up the country's non-oil exports and boosting the government revenue from import duties."²¹¹ In addition, foreign businesses were no longer faced with the prospect of dealing with corruption as a necessary element of doing business with Indonesia; it is reasonable to infer that this increased the willingness of foreigners to deal with Indonesian parties.

205. Low, *supra* note 5, at 5.

206. *Kadin Asks for Transition Period for Customs Law*, JAKARTA POST, Feb. 17, 1997, at 1, available in LEXIS, News Library, Curnws File.

207. *Id.*

208. *Return of Local Customs Inspections Feared*, *supra* note 40.

209. *Id.*

210. Although Indonesia modified its relationship with SGS in 1991, making it a subcontractor to the state-owned PT Surveyer Indonesia, its use of SGS to do PSI was basically consistent from 1985 to 1997. *Id.*

211. Borsuk, *supra* note 34.

B. THE DEBATE: PSI OR A RETURN TO PORT-OF-UNLOADING INSPECTION?

The PSI system largely alleviated the primary problems of congestion and corruption. Having enjoyed such success with the PSI system, Indonesian and foreign business people were distressed to learn in January 1997 that the Indonesian government was considering abolishing its use of PSI and returning customs work to the Customs Department.²¹² A new customs law was being developed by the Indonesian government, and the shift would take effect in April 1997.

The impending decision sparked a national and international debate. Indonesian and foreign business people feared that abolishing PSI would return Indonesia to its pre-1985 state of congestion and corruption.²¹³ Business people preferred PSI because it had already proven it could guarantee the smooth and fast flow of imports into Indonesia.²¹⁴

Of major concern to those opposed to PSI abolition was the mentality of the Customs Department. Many claimed that customs officials' tendencies had not changed since the corrupt pre-PSI days.²¹⁵ Although PSI had lessened the effect of corruption on Indonesian imports and exports, corruption was still regarded as being endemic in the Indonesian civil service generally.²¹⁶ A 1996 study ranked Indonesia as the tenth most corrupt of fifty-four developing and developed countries.²¹⁷

Many businesses were not convinced that the Customs Department would avoid this corruption.²¹⁸ Business people feared that underpaid civil servants, including front-line customs officials, would be unable to resist bribes and corruption.²¹⁹

212. *Return of Local Customs Inspections Feared*, *supra* note 40.

213. *Id.*

214. *Germany Worried About New Gov't Ruling on Customs*, JAKARTA POST, Feb. 27, 1997, available in LEXIS, News Library, Curnws File.

215. *Kadin Asks for Transition Period for Customs Law*, *supra* note 206, at 1.

216. *Importers Want Longer Customs Law Transition Period*, JAKARTA POST, Feb. 21, 1997, available in LEXIS, News Library, Curnws File.

217. *Return of Local Customs Inspections Feared*, *supra* note 40. The study was conducted by the Berlin-based Transparency International. *Id.* The study was used by the London-based Economist Intelligence Unit (EIU) in its study of the implementation of the new Indonesian customs law. Though the report recognized that PSI had some shortcomings, the report praised PSI highly for its valuable contribution to improving the efficiency of Indonesian trade. *Low-Paid Customs Officials Could Hinder Trade*, JAKARTA POST, Mar. 20, 1997, at 1, available in News Library, Curnws File.

218. *Low-Paid Customs Officials Could Hinder Trade*, *supra* note 217, at 1.

219. *Id.*

Around the same time, the World Customs Organization (WCO) also warned of the dangers of overworked and underpaid customs officials and the negative effect those officials could have on a country's international trade.²²⁰

In addition, business people were concerned that the return to port-of-unloading inspection would increase the costs of importing and cause delays in import flows, thereby critically reducing the flow of trade.²²¹ This flow reduction would be disastrous for Indonesia because imports were vital to its economy. For example, the manufacturing industry depended largely on imported materials and intermediate goods, and Indonesian investment projects relied almost totally on imported capital goods.²²²

The Indonesian Director-General of Customs and Excise characterized these worries as "unfounded."²²³ He argued that the new system, which relied on shippers sending cargo data to customs officials via computer, would prevent the congestion from occurring.²²⁴ Though not denying that there would be some corruption, the Director-General stated that the problems with corruption would be considerably reduced due to training, a higher caliber of staff, and the "phasing out of those who had the old habit."²²⁵ Furthermore, the Director-General believed returning to port-of-unloading inspection would be good for national prestige and would save the government almost \$100 million annually which would otherwise be paid to the PSI entity for the import inspection services.²²⁶

Fearing that these proposed improvements to the Customs Department would prove inadequate, the Indonesian Chamber of Commerce and Industry and Indonesian Importers Association requested a transition period of at least three to six months before the new laws would be fully enforced.²²⁷ The Association's chairman, Mr. Saud, did not want the new law fully enforced until 2003. In the interim, he proposed that importers

220. *Id.*

221. *Development Goes On*, JAKARTA POST, Apr. 3, 1997, available in LEXIS, News Library, Curnws File.

222. *Id.*

223. *Return of Local Customs Inspections Feared*, *supra* note 40.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Importers Want Longer Customs Law Transition Period*, *supra* note 216.

should be able to choose which system, PSI or on-arrival inspection, would apply to their imports.²²⁸

C. THE SITUATION AFTER ABANDONING PSI

The Indonesian government returned the responsibility for customs work to the Indonesian Customs Department and the new procedures took effect²²⁹ on April 1, 1997.²³⁰ The new customs procedures presently involve: (1) self-assessment on duties and taxes due, (2) on-arrival inspections, and (3) post-release audit.²³¹

In the new system, importers are categorized into "green light" and "red light" groups.²³² Those in the green light group enjoy the smooth flow of their documents and goods, while those in the red light group face a physical inspection without price verification.²³³ However, green light importers will undergo random inspections to keep the importers honest and prevent corruption.²³⁴ The system allows importers to make a self-assessment on the tariffs, included in the documents they send to the Customs Office. Under the new law, the verification procedures are largely paperless, due to the system's reliance on an Electronic Data Interchange System (EDI) and only highly selective physical inspections.²³⁵ As a final protection, the Customs Office has a two year period following the arrival of the imported goods to conduct a post audit inspection.²³⁶

At the end of April 1997, however, cargo flows through Indonesian ports remained slow, resulting in higher handling and

228. *Id.* Mr. Saud also stated that during the transition period, those importers choosing to use the PSI system for their imports should pay all the inspection fees. *Id.*

229. After the decision to proceed with full enforcement of the law upon implementation, worried importers of textiles, footwear, plastic and steel began stockpiling six months of supplies, believing that the implementation of the new customs law would hinder the flow of imports for some time. *RI Customs Law Triggers Panic*, JAKARTA POST, Mar. 18, 1997, at 13, available in 1997 WL 10016156. Stockpiling for such a length of time is unusual; importers usually stockpile for no more than three months due to the costs. *Id.*

230. *Restoring Images, Imposing Law on Customs Procedures*, INDONESIA NAT'L NEWS AGENCY, Apr. 4, 1997, available in 1997 WL 9775447. The return to port-of-unloading inspection was accomplished through Indonesian Law No. 10/1995. *Id.*

231. *RI Customs Law Triggers Panic*, *supra* note 229, at 13.

232. *Restoring Images*, *supra* note 230.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

storage costs.²³⁷ By May 15, 1997, just six weeks after the Customs Department resumed control of the ports, "the ports were packed and stacked," and "overflowing with containers."²³⁸ Though clearance times had increased to five to seven days from a previous time frame of twenty-four to seventy-two hours, importers reported that things were improving.²³⁹ The Customs Department and importers shared the blame for the congestion, which seemed to be the result of three factors: (1) unprepared importers and customs officials, (2) a higher than average flow of imports, and (3) the ports' already strained infrastructure.²⁴⁰

Lack of computer skills of both importers and customs officials proved to be a key problem.²⁴¹ The new system relied on the use of computers and an electronic data interchange system to facilitate the fast and easy flow of imports.²⁴² One month after the implementation of the new system, though, "only five percent of importers are using EDI, 30 percent submit documentation on computer diskettes, while 65 percent still process the paperwork manually."²⁴³ The increase in import flows, combined with delays in processing documents and customs clearance, led to congestion in the container yard and higher storage costs for importers.²⁴⁴ The increased import volumes also strained the customs infrastructure and the inefficient truck fleet.²⁴⁵ Though the immediate effects of the new regulations were largely negative, optimism remained that imports would flow more smoothly as both importers and customs officials gained experience with the system.²⁴⁶

As time went on and the situation did not improve, the parties began placing the blame on themselves and each other. The Indonesian customs director stated that the customs office would be unable to speed up the clearance of goods without help from banks, customs brokers and the port authority.²⁴⁷ In addi-

237. *Complaints About New Customs Service Start*, JAKARTA POST, Apr. 29, 1997, available in 1997 WL 10557046.

238. *Indonesian Ports Packed and Stacked*, *supra* note 43, at 7.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* The main container yard, which operated at 60 percent capacity before the new regulations were implemented, was operating at 90 percent capacity after the implementation of the new customs law. *Id.*

245. *Id.*

246. *Id.*

247. *Customs Director Vows to Improve Service*, JAKARTA POST, May 9, 1997, available in 1997 WL 10557714.

tion, the customs service blamed the importers' unwillingness to use EDI for the pile-ups.²⁴⁸ Meanwhile, importers and customs brokers blamed the slow processing of customs documents for the slow movement of goods, and the state-owned port management company blamed inadequate customs clearance for the problems.²⁴⁹ After little more than six weeks with the new system, local concern was rampant and foreign export groups were holding conferences to discuss placing the issue of delays on their watch lists.²⁵⁰

By June of 1997, perspectives on the causes of the customs problems were shifting. According to some, the difficulties experienced were not due to "honest" mistakes inherent in a learning process" but to abuses of authority by customs officials.²⁵¹ Importers complained that the costs of clearing goods through ports kept increasing because customs and port officials, without the consent of the importers, would arbitrarily order that containers be transferred from the port customs area to private storage depots.²⁵² This procedure cost importers approximately \$205 per container per day in storage fees, excluding trucking costs.²⁵³ Analysts and business people feared that the private storage depot owners and the customs officials were conspiring together.²⁵⁴ Though recognizing that ten weeks was perhaps not long enough for a rigorous assessment of the new system, those dissatisfied with the new system renewed their cries for the government to review the system before permanent damage was done to the Indonesian economy.²⁵⁵

It remains to be seen how the Indonesian government will respond to the cries for reevaluation of the new port-of-unloading system. That the debate over PSI is a timely and important issue is demonstrated by the possibility that the controversy over PSI elimination, and the effects of its elimination, contributed to the recent economic collapse in Indonesia. Regardless, Indonesia's experience with PSI is surely instructive to other de-

248. *Customs Told Port Pile-Up Could Affect Trade*, JAKARTA POST, May 20, 1997, available in 1997 WL 11061143.

249. *Customs Director Vows to Improve Service*, supra note 247.

250. *Customs Told Port Pile-Up Could Affect Trade*, supra note 248.

251. *Customs Hurdles Resurge*, JAKARTA POST, June 11, 1997, available in 1997 WL 11478837.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

veloping countries who are contemplating either the adoption or the elimination of PSI in their own country.

IV. THE FUTURE OF PSI

A. PSI ENTITY OFFICIAL'S PERSPECTIVE

According to SGS, PSI's utility in facilitating trade and aiding in the development of third world nations remains as viable today as it was in 1965 and subsequent years.²⁵⁶ SGS maintains that although it presently complies with the Agreement on Preshipment Inspection, it acted within the Agreement's parameters well before the implementation of the Agreement.²⁵⁷ SGS continues to see PSI as an ideal way for developing countries to better control the importation of goods, compile statistical data, facilitate cargo clearance, assure proper classification, reduce smuggling and corruption, and enhance import duty and tax collection.²⁵⁸ In addition, SGS believes PSI benefits exporters by helping to maintain the solvency of U.S. trading partners, providing a fairer trading environment for U.S. exporters, which are uniquely subject to the U.S. Foreign Corrupt Practices Act,²⁵⁹ and helping prevent importers from involving U.S. exporters in illegal practices.²⁶⁰ Furthermore, SGS believes PSI is beneficial because it provides exporters with a free way to check on their suppliers' practices while simultaneously facilitating Letter of Credit issuance to pay for U.S. goods.²⁶¹

One drawback of the PSI system may be competition among several different PSI companies. Rather than being beneficial,

256. Letter from Jeremiah J. O'Neill, *supra* note 21; Memorandum from SGS Government Programs, Inc., *Preshipment Inspection of Imports: Guidelines for Exporters*, Oct., 1996 (on file with *Minnesota Journal of Global Trade*).

257. According to its brochure, SGS is committed to carrying out inspection in accordance with the Agreement on PSI. Memorandum from the SGS Government Programs, Inc., *supra* note 256, at 3. In particular, SGS states its commitment to: execution of inspections in a transparent and non-discriminatory manner, protection of confidential business information, avoidance of conflicts of interest, avoidance of delays, price verification procedures for establishing the export market price and appeals procedures. *Id.* SGS also invites exporters who feel SGS has not complied with the Agreement on PSI to complain or appeal to the SGS office which carried out the inspection and after that to refer the matter to an Independent Review. *Id.*

258. *Id.*

259. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (1996) [hereinafter FCPA]. The FCPA was signed into law by President Carter on December 19, 1977. Pub. L. No. 95-213, tit. I, § 101, 91 Stat. 1494 (1977).

260. Memorandum from SGS Government Programs, Inc., *supra* note 256.

261. *Id.*

competition in the context of PSI market share may lead to attempts by competing PSI entities to accommodate the exporter or importer at the expense of accuracy and thoroughness.²⁶²

B. AN INDEPENDENT ASSESSMENT OF PSI

1. *PSI Generally*

Preshipment inspection is an invaluable "stepping stone" for developing countries as they more fully participate in global trade. On the other hand, nearly everyone, PSI entities excluded, agrees that though PSI can be an effective system, it is not sufficient as a long term answer to a country's import inspection problems.²⁶³ The PSI Agreement does not specify how long countries using PSI can continue to use the system. So, in stating that PSI is only a temporary solution, the Agreement relies on User Members working toward the eventual dismantling of PSI systems used by their own countries. It is more prestigious for a country to be able to maintain its own system for inspection because it demonstrates a country's ability to support an extensive infrastructure as well as to keep fraud and corruption at a minimum. It also is probably more cost efficient.²⁶⁴ Yet, PSI is important and certainly should not be completely abolished from the global trade scene in the near future.

PSI gives a country time to prepare itself for the more desirable port-of-unloading inspection systems. This time is necessary to strengthen and expand a country's existing infrastructure. Additionally, time is needed to train both customs officials and importers on the mechanics of the new system and the skills they must possess in order to facilitate and participate in the new system. Finally, time is required to ensure

262. Letter from Jeremiah J. O'Neill, *supra* note 21.

263. Because the PSI Agreement only provides for PSI to be used "for as long and in so far as it is necessary to verify the quality, quantity or price of imported goods," its signatories have implicitly accepted PSI's temporary nature. PSI Agreement preamble.

264. For more information on the costs of PSI, see Low, *supra* note 5, at 52-66. Direct assessment of the performance of PSI companies and the benefits of their services is difficult for two reasons. *Id.* at 52. Governments often contract for PSI services while simultaneously undertaking other reforms, thereby making it almost impossible to determine the explanatory weight to be assigned to the separate parts of the reform package. *Id.* In addition, quantified performance results cannot be taken at face value because many of the gains from PSI intervention, especially on the revenue side, are realized only if the governments act on the PSI recommendations. *Id.* On the other hand, there is no real basis from which to judge the possible deterrent effects of PSI. *Id.*

that the country's economic infrastructure is technologically advanced enough to handle port-of-unloading inspection.

Indonesia's shift away from PSI illustrates this. Had Indonesia used the twelve years when it relied on PSI to prepare itself for an eventual shift away from PSI, the switch would not have been met with such fear and opposition. The primary complaints of those opposed to the Indonesian shift away from PSI focused on congestion and corruption. These two fears translate into the problems of unchanged attitudes of customs officials²⁶⁵ and the country's general lack of preparation to enter the new system²⁶⁶ due to lack of storage space, technology and computer skills, and infrastructure. These are not problems that lack solutions, or even problems with extremely difficult solutions; however, these are problems that require time to solve.

Solutions to these problems also require money. In addition to acting as an interim customs mechanism, PSI can serve to strengthen the country's economy while the country prepares to implement its own system.²⁶⁷ Employing PSI can facilitate trade, increase national and international confidence in the country's market, and increase import duties.

Without the necessary supplements of providing training and bolstering infrastructure, a country runs the risk of becoming "addicted" to PSI. Once again, Indonesia provides a helpful example. Due to the lack of supplemental preparations, Indonesian and foreign business people became dependent on PSI and viewed it as the only method of maintaining the levels of imports and relative ease of trade that PSI had initially achieved. Additionally, confidence in the abilities of Indonesian customs officials to step in and take over was minimal, due to the lack of

265. See *supra* notes 205-09 and accompanying text (discussing the corruption in the Indonesian Customs Department).

266. See *supra* notes 229-55 and accompanying text (discussing problems caused by Indonesia's lack of preparation before switching from PSI to port-of-unloading inspection).

267. If the process of readying the country takes place over ten to fifteen years, the capital outlays can be spread out.

extensive training²⁶⁸ that most believe is necessary for the facilitation of a customs inspection system.²⁶⁹

2. *Effectiveness of PSI Agreement at Addressing Exporters' Concerns*

The PSI Agreement addresses all of the major concerns that United States exporters had on the eve of the Uruguay Round. Moreover, the PSI Agreement succeeded in addressing the two underlying concerns of most exporters—PSI firms' unaccountability and seeming omnipotence.

The PSI Agreement gained the trust of exporters through the establishment of its appeals procedure, the Independent Entity, transparency, the price verification controls, and the protection of confidential business information. In particular, the appeals procedure and the Independent Entity infuse the PSI process with procedural predictability that was previously lacking. Convinced that they will now have the opportunity to explain themselves, challenge the internal appeals procedure determination if necessary, and be able to rely on an independent binding decision, exporters are more willing to subject themselves to PSI. In addition, the detailed Article on price verification helps alleviate the exporters' fears that PSI firms could make price verifications based on any factors they deem relevant. Finally, the imposition on a named party, the User Members, of the responsibility to ensure that the standards and rules of the PSI Agreement are followed gives this Agreement the viability it needs to be a success. However, even with these significant strides, the PSI Agreement has not resolved all the complaints about PSI. In December of 1997, upon the recom-

268. A country may contract with a PSI entity for more than PSI inspections—training or retraining of the country's own officials may also be part of the contract package. Though the PSI entities either have or could easily acquire the expertise needed to give this training, it probably is a better idea for the training to come from some other source, because of the conflicts of interest that arise when the PSI entity is required to train itself out of a contract. Low, *supra* note 5, at 84-85.

269. In March of 1996, Nigeria announced its shift to the use of preshipment inspection. *M is for Nigeria - Import and Export Regulations*, AFRICAN ECON. DIG., July 8, 1996, at 6, available in LEXIS, World Library, Curnws File. The change to preshipment inspection has allowed Nigeria to shift much of the cost of inspection to exporters and importers, thus enabling it to cut up to 30% of its Customs Staff. *Id.* This is an example of the kind of reorganization and weeding out that PSI facilitates. With the implementation of PSI, Nigeria could concentrate on paring down its customs force to only those officials who were honest and capable. Training of this smaller, more capable and efficient force would be vastly more feasible.

mendation of a WTO working party, the General Council agreed to adopt a recommendation aimed at improving the implementation of the Agreement on PSI.²⁷⁰

V. CONCLUSION

In the 1980s, PSI attracted a number of developing countries because it allowed them, in spite of their customs corruption problems and deficient infrastructures, to participate in global trade at increasingly higher levels. Though developing countries were pleased with the use of PSI, large exporter countries perceived PSI firms as third parties intruding into independent, valid contracts. Most exporter complaints centered on delays and increased costs caused by PSI, fears about the confidentiality of business information required by PSI firms, and problems with dispute resolution.

Due to these widely divergent views about PSI, the topic became an issue for the Uruguay Round of GATT negotiations. The result of the negotiations was the PSI Agreement. The PSI Agreements' appeals procedure, Independent Entity, transparency requirements, specific price verification rules, and protection of confidential business information helped alleviate exporters' fears, allowing exporters and PSI-using importing countries to put more faith in the process of PSI.

Though the PSI Agreement was a step in the right direction, most still agree that PSI should not be the long term answer for a country's importing needs. Instead, PSI should be used while a country reformulates policy, retrains staff, bolsters infrastructure, and improves technology. This combination of PSI and simultaneous rebuilding allows a country to reap the benefits of PSI, increased revenues and trade facilitation, but allows it to attempt to avoid becoming dependent on PSI in the long term. Yet, because the PSI Agreement does not specify guidelines or a timeline from which to determine when a country no longer needs PSI or should begin to move away from it, PSI is sure to remain a contentious issue for years to come.

270. *WTO Chief Says 1997 'Good Year for Trade,' But Warns Against Curbs in Asia's Aftermath*, 14 Int'l Trade Rep. (BNA) No. 50, at 2162 (Dec. 17, 1997).

